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THE LAW
OF
LANDLORD AND TENANT

BY
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IN TWO VOLUMES

VOL. I

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HERBERT THORNDIKE TIFFANY

PREFACE.

This work represents an attempt not only to state the decisions on the law of Landlord and Tenant, but also to discuss the various phases of the subject from the standpoint of principle. This latter has necessarily involved a frequent expression of my own opinion, and occasional criticism of positions adopted by courts of high standing. I submit my views in no presumptuous spirit, and only hope that their expression, accompanied by a statement of the grounds on which they are based, may occasionally be suggestive and helpful, even though not convincing.

References to the state statutes bearing on the subject will be found in the notes. In inserting these references I have, in the case of each state, made use of the latest compilation of statutes to which I had access at the time, and have not attempted to search the volumes of session laws subsequently published. Consequently, they do not present the law, as it exists in some jurisdictions, with absolute exactitude. My object in inserting these references is, indeed, not so much to relieve members of the bar of the trouble of investigating the statutes for themselves, as to show the tendencies of legislation, and to give aid in the understanding of decisions which have little or no meaning apart from the enactments on which they are based.

H. T. T.

Baltimore, Md., February, 1910.

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LANDLORD AND TENANT.

CHAPTER I.

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§ 1. The doctrine of tenure.

It was a fundamental principle of the feudal system, as established in England after the Norman Conquest, that all land in the possession of a subject was held "of" the king as having been originally granted by the latter. One who held land under a grant directly from the king was known as a tenant of the king, and such tenant could himself make a grant of the land or of a part thereof to another to be held by the latter of him, the grantor, without affecting the relation already existing between himself and the king. The last grantee, while thus holding

of his grantor, could himself grant the land or a part thereof to be held of himself, and such succession of grants could in theory continue indefinitely, each grantee being the tenant of his grantor, his "lord," as holding of and under him. The king himself was known as "the lord paramount," and the last grantee, the lowest in the scale of tenants, who was in actual possession of the land, was known as "the tenant in demesne." Each person in the scale, standing between the king and the tenant in demesne, was lord as regards those below him, and tenant as regards those above him.¹ There was said to exist between each lord and the person who held immediately under him a "tenure," and the tenures were classified according to the classes of services which the tenant undertook to render to the lord in return for the grant to him. The term "tenure" is also used, particularly by modern writers, in a purely abstract sense, to describe the relation thus existing between a lord and his tenant, without reference to the particular terms of the holding.

By the statute of *Quia Emptores*,² passed in the latter part of the thirteenth century, it was provided in effect that thereafter no subject should convey his land or tenements to be held of himself in fee, but that the grantee (feoffee) should hold, not of the grantor, but of the same person of whom the grantor had held, the grantee being thus substituted for the grantor as tenant of the grantor's lord. Consequently, all holdings by a tenant in fee simple, of a lord other than the king, existent at the present day in England, must date from a time anterior to this statute.

The statute of *Quia Emptores* did not apply when the conveyance was of an estate less than that of the grantor, so that he could be regarded as having an estate in reversion, and such a conveyance, after as before the statute, created a tenure between the grantor and grantee.³ A tenure thus arising as a result of the existence of a reversion in the grantor has been conveniently designated as an "imperfect tenure" as distinguished

¹ Pollock & Maitland, *Hist. Eng. Law* (2d Ed.) 232 et seq.; Co. Litt. 65a, and Hargrave's note; 2 Blackst. Comm. 59. ² 2 Co. Inst. 504; Y. B. 22 Edw. 1, p. 641; Litt. § 132; Challis, *Real Prop.* (2d Ed.) 18; Digby, *Hist. Real Prop.* (4th Ed.) p. 235, note; Gray,

³ Stat. Westminster III. (18 Edw. 1, c. 1, A. D. 1290). *Perpetuities* (2d Ed.) 15.

from the "perfect tenure" created before the statute by a conveyance in fee.⁴ In the case of perfect tenure the rents or services, the obligation of which was assumed by the tenant, were incident to the seignior, the right of lordship, while in the case of imperfect tenure the rents or services were regarded as incident to the estate in reversion, or "reversion," as it is commonly called.

In this country a perfect tenure may be regarded as existing in some states, estates in fee simple being held of the state as lord, but presumably in most of such states the statute of *Quia Emptores* is to be regarded as in force, so that no tenure can be created by a conveyance by an individual in fee simple. In Pennsylvania and South Carolina the law is perhaps otherwise, so that one may make a grant of land to another to hold of the grantor in fee simple.⁵

Since "perfect" tenure as between individuals exists in but few if any jurisdictions in this country, the only character of tenure which is here a subject for practical discussion is that "imperfect" tenure which exists in the case of a conveyance by one of an estate less than his own, leaving a reversion in him, and the rights and liabilities arising in connection with such tenure are what constitute the subject of this treatise.

As is more fully stated in another place,⁶ such conveyance of an estate less than that of the grantor is known as a "lease" or "demise" and usually, though not necessarily,⁷ the person to whom the conveyance is made becomes liable for the payment of certain periodical sums, known as rent, as a compensation for the right to use and enjoy the land.

§ 2. "Landlord" and "tenant."

The word "landlord" is by no means a modern term, it having been in use at least as early as the first part of the fifteenth century.⁸ Its use by legal writers seems, however, comparatively

⁴ Coke's Copyholder, § 31; Tracts, 48; Leake, Dig. Prop. 42.

⁶ See post, § 16.

⁷ See post, § 165.

⁸ The subject of tenure in the United States is admirably discussed in Gray, Perpetuities, §§ 20, 28. As to tenure in Pennsylvania, see Cadwallader, Ground Rents, c. 1.

⁸ Murray's English Dictionary refers to a passage in Liber Albus, 192 b (Rolls' Ed. I, 22), "Le lessour, appelle landlord" (A. D. 1419), and states that a similar word existed in

modern,⁹ and possibly arose from the fact that it is more comprehensive than the word lessor, as including not only the person who makes the lease but also one to whom the reversion passes from the lessor by voluntary act or by operation of law. The use of the word "landlord" is confined to the case of one having a reversionary interest, the word "lord" being still applied in England to one of whom another holds in fee by reason of a conveyance prior to the statute of *Quia Emptores*.

The word "tenant," formerly used only as descriptive of the person who held land of another, came, as the doctrine of the various estates in land was developed, to be used in connection with the terms descriptive of the *quantum* of these states, as "tenant in fee simple," "in fee tail," "for life," or "for years," often without particular reference to the fact that the holding was under another but rather in the sense of the "holder" or "owner" of a particular interest in the land, and at the present day the term "tenant" is frequently so used. Thus, when the phrase "tenant in fee simple" is employed, it is intended thereby to describe the *quantum* of the holding rather than to direct attention to the fact that the holding is "of" some person. A "tenant in fee simple" does hold of another in England and in those states in which the existence of "perfect tenure" is recognized, the holding being ordinarily of the Crown or of the state as lord paramount, but this fact is of practically no importance at the present day. In those states in which perfect tenure is not recognized, a tenant in fee simple holds of no person, and the word "tenant" can there mean only "holder" or "owner." The expression "tenant" then may, at the present day, be said to be used in two senses. We speak of a "tenant in fee simple," "in fee tail," "for life," or "for years," meaning thereby merely the holder of an interest of that character, without intending

Early English. The same work refers to a passage in Shakespeare's *Richard the Second*, act 2, scene 1, "Landlord of England art thou now, not king." arising from leases, as distinct from conveyances in fee, to a consideration of the position of the "lessor," the person who made the lease. Littleton (section 457) speaks of

⁹ The writer has not observed any use of the word by Littleton or Coke, they confining themselves, in discussing the rights and liabilities be understood of a lord in fee simple, and of a tenant of like estate. The

to suggest the idea of dependence on or holding "of" another. When, however, we speak of "a tenant," without mention of any estate or interest, or when we use the expression "landlord and tenant," we have reference, not to the fact that one has an interest of a certain *quantum* in the land, but to the fact that the holding or possession is by the consent of and in dependence on another, that is, to the fact that the relation of tenure exists, the "imperfect tenure" which may still be created, in spite of the statute of *Quia Emptores*.

One who holds the possession of land is, it is conceived, necessarily a tenant thereof, and he is, except in the one case of tenant at sufferance hereafter adverted to,¹⁰ tenant in one of the two senses of the word referred to above, and he may be a tenant in both senses. That is, he necessarily has an estate in the land, and he may hold such estate "of" or "under" another. There are unquestionably a number of cases not in harmony with the statement above made, that one in possession of land is always a tenant,¹¹ but these, it is submitted, were wrongly decided upon the mistaken view that when one is put in possession of land as a result of a transaction not directly intended to create a tenancy he is not a tenant.¹²

Though the person in possession of land is always a tenant of the land, one may in one case be a tenant without having possession of the land. This occurs when one who is a tenant of the land, whether holding under another or not so holding, grants an estate less than his own. The possession then vests in the grantee, and he is regarded as a tenant under the grantor, but the latter is also a tenant of the land as having an estate in the land, and frequently, likewise, as himself holding by tenure

word "landlord" is not found in "exclusive possession and control" *Termes de la Ley* (circ. 1563), the earliest law dictionary.

¹⁰ See post, § 15a.

¹¹ See post, §§ 43, 46.

¹² In *Boston El. R. Co. v. Grace & Hyde Co.*, 50 C. C. A. 239, 112 Fed. 279, it is decided that one who was given a lien on land for improvements made thereon by him and the

thereof until he could repay himself from the income was not a tenant, but was an agent of the owner. But, properly speaking, an agent does not have possession, he holding merely in behalf of his principal (post, note 170). And one holding land as agent of another can evidently have no right to exclude such other.

under another. In the latter case the tenant holding the lesser estate is frequently referred to as a "subtenant."¹³

The words "tenant" and "lessee" are frequently used by the courts with considerable looseness as if equivalent in meaning. The word "lessee" should, however, be applied only to the person to whom the lease or demise creating the tenancy is originally made, while the word "tenant" is applicable to any person who holds possession under a lease, whether the original lessee or the latter's assignee. A lessee, provided he has entered under the lease, is necessarily a tenant, but a tenant is not necessarily a lessee, since he may be merely an assignee mediate or immediate of the lessee.

Corresponding to the word "tenant" as denoting one holding land is the word "tenancy" as referring to the "holding" of the land. Like the word "tenant," "tenancy" sometimes refers more particularly to the fact that the holding is "of" and in subordination to another, as when we speak of "the relation of tenancy," and sometimes it refers more particularly to the interest of the tenant, as when we speak of a tenancy "in fee simple," "for life," or "for years."

§ 3. The possessory rights of the tenant.

a. **The tenant has the possession.** As above indicated, one who is the tenant of land under another has the possession of the land, unless he has divested himself of the possession by creating a subtenancy, in which case, applying the same rule, the subtenant has the possession.¹⁴

Possession involves not only the exercise of acts of ownership over the land but also the exclusion of the exercise of such acts by others.¹⁵ That is, possession is necessarily exclusive, the only case in which two or more persons can at the same time be in possession of one piece of land being when they are concurrent owners, that is, cotenants, and in such case there are not two separate possessions but rather a single possession, that is, as

¹³ See post, § 151.

¹⁴ In *Gray v. Kerr Land Co.* (N. D.) 113 N. W. 1034, the official syllabus says that "land which is farmed by a tenant under a lease from the owner is in possession of the owner

and not of the tenant." This must be a mistake. The opinion refers to the lessee's possession under the lease.

¹⁵ *Lightwood, Possession of Land*, 14; *Pollock & Wright, Possession*, 21.

stated by Blackstone, a "unity of possession."¹⁶ Since then possession is necessarily exclusive, statements that the tenant has possession and that he has "exclusive" possession may be regarded as equivalent.¹⁷

Since the tenant has the possession and the right of possession, he and he alone may maintain trespass or its statutory equivalent on account of an unauthorized entry on the land, or ejectment against one wrongfully excluding him from possession.¹⁸

b. Entry by landlord during tenancy—(1) **Is ordinarily tortious.** The principle that the tenant has the possession of the land applies as against his landlord as well as against third persons, and consequently an unauthorized entry by the landlord renders the latter liable to an action of trespass *quare clausum fregit*, or its statutory equivalent.¹⁹ There is no presumption of an express authority in the landlord to enter,²⁰ and the law gives him authority to enter for certain exceptional purposes only.²¹

¹⁶ 2 Blackst. Comm. 180, 191.

¹⁷ See *Roads v. Trumpington*, L. R. 6 Q. B. 56; *Lightbody v. Truelssen*, 39 Minn. 310, 40 N. W. 67; *Lin-denbower v. Bentley*, 86 Mo. 515; *State v. Page*, 1 Speer Law (S. C.) 408, 40 Am. Dec. 608; *Pittsburgh, C. & St. L. R. Co. v. Thornburgh*, 98 Ind. 201; *Central Mills Co. v. Hart*, 124 Mass. 123; *Neal v. Brandon*, 70 Ark. 79, 66 S. W. 200.

¹⁸ See post, chapter XXXIII.

¹⁹ *Schwartz v. McQuaid*, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112; *Dickinson v. Goodspeed*, 62 Mass. (8 Cush.) 119; *Rees v. Baker*, 4 G. Greene (Iowa) 461; *Bryant v. Sparrow*, 62 Me. 546; *Teagarden v. McLaughlin*, 86 Ind. 476, 44 Am. Rep. 332; *Haywood v. Rogers*, 73 N. C. 320; *Barneycastle v. Walker*, 92 N. C. 198; *McGee v. Gibson*, 41 Ky. (2 B. Mon.) 353; *Williams v. Cleaver*, 4 Houst. (Del.) 453; *State v. De Bailion*, 113 La. 572, 37 So. 481.

But a third person cannot assert that the landlord had no right

to enter. *Ebersol v. Trainor*, 81 Ill. App. 645. In this case it was decided that such person, after placing obstructions on the leased premises, could not hold the landlord liable for removing them on the ground that he had no right to enter for the purpose.

The landlord cannot ordinarily bring trespass against his tenant, the possession being in the latter. *Rogers v. Brooks*, 99 Ala. 31, 11 So. 753. The rule is different, however, in the case of a tenancy at will in case the tenant commits waste. See post, § 109 b (1), note 759.

²⁰ *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553. But see *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362, to the effect that mere failure by the tenant to object to the landlord's entry to rebuild involves the grant of a license to do so. The text book cited in this latter case does not appear to sustain the statement.

²¹ See post, § 3 b (2).

The mere entry of the landlord on the premises, not resulting in injury to the tenant, can make him liable in nominal damages only.²² If, however, the unauthorized entry is accompanied by acts of violence or oppression directed against the tenant or his property, or if it results in substantial interference with his enjoyment, he will be entitled to recover substantial damages. Accordingly, the tenant has been regarded as entitled to substantial damages when the landlord removed fences upon the lands,²³ when the landlord removed the roof from the residence on the land, exposing the tenant to the elements and ultimately causing the loss of an eye,²⁴ and likewise when the landlord entered and by threats prevented the tenant's employees from cutting timber in accordance with the terms of the lease.²⁵ The landlord has been held liable for the diminution in the profits of the tenant's business caused by the unauthorized making of repairs by the former,²⁶ and for a trespass caused by animals belonging to him.²⁷ He has been made liable in punitive damages for breaking open an out house on the premises in order to get his goods.²⁸

The landlord having no right himself to enter on the premises, he can obviously give a third person no right to do so.²⁹

Not only may the tenant maintain an action of trespass against the landlord in case of an unauthorized entry by the latter, but he may, if excluded from the possession by the landlord, maintain ejectment against him as he could against a third person in

²² So it has been decided that the landlord is liable in nominal damages only if he enters after the tenant has removed from the premises with all his property. *Shannon v. Burr*, 1 Hilt. (N. Y.) 39. And see *Reeder v. Purdy*, 41 Ill. 279.

²³ *Abrams v. Watson*, 59 Ala. 524. That the landlord cannot enter to remove the fence, and that he is criminally liable under the local statute for doing so, see *State v. Piper*, 89 N. C. 551.

²⁴ *Hatchell v. Kimbrough*, 49 N. C. 163.

²⁵ *Crane v. Patton*, 57 Ark. 340, 21 S. W. 466.

²⁶ *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847.

²⁷ *Frout v. Hardin*, 56 Ind. 165, 26 Am. Rep. 18.

²⁸ *Shores v. Brooks*, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332.

²⁹ *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553; *Darling v. Kelly*, 113 Mass. 29; *Brown v. Powell*, 25 Pa. 229; *Crowell v. New Orleans & N. E. R. Co.*, 61 Miss. 631.

like case,³⁰ unless he has made a sublease, thereby putting the right of possession in another.³¹

(2) **Is permissible for certain purposes.** The landlord is recognized as having, apart from any stipulation, a right of entry on the land while in the tenant's possession for certain limited purposes. He has the right to enter to demand payment of rent^{31a} or to levy a distress.^{31b} It has also been said that he may enter to "view waste," that is, to determine whether waste has been committed, provided at least that this does not involve the breaking of windows or doors,^{31c} or to post a notice of non-liability under the mechanics' lien law.³² He may, no doubt, enter, without being guilty of trespass, for the purpose of complying with police and sanitary orders and regulations,³³ and he

³⁰ *Tennessee & C. R. Co. v. East Alabama R. Co.*, 75 Ala. 516, 51 Am. Rep. 475; *Olendorf v. Cook*, 1 Lans. (N. Y.) 37; *Karns v. Tanner*, 66 Pa. 297; *Feret v. Hill*, 15 C. B. 207. And he may recover mesne profits. *Holmes v. Davis*, 19 N. Y. 488.

³¹ *Austin v. Kimball*, 167 Mass. 300, 45 N. E. 627.

^{31a} *Proud v. Hollis*, 1 Barn. & C. 8.

In *State v. Forsythe*, 89 Mo. 667, 1 S. W. 834, it is decided that a landlord whose rent is payable in part of the crop may go on the premises and "request" a division of the crop. In *Smith v. Caldwell*, 78 Ark. 333, 95 S. W. 467, it is decided that the landlord may go on the premises to collect the rent and threaten to attach the crop.

^{31b} See post, chapter XXXII.

^{31c} In *Y. B. 11 Hen. 4*, 75 b, it is decided by three judges against one that an entry for this cause is justifiable. Thirning, the dissenting judge, opposes this view on the ground that it would enable the reversioner to keep entering constantly. In *Y. B. 9 Hen. 6*, 29 b, there is a dictum by Babington, J., that a reversioner can enter to view "re-

paration," that is, the state of repair, "which was conceded." In *Y. B. 21 Hen. 7*, 13, there is a dictum by Rede, J., that the reversioner can enter to see if the tenant has done waste. These cases appear in Brooke's Abridgment, Trespass, pl. 16, pl. 91, pl. 208. In *Bagshaw v. Gaward*, *Yel.* 96, and *Six Carpenters' Case*, 8 Coke, 146, there is a dictum to this effect in the course of the statement that one who enters by authority of law and abuses the authority, becomes a trespasser ab initio. In *Anderson v. Dickie*, 26 How. Pr. (N. Y.) 105, there is a dictum that the landlord may enter to prevent waste and "to save himself from liability for leaving an exposed opening in the highway."

³² *Congdon v. Cook*, 55 Minn. 1, 56 N. W. 253.

³³ So he may enter to repair plumbing in compliance with an order of the board of health (*Dexter v. King* 28 N. Y. St. Rep. 750, 8 N. Y. Supp. 489) or to repair the building in compliance with an order of the building department. *White v. Thurber*, 55 Hun, 447, 8 N. Y. Supp. 661; *Campbell v. Porter*, 46 App. Div. 628, 61 N. Y. Supp. 712.

will generally be exempt from liability for acts required by the state or municipal authorities.³⁴

Apart from stipulation, the landlord has, by occasional decisions, no right to enter on the premises to make repairs,³⁵ and an injunction has issued to restrain a sublessor from entering on the sublessee for that purpose, although there was in the head lease a provision for forfeiture in case of failure to repair.³⁶ On the other hand it has been said that a landlord has the right, without subjecting himself to liability as a trespasser, to make repairs necessary to put the premises in the condition in which they were at the time of the lease, and to remedy defects amounting to a nuisance.³⁷ And in one case an injunction at the suit of the tenant to restrain the landlord from taking down the unsafe walls of a building for the purpose of reconstructing it was refused.³⁸ Occasionally, the statute authorizes an entry for this purpose.³⁹ There is a recent decision that the owner of an office building may place a "to let" sign upon the inside of the window of an office which he has leased to another upon the latter's indication of an intention to remove without giving a notice of the stipulated length.⁴⁰ The placing of such a sign evidently involves an entry upon the premises for the purpose of placing it there, and a different view might be taken as to the rights of the landlord upon a lease of premises of a different character.

At common law the landlord of a tenant at will has the right to enter on the premises for the purpose of terminating the tenancy,⁴¹ but if he commits wrongful acts after so entering, he

³⁴ *Dunn v. Mellon*, 147 Pa. 11, 23 Atl. 210, 30 Am. St. Rep. 706; *Markham v. David Stevenson Brew. Co.*, 51 App. Div. 463, 64 N. Y. Supp. 617. he may enter to make repairs in *Reeder v. Purdy*, 41 Ill. 279.

³⁵ *Barker v. Barker*, 3 Car. & P. 557; *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852 (dictum); *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847; *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362. ³⁶ *Dawson v. Brouse*, Wils. (Ind.) 441.

And see, post, § 186 c. ³⁷ See *Merrick's Rev. Civ. Code, La.* art. 2700; *Bonnecaze v. Beer*, 37 La. Ann. 531. And a statutory requirement that the landlord make repairs has been regarded as authorizing him to enter to make them. *Dwyer v. Carroll*, 86 Cal. 298, 24 Pac. 1015.

³⁸ *Stocker v. Planet Bldg. Soc.*, 27 Wkly. Rep. 877. ³⁹ *Whipple v. Gorsuch*, 82 Ark. 252, 101 S. W. 735, 10 L. R. A. (N. S.) 1133.

⁴⁰ *Kaufman v. Clark*, 7 D. C. 1. There is a dictum to the effect that ⁴¹ See post, § 13 b (1).

becomes a trespasser *ab initio*.⁴² Under the statutes requiring a notice to terminate a tenancy at will,⁴³ the landlord has no right to enter on the premises, and he may consequently be made liable in trespass *quare clausum fregit* if he does so enter.⁴⁴

In case the lease contains an exception of part of the land or of what is in law regarded as a part thereof, the possession of such part is in the lessor. Consequently, in case trees and minerals are excepted in the lease, the tenant is liable to the landlord in trespass if he fells or lops the trees,⁴⁵ or presumably if he removes the minerals, and the landlord has in such case a right of entry upon the land so far as may be necessary for the utilization of the thing excepted.⁴⁶

When the law gives the landlord authority to enter for a particular purpose, as, for instance, to distrain, he becomes a trespasser *ab initio* if he abuses such an authority.⁴⁷

The landlord may have, by reason of statute or express stipulation and occasionally by the common law, the right to enter and take possession of the premises for some default on the part of the tenant,⁴⁸ and he has the right to re-enter upon the termination of the tenant's leasehold interest, and this, by the weight of authority, even though the tenant makes resistance thereto.⁴⁹

Upon the question whether, on the tenant's abandonment of the premises before the expiration of his leasehold interest, the landlord may enter without thereby subjecting himself to liability as a trespasser, the decisions are not entirely clear. The

⁴² *Faulkner v. Alderson, Gilmer v. Watson*, 93 Mo. 107, 5 S. W. 605.

(Va.) 221; *Moore v. Boyd*, 24 Me. 242. ⁴⁷ *Six Carpenters' Case*, 8^o Coke, 146, 1 *Smith's Leading Cases*, 143, and notes; *Brown v. Stackhouse*, 155 Pa. 582, 26 Atl. 669, 35 Am. St. Rep. 908.

⁴³ See post, § 194 b.

⁴⁴ *Cunningham v. Holton*, 55 Me. 33; *Marden v. Jordan*, 65 Me. 9; *Dickinson v. Goodspeed*, 62 Mass. (8 Cush.) 119. See *Elliott v. State*, 39 Tex. Cr. App. 242, 45 S. W. 711.

⁴⁵ 1 Wms. Saund. 321, note (5) to *Pomfret v. Ricroft*, citing *Ashmead v. Ranger*, 1 Ld. Raym. 551.

⁴⁶ *Liford's Case*, 11 Coke, 48 b; *Foster v. Spooner*, Cro. Eliz. 17; *Heydon v. Smith's Case*, Godb. 172; *Wardell*

⁴⁸ See post, chapter XIX.

⁴⁹ See post, § 216.

fact that in England there is a statute providing a special proceeding for the recovery of possession of the premises, when one-half year's rent is in arrear, if deserted by the tenant and left uncultivated or unoccupied so as no sufficient distress can be had to countervail the arrears of rent,⁵⁰ may be regarded as tending to show that at common law the landlord has no right to enter on the abandoned premises without such proceeding. In this country there are at least two decisions to the effect that the landlord is a trespasser if he enters before the end of the term, though the tenant has abandoned the premises.⁵¹ On the other hand there are occasional decisions that the landlord has the right in such a case to enter upon the premises for the purpose of caring for them,⁵² and a few decisions according to which the tenant's abandonment gives the landlord the right to resume possession of the premises as if the lease had never been made.⁵³ The fact that the tenant temporarily withdraws from the occupation of the premises gives the landlord, however, no right to enter thereon.⁵⁴ The question which ordinarily arises upon an abandonment of the premises by the tenant is not whether the landlord may re-enter and resume control, but whether such resumption of control is sufficient to show an acceptance of the tender of possession inferable from the abandonment, so as to

⁵⁰ 11 Geo. 2, c. 19, § 16.

⁵¹ *Brown v. Kite*, 2 Tenn. (2 Overt.) 233; *Shannon v. Burr*, 1 Hilt. (N. Y.) 39.

⁵² *State v. McClay*, 1 Har. (Del.) 520; *Pier v. Carr*, 69 Pa. 326.

⁵³ *Wheat v. Watson*, 57 Ala. 581; *Packer v. Cockayne*, 3 G. Greene (Iowa) 111; *Kiplinger v. Green*, 61 Mich. 340, 28 N. W. 121, 1 Am. St. Rep. 582; *Zigler v. McClellan*, 15 Or. 499, 16 Pac. 179 (semble); *Ebersol v. Trainor*, 81 Ill. App. 645 (dictum).

In *Haller v. Squire*, 91 Iowa, 10, 58 N. W. 921; *Torrans v. Stricklin*, 52 N. C. (7 Jones Law) 50, it is decided that after such resumption of control of the premises by the landlord the tenant cannot assert a right

to return. In *Lennen v. Lennen*, 87 Ind. 130, it is said that if the owner could not enter upon its abandonment by the tenant, "an owner of valuable property might be compelled to stand by and see his property go to ruin for want of some one to occupy and care for it."

The delivery of the key by the tenant to the landlord that the latter may enter for a particular purpose does not involve a relinquishment of possession by the tenant. *Schwartz v. McQuaid*, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112.

⁵⁴ *Schwartz v. McQuaid*, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112; *Larkins v. Avery*, 23 Conn. 304; *Hough v. Brown*, 104 Mich. 109, 62 N. W. 143; *McKinney v. Reader*, 7

effect a surrender, relieving the tenant from liability under his lease. This matter is discussed in a subsequent part of this work.⁵⁵

In one state it has been decided that the fact that the rent is to be paid in a share of the crop does not entitle the landlord to enter to take it,⁵⁶ but that if the title to the crop is, by express stipulation, to remain in the landlord until the rent is paid, he may enter to save the crop if this is reasonably necessary.⁵⁷ In another state, a right in the landlord to take his share of the crop has been recognized.⁵⁸ It seems clear that if by express stipulation he is to have a share of the crop as standing on the ground, he may enter for the purpose of harvesting it,⁵⁹ and that the landlord may go on the premises for the purpose of demanding his share of the crop seems unquestionable.⁶⁰

(3) **Under express stipulations.** Not infrequently by an express stipulation the landlord is given the right to enter upon the tenant's possession for a particular purpose. In such a case the landlord himself is merely a licensee as regards his right to enter during the tenancy, and the tenant has the exclusive possession to the same extent as any owner of land who has granted a license to another.⁶¹ Such would seem to be the case

Watts (Pa.) 123; *Chancey v. Smith*, 25 W. Va. 404, 52 Am. Rep. 217.

⁵⁵ See post, § 190 c.

⁵⁶ *Wadley v. Williams*, 75 Ga. 272. This is, in *Woodruff v. Adams*, 5 Blackf. (Ind.) 317, 35 Am. St. Rep. 122, asserted to be the case if the landlord's portion of the crop was to be delivered to him by the tenant off the demised premises.

⁵⁷ *Riddle v. Hodge*, 83 Ga. 173, 9 S. E. 786.

⁵⁸ *Kamerick v. Castleman*, 23 Mo. App. 481.

⁵⁹ See *Woodruff v. Adams*, 5 Blackf. (Ind.) 317, 35 Am. St. Rep. 122.

⁶⁰ *State v. Forsythe*, 89 Mo. 667, 1 S. W. 834. Ante, note 31 a.

⁶¹ See *Pollock & Wright*, Possession, 80, and post, § 7 a. So where,

as in *Winter v. Stevens*, 91 Mass. (9 Allen) 526, it is held that one who built on another's land by permission, and with whom the owner boarded, was tenant at will. The owner was, it seems, to be regarded as a mere licensee, with the exclusive possession in the tenant. And the lessor, reserving the right to go on certain fields to harvest the grain, is a licensee merely, the possession being in the lessee. *Stebbins v. Demorest*, 138 Mich. 297, 101 N. W. 528. In *Leavitt v. Leavitt*, 47 N. W. 329, where by agreement the remainderman took up his residence on the property with the life tenant and carried on the necessary farming operations and he was regarded as a tenant at will, the life tenant might be regarded as on the premises

when the landlord is allowed to enter for the purpose of inspecting the premises,⁶² and when the landlord is given the right to enter to make necessary repairs, as is frequently done.

A covenant by the landlord to make repairs has been held to involve a stipulation allowing him to enter for this purpose,⁶³ and the same effect has been given to a provision that rent shall not be paid so long as the premises are out of repair.⁶⁴ Such a grant of the right to enter to make repairs exempts the landlord from any liability for injury to the tenant, as by interruption of his business, caused by the reasonable exercise of the right,⁶⁵ but it does not exempt him from liability for acts, not necessarily involved in the repairs so allowed, done by him after entry,⁶⁶ or from liability for injury to the tenant caused by unreasonable delay in prosecuting the repairs.⁶⁷

The fact that the landlord is, by statute or by express stipulation, given the right to enter to make repairs gives him no right to make alterations,⁶⁸ and *a fortiori* no such right exists in the absence of any authority to make repairs.⁶⁹

The license to enter to make repairs need not be contained in the instrument of lease but may be given at any time, and may

merely as licensee under the tenant at will.

⁶² See *Roads v. Overseers of Trun-*
pington, L. R. 6 Q. B. 56.

⁶³ *Saner v. Bilton*, 7 Ch. Div. 815; *Kellenberger v. Foresman*, 13 Ind. 475; *Schutz v. Corn*, 5 N. Y. St. Rep. 19, 24 Wkly. Dig. 498; *Macnair v. Ames* (R. I.) 68 Atl. 950.

⁶⁴ *Smith v. McLean*, 123 Ill. 210, 14 N. E. 50.

⁶⁵ *Turner v. McCarthy*, 4 E. D. Smith (N. Y.) 247; *Kellenberger v. Foresman*, 13 Ind. 475.

⁶⁶ *Dutton v. Holden*, 4 Wend. (N. Y.) 643; *White v. Mealio*, 63 N. Y. 609.

⁶⁷ *White v. Mealio*, 63 N. Y. 609; *Ferguson v. Troop*, 17 Can. Sup. Ct. 527; *Smith v. McLean*, 123 Ill. 210, 14 N. E. 50.

⁶⁸ So a permission to the land-

lord to enter to make such repairs and alterations as shall be necessary, or as he may consider important, for the preservation or improvement of the premises, does not authorize the erection by him of two extra stories on the building for his own use. *Hessler v. Schafer*, 20 Misc. 645, 46 N. Y. Supp. 1076. And a statutory right to make repairs on a building intended for the occupation of human beings so as to render it tenantable does not authorize an entry to make alterations. *Dwyer v. Carroll*, 86 Cal. 298, 24 Pac. 1015.

⁶⁹ *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; *Brande v. Grace*, 154 Mass. 210, 31 N. E. 633; *Fargis v. Walton*, 107 N. Y. 398, 14 N. E. 303. Compare *Townsend v. Boyd*, 217 Pa. 386, 66 Atl. 1099.

be evidenced by conduct as well as by express language.⁷⁰ Such a license to enter to make repairs, given by the tenant after the lease, may, it has been decided, be revoked before the actual commencement of the work.⁷¹

A right in the landlord to enter for a particular purpose has been enforced by injunction when his exclusion by the tenant was calculated to cause him irreparable injury.⁷²

§ 4. The tenant's possession is not adverse to the landlord.

The possession of a tenant under a lease is not adverse to the landlord so as to give the tenant title to the land by the continuance of the possession for the statutory period of limitation.⁷³ This is merely one application of the principle which extends to persons in other relations, that possession for the

⁷⁰ See *Ferguson v. Troop*, 17 Can. 2057, 72 S. W. 822; *McGinnis v. Porter*, 20 Pa. 80; *McCutchin v. McCutchen*, 77 S. C. 129, 57 S. E. 678, 12 L. R. A. (N. S.) 1140; *Lea's Lessee v. Netherton*, 17 Tenn. (9 Yerg.) 315; *Balles v. Dolch* (Tex. Civ. App.) 60 S. W. 267; *New York & T. Land Co. v. Dooley*, 33 Tex. Civ. App. 636, 77 S. W. 1030; *Pulford v. Whicher*, 76 Wis. 555, 45 N. W. 418.

⁷¹ *Fargis v. Walton*, 107 N. Y. 398, 14 N. E. 303.

⁷² *State Bank v. Rohren*, 55 Neb. 223, 75 N. W. 543. Compare *Carlson v. Koernet*, 226 Ill. 15, 80 N. E. 562.

⁷³ *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 92 S. W. 21; *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596; *Catlin v. Decker*, 38 Conn. 262; *McMullin v. Erwin*, 58 Ga. 427; *Vanduyn v. Hepner*, 45 Ind. 589; *Whiting v. Edmunds*, 94 N. Y. 309; *Parish Board of School Directors v. Edrington*, 40 La. Ann. 633, 4 So. 574, 1 L. R. A. 378; *Den d. Van Blarcom v. Kip*, 26 N. J. Law (2 Dutch.) 351; *Owen v. Village of Brookport*, 208 Ill. 35, 69 N. E. 952; *Smalley v. Mitchell*, 110 Mich. 650, 68 N. W. 978; *Pharis v. Jones*, 122 Mo. 125, 26 S. W. 1032; *Dixon v. Finnegan*, 182 Mo. 111, 81 S. W. 449; *Martin v. Martin* (Iowa) 94 N. W. 493; *Slattery v. Slattery*, 120 Iowa, 717, 95 N. W. 201; *Pittsburg, C., C. & St. L. R. Co. v. Dodd*, 24 Ky. Law Rep.

2057, 72 S. W. 822; *McGinnis v. Porter*, 20 Pa. 80; *McCutchin v. McCutchen*, 77 S. C. 129, 57 S. E. 678, 12 L. R. A. (N. S.) 1140; *Lea's Lessee v. Netherton*, 17 Tenn. (9 Yerg.) 315; *Balles v. Dolch* (Tex. Civ. App.) 60 S. W. 267; *New York & T. Land Co. v. Dooley*, 33 Tex. Civ. App. 636, 77 S. W. 1030; *Pulford v. Whicher*, 76 Wis. 555, 45 N. W. 418.

But in *Brown v. Issaquena County Sup'rs*, 54 Miss. 230; *Jones v. Madison County*, 72 Miss. 777, 18 So. 87, it is held that if one enters under a lease of school lands for ninety-nine years, although the lease is void for non-compliance with statutory requirements, he may show that he has held possession for the period of limitations, and that consequently he is entitled to the land for the balance of the term. It would seem that, since he entered by permission, he was a tenant, although not under the intended lease, and that consequently limitations would not run in his favor. Furthermore, if they did run, he would it seems, acquire in effect a fee simple title. The acquisition, by adverse possession, of an

statutory period of limitation will not defeat the right of the original owner to recover the land, unless the possession is hostile, under claim of right, and of such character as to exclude any recognition of the rights of the true owner. The relation of tenancy is merely one of several relations which raise a presumption that the person in possession is holding not under claim of right but in subordination to and in recognition of the rights of the other party to the relation. This principle applies in favor of the landlord as well when the tenant is wrongfully holding over after the end of the term as when he is rightfully holding under the demise. In neither case does his continued possession bar recovery by the landlord.⁷⁴

Though the possession of the tenant is *prima facie* in subordination to the landlord's rights, it may become adverse to the landlord by the tenant's open repudiation of the tenancy and his notification to the landlord to that effect.⁷⁵ There are occasional *dicta*,⁷⁶ and at least one decision,⁷⁷ that the tenant

estate for years, is not recognized by the cases, nor is it in accord with principle.

⁷⁴ Gwynn v. Jones' Lessee, 2 Gill & J. (Md.) 173; Carson v. Broady, 56 Neb. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Day v. Cochran, 24 Miss. 261; Holman v. Bonner, 63 Miss. 131; Lyebrook v. Hall, 73 Miss. 509, 19 So. 348; Whaley v. Whaley, 1 Speer Law (S. C.) 225, 40 Am. Dec. 594; Jackson v. Carns, 20 Johns. (N. Y.) 301; Miller v. Warren, 94 App. Div. 192, 87 N. Y. Supp. 1011; Id., 182 N. Y. 539, 75 N. E. 1131; Learned v. Tallmadge, 26 Barb. (N. Y.) 443; Taylor v. Kelly, 56 N. C. (3 Jones Eq.) 240; Schuyllkill & D. Imp. & R. Co. v. McCreary, 58 Pa. 304; Bodkin v. Arnold, 45 W. Va. 90, 30 S. E. 154 (semble); Ross v. McManigal, 61 Neb. 90, 84 N. W. 610; Leport v. Todd, 32 N. J. Law, 124; Nessley v. Ladd, 29 Or. 354, 45 Pac. 904; Brandon v. Bannon, 38 Pa. 63; Duke v. Harper, 14 Tenn. (6 Yerg.) 280, 27 Am. Dec. 462; Flanagan v.

Pearson, 61 Tex. 302; Greeno v. Munson, 9 Vt. 37, 31 Am. St. Rep. 605; Sherman v. Champlain Transp. Co., 31 Vt. 162; Emerick v. Tavener, 9 Grat. (Va.) 220, 58 Am. Dec. 217; Allen v. Paul, 24 Grat. (Va.) 332; Swann v. Young, 36 W. Va. 57, 14 S. E. 426.

⁷⁵ Willison v. Watkins, 28 U. S. (3 Pet.) 43; Wells v. Sheerer, 78 Ala. 142; Ponder v. Cheeves, 104 Ala. 307, 16 So. 145; Catlin v. Decker, 38 Conn. 262; Morris v. Wheat, 11 App. D. C. 201; Rigg v. Cook, 9 Ill. (4 Gilm.) 336, 46 Am. Dec. 462; Patterson v. Hansel, 67 Ky. (4 Bush) 654; South's Heirs v. Marcum, 22 Ky. Law Rep. 641, 58 S. W. 527; Meridian Land & Industrial Co. v. Ball, 68 Miss. 135, 8 So. 316; Greenwood v. Moore, 79 Miss. 201, 30 So. 609.

⁷⁶ Millett v. Lagomarsino, 107 Cal. 102, 40 Pac. 25; Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576.

⁷⁷ Dasher v. Ellis, 102 Ga. 830, 30 S. E. 544. It is so in terms decided

cannot thus render his holding adverse to the landlord without relinquishing possession of the premises, but the great weight of authority is otherwise. The repudiation of the tenancy must, it is said, be "clear, positive, and continued,"⁷⁸ and the landlord is not affected by the repudiation of the tenancy and assertion of an adverse holding, unless and until notice thereof is brought home to him.⁷⁹ It has been asserted that "express" notice to the landlord is necessary for this purpose,⁸⁰ but the cases generally are to the effect that it is sufficient that he has in some way received notice of the tenant's assertion of adverse title.⁸¹

As elsewhere stated, the fact that the tenant attorns to a third person does not of itself render his possession adverse,⁸² nor does the mere act of the tenant in taking and recording a conveyance of the property from one who claims adversely to the landlord have this effect,⁸³ nor is the possession adverse because rent is neither demanded nor paid.⁸⁴ Even a judgment in favor

in New York (*Delancey v. Ganong*, 9 N. Y. [5 Seld.] 1; *Whiting v. Edmunds*, 94 N. Y. 309; *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629), but there the statute itself so provides. See post, note 86.

⁷⁸ *Morris v. Wheat*, 11 App. D. C. 201; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462; *Wilkins v. Pensacola City Co.*, 36 Fla. 36, 18 So. 20; *Neff v. Ryman*, 100 Va. 521, 42 S. E. 314; *Wessey v. Ladd*, 29 Or. 354, 45 Pac. 904.

⁷⁹ *Willison v. Watkins*, 28 U. S. (3 Pet.) 43; *Wells v. Sheerer*, 78 Ala. 142; *Holman v. Bonner*, 63 Miss. 131; *Greenwood v. Moore*, 79 Miss. 201, 30 So. 609; *Campbell v. Shipley*, 41 Md. 81; *Ross v. McManigal*, 61 Neb. 90, 84 N. E. 610; *Farrow's Heirs v. Edmundson*, 43 Ky. (4 B. Mon.) 605, 41 Am. Dec. 250; *McGinnis v. Porter*, 20 Pa. 80; *Whaley v. Whaley*, 1 Speer Law (S. C.) 225, 40 Am. Dec. 594; *Duke v. Harker*, 14 Tenn. (6

Yerg.) 280, 27 Am. Dec. 462; *Watson v. Smith's Lessee*, 18 Tenn. (10 Yerg.) 476; *Uddell v. Peak*, 70 Tex. 547, 7 S. W. 786; *Stacy v. Bostwick*, 48 Vt. 192; *Allen v. Paul*, 24 Grat. (Va.) 332; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

⁸⁰ *McGinnis v. Porter*, 20 Pa. 80.

⁸¹ *Brandon v. Bannon*, 38 Pa. 63; *Wells v. Sheerer*, 78 Ala. 142; *Morton v. Lawson*, 40 Ky. (1 B. Mon.) 45; *Catlin v. Decker*, 38 Conn. 262; *Floyd v. Mintsey*, 7 Rich. Law (S. C.) 181; *Udell v. Peak*, 70 Tex. 547, 7 S. W. 786; *Rensens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423.

Notice to a third person is not sufficient. *Trustees of Wadsworthville Poor School v. Meetze*, 4 Rich. Law (S. C.) 50; *Stacy v. Bostwick*, 48 Vt. 192.

⁸² See post, § 19 b (1).

⁸³ *Udell v. Peak*, 70 Tex. 547, 7 S. W. 786.

⁸⁴ *Campbell v. Shipley*, 41 Md. 81;

of the landlord against the tenant for the possession of the premises does not, it has been held, render the subsequent holding by the latter adverse to the former.⁸⁵

In some of the states there is a statutory provision that the possession of the tenant shall be deemed the possession of the landlord till a certain time has elapsed after the termination of the tenancy, in spite of any assertion by the tenant of an adverse title.⁸⁶

§ 5. The tenant is not the landlord's agent.

The fact that one is tenant of another does not of itself create any relation of agency between them, so as to impose a liability on the landlord to third persons by reason of the acts or declarations of the tenant. Accordingly, it has been decided that a landlord is not bound by the false statement of the tenant to an intending purchaser that he holds under the person undertaking to sell the property.⁸⁷ Nor can the tenant impose a servitude or lien on the premises to the detriment of the landlord's reversionary estate,⁸⁸ and, as will appear later, a landlord is not liable for injuries to third persons caused by the acts or

Ehrman v. Mayer, 57 Md. 612; *Leport v. Todd*, 32 N. J. Law, 124; *Whiting v. Edmunds*, 94 N. Y. 309; *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357.

⁸⁵ *Church v. Wright*, 4 App. Div. 312, 38 N. Y. Supp. 701, 39 N. Y. Supp. 989.

⁸⁶ The New York Code of Civil Procedure, § 373, provides that "where the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of twenty years after the termination of the tenancy, or, where there has been no written lease, until the expiration of twenty years after the last payment of rent, notwithstanding that the tenant may have ac-

quired another title or may have claimed to hold adversely to his landlord. But this presumption shall not be made after the periods herein limited." The California Statute (Code Civ. Proc. § 326) is the same, with the exception that "five" is substituted for twenty, while in the Wisconsin statutes (St. 1897, § 4216) "ten" is substituted for "twenty."

⁸⁷ *Clarke v. Beck*, 72 Ga. 127.

⁸⁸ *Gentleman v. Soule*, 32 Ill. 271, 83 Am. St. Rep. 264; *Doda v. Schmidt*, 47 Ill. App. 267; *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486. So it is well settled that the tenant cannot subject the reversion to a mechanic's lien. See 20 Am. & Eng. Enc. Law (2 Ed.) 319.

neglect of the tenant with reference to the premises.⁸⁹ Nor is he liable for injuries even to his own tenant caused by the acts of persons holding other premises as his tenants growing out of their occupancy of such premises.⁹⁰ The only instances, apparently, in which liability has been imposed on the landlord for the acts of the tenant, not participated in or authorized by him, have occurred under the rule adopted in some states that a public corporation, such as a railroad company, cannot, by leasing its property, relieve itself from the performance of its public duties, unless the legislative authority to lease expressly so provides.⁹¹

§ 6. Trespasser distinguished from tenant.

The distinction between a trespasser and a tenant is an obvious one, the former being one who enters on another's land without either permission or authority in law, and a tenant being one who enters or retains possession by permission as expressed by the grant to him of an estate in the land.⁹² The unquestionable fact that a trespasser is not a tenant of the rightful owner has been most frequently referred to in connection with actions for use and occupation, hereafter discussed.⁹³

One who has entered as a trespasser may become a tenant by recognizing the rights of another in the land and in effect agreeing to hold under him.⁹⁴ The fact, however, that a trespasser, upon a demand by the landowner that he pay a certain amount

⁸⁹ See post, §§ 97, 101. See *Bachert v. Lehigh Coal & Nav. Co.*, 208 Pa. 362, 57 Atl. 765. *Bldg. Co.*, 86 Ill. App. 681, and post, § 98.

The fact that a lease was made with the intention that the land should be cleared, and subject to an agreement that the landlord should receive a share of the proceeds of the land when cleared, was held not to make the landlord liable for injuries to another's property caused by the negligence of the tenant in burning the brush wood. *Ferguson v. Hubbell*, 26 Hun (N. Y.) 250.

⁹⁰ *Abrams v. Watson*, 59 Ala. 524. See *J. B. Sanborn Co. v. Marquette*

Bldg. Co., 86 Ill. App. 681, and post, § 98.

⁹¹ See Baldwin, *Railroad Law*, 460;

44 L. R. A. 737, note to *Caruthers v. Kansas City, Ft. S. & M. R. Co.*

⁹² *Pico v. Phelan*, 77 Cal. 86, 19 Pac. 186; *Jackson v. Mowry*, 30 Ga. 143; *Krug v. Davis*, 101 Ind. 75; *Martin v. Knapp*, 57 Iowa, 336, 10 N. W. 721; *Petty v. Malier*, 54 Ky. (15 B. Mon.) 591; *Center Creek Min. Co. v. Frankenstein*, 179 Mo. 564, 78 S. W. 785; *Dixon v. Hern*, 21 Nev. 65, 24 Pac. 337; *Neppach v. Jordan*, 15 Or. 308, 14 Pac. 353.

⁹³ See post, chapter XXX.

⁹⁴ See post, §§ 19, 303.

of rent, while refusing to pay such amount intimates a readiness to pay a less amount, has been regarded as not making him a tenant,⁹⁵ and *a fortiori*, it seems, the owner of land cannot make a trespasser thereon his tenant by merely demanding that such trespasser pay rent to him, the trespasser not acceding to his demand or otherwise recognizing him as his landlord.⁹⁶ That the person entitled refrains from taking measures to expel the trespasser cannot, it would seem clear, make the latter his tenant.⁹⁷ One who has been a tenant may become a trespasser by giving up possession at the end of his term and subsequently entering without permission.⁹⁸ He does not, however, become a trespasser by wrongfully holding over beyond the time of rightful possession. He becomes a "tenant at sufferance."⁹⁹

§ 7. Licensee distinguished from tenant.

a. **The nature of a license.** One having an estate in land may, without parting with such estate, give another rights of enjoyment in the land in one of three ways. He may give another a lesser estate in the land, that is, the possession and control for a limited time, retaining the "reversion," thus making such other his tenant. Or he may grant to another a right to use the land for a certain defined and limited purpose, either in perpetuity or for a named period, the possession of the land, however, remaining in him as before. Such a right in another's land (*jus in re alieno*) is sometimes known as a "servitude," and may in our law be either an easement or a right of *profit a prendre*.¹⁰⁰ To be distinguished both from a tenancy and a servitude, whether an easement or a right of profit, is the right given by a license. A license, it is said in a leading case on the subject, "passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful, as a license to hunt in a man's park, to come into his house, are only actions which without license had been unlaw-

⁹⁵ Gallagher v. Himelberger, 57 Ind. 63; Hill v. Coal Valley Min. Co., 103 Ill. App. 41; Center Creek Min. Co. v. Frankenstein, 179 Mo. 564, 78 S. W. 785.

⁹⁶ See post, § 302, at note 30.

⁹⁷ See post, § 13 a (5).

⁹⁸ Douglass v. Geller, 32 Kan. 499, 4 Pac. 1039.

⁹⁹ See post, § 15.

¹⁰⁰ See 1 Tiffany, Real Prop. §§ 304-341.

ful.”¹⁰¹ The right of a licensee, therefore, is merely that of exemption from liability to the owner of the land in case he does certain specified acts on the land. He has not the possession of the land, this remaining in the licensor, and he has not, it seems clear on principle, any interest in the land which he may assert against a third person, that is, his right is purely *in personam* against the owner of the land and not *in rem*.¹⁰² There are occasional decisions apparently to the contrary,¹⁰³ but these decisions can be supported, it is submitted, only on the theory that the right in question though called a license was not such. As has been remarked, “if a so-called license does operate to confer an exclusive right capable of being protected against a stranger, it must be that there is more than a license, namely the grant of an interest or easement.”¹⁰⁴

A license is ordinarily revocable at the will of the owner of the land,¹⁰⁵ unless it is incident to a grant, as when one is given a license to hunt on another’s land and to carry away the game killed, or to cut and remove trees on the land¹⁰⁶ or to

¹⁰¹ Thomas v. Sorrel, Vaughan, 351.

the exercise of his license, on the theory that the licensee had the possession of the land or of a part thereof. But a licensee never has possession of the land, since that remains in the licensor.

In Richards v. Gauffret, 145 Mass. 486, 14 N. E. 535, it was decided that one given, by an instrument under seal, the exclusive right to cut ice from another’s pond, could recover damages from a third person who cut the ice. The only reason given is that “it would be a reproach to the law” were it otherwise, and it is added that “he had an interest greater than a revocable license.” What he actually had, it seems, was a right of “profit a prendre,” which is no doubt a right *in rem*.

¹⁰⁴ Pollock, Torts (6th Ed.) p. 367.

¹⁰⁵ Goddard, Easements (6th Ed.) 564; 1 Tiffany, Real Prop. § 304.

¹⁰⁶ Wood v. Leadbitter, 13 Mees. & W. 838; Miller v. State, 39 Ind.

¹⁰² See Pollock, Torts (6th Ed.) 366; Goddard, Easements (6th Ed.) 446; Heap v. Hartley, 42 Ch. Div. 461; Whaley v. Laing, 2 Hurl. & N. 476, 3 Hurl. & N. 675; Hill v. Tupper, 2 Hurl. & C. 121. Per Bramwell, in Stockport Water Works v. Potter, 3 Hurl. & C. 300; Clapp v. Boston, 133 Mass. 367; Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001. Per Loring, J., in Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937.

¹⁰³ Case v. Weber, 2 Ind. 108, is to the effect that one having a license to flow water through another’s land has a right of action against a third person who obstructs such flow. And in Paul v. Hazleton, 37 N. J. Law, 106, and Miller v. Greenwich, 62 N. J. Law, 771, 42 Atl. 735, it is held that a licensee might sue a third person in trespass *quare clausum fregit* for interference with

remove chattels sold to him by the landowner.¹⁰⁷ Moreover, in some states, the view has been adopted that if the licensee has made expenditures on the faith of the licensee, it cannot be revoked.¹⁰⁸ The right to revoke the license may be exercised, without any notice, by a mere interference with the exercise of the license,¹⁰⁹ but though the license may ordinarily be revoked, the licensor may be held liable in damages if such revocation involves the breach of a contract.¹¹⁰

A license is ordinarily purely personal, so that the benefit thereof cannot be transferred.¹¹¹ It has, however, in one case been held that the benefit of a license to the lessor to enter for a certain purpose passes to his transferee and is enforceable against an assignee of the lessee, the instrument of lease expressly providing that the stipulations of the lease should extend to and be binding on the assignees of the respective parties,¹¹² and in another case it was held to pass to the lessor's transferee without any mention of him.¹¹³ Such a stipulation giving the lessor a right to enter on the land, if regarded as a contract authorizing a recovery of damages, may well pass in favor of a transferee

267; Long v. Buchanan, 27 Md. 502, 110 Kerrison v. Smith [1897] 2 Q. B. 92 Am. Dec. 653; Sterling v. War- 445; McCrea v. Marsh, 78 Mass. (12 den, 51 N. H. 217, 12 Am. Rep. 80; Gray) 211, 71 Am. St. Rep. 745.

Metcalf v. Hart, 3 Wyo. 513, 27 Pac. 111 Wickham v. Hawker, 7 Mees. 900, 31 Pac. 407, 31 Am. St. Rep. 122. & W. 63; Ackroyd v. Smith, 10 C. B.

¹⁰⁷ Browne, Stat. of Frauds, § 27; 188; Prince v. Case, 10 Conn. 375, Rogers v. Cox, 96 Ind. 157, 49 Am. 27 Am. Dec. 675; Jenkins v. Lykes, Rep. 152; Giles v. Simonds, 81 19 Fla. 148, 45 Am. Rep. 19; Mass. (15 Gray) 441, 77 Am. Dec. Johnson v. Skillman, 29 Minn. 95, 12 373; Wood v. Manley, 11 Adol. & E. N. W. 149, 43 Am. St. Rep. 192; Cowles v. Kidder, 24 N. H. 364, 57 34.

¹⁰⁸ See cases cited, Tiffany, Real Am. Dec. 287; Blaisdell v. Ports- Prop. § 304, note 21. mouth, G. F. & C. R. Co., 51 N. H.

¹⁰⁹ Hyde v. Graham, 1 Hurl. & C. 483; Mendenhall v. Klinck, 51 N. Y. 593; Nichols v. Peck, 70 Conn. 439, 246; Fuhr v. Dean, 26 Mo. 116, 69 39 Atl. 803, 40 L. R. A. 81, 66 Am. St. Am. Dec. 484; Dark v. Johnston, 55 Rep. 122; Simpson v. Wright, 21 Ill. Pa. 164, 93 Am. Dec. 732.

App. 67; Hodgkins v. Farrington, 150 ¹¹² Marks v. Gartside, 16 Ill. App. Mass. 19, 22 N. E. 73, 5 L. R. A. 209, (16 Bradw.) 177.

15 Am. St. Rep. 168; Wilson v. St. ¹¹³ Brewster v. Gracey, 65 Kan. Paul, M. & M. R. Co., 41 Minn. 56, 42 137, 69 Pac. 199. And see Stebbins N. W. 600, 4 L. R. A. 378; Pitzman v. Demorest, 138 Mich. 297, 101 N. v. Boyce, 111 Mo. 387, 19 S. W. 1104, W. 528.

33 Am. St. Rep. 536.

of the reversion and be enforceable against an assignee of the lessee as a covenant running with the land;¹¹⁴ but regarding the stipulation as a license merely, it is not entirely clear upon what principle a transferee of the reversion is to be regarded as entitled to the benefit thereof. It may perhaps be regarded as a license "coupled with an interest" which by the common law is assignable.¹¹⁵

b. **Application of the distinction.** A tenant, as we have before seen, has the possession and the right of possession, which he may assert against the whole world and which, except in the case of tenant at will,¹¹⁶ he may transfer to another, and is not terminable at the landlord's option. One having a servitude over another's land, that is an easement or right of profit, though he has not, like the tenant, a right of possession but merely a right to use the land for a certain purpose may, like the tenant, assert his right against the whole world,¹¹⁷ and his right is not ordinarily terminable at the option of the owner of the land. One having a license, on the other hand, has merely a permission to do certain acts, which he can assert against the licensor only, and which is ordinarily terminable or revocable at the will of the latter, and is not transferable. It is evident from the above considerations that a servitude, as having the element of permanence to a greater or less degree, and that of transferability, and as giving rights *in rem*, much more closely resembles a tenancy than does a license, but while the question has frequently arisen whether, in a particular case, one was a licensee or a tenant, whether one was the owner of a servitude in land or a tenant thereof has been but seldom the subject of inquiry. This is presumably owing to the fact that easements, by far the more ordinary class of servitudes, are at common law recognized for a limited number of purposes only and only as "appurtenant" to other land.

The question whether one is a tenant of certain land or the owner of a servitude therein is, it is conceived, to be determined solely by the consideration whether he has been given the possession of the land or merely a right to use it for a certain specified purpose, and, likewise, the question whether one is a

¹¹⁴ See post, § 149 b.

¹¹⁵ 1 Tiffany, Real Prop. § 304.

¹¹⁶ See post, § 13 b (4).

¹¹⁷ See 1 Tiffany, Real Prop. § 325.

tenant or a licensee is to be determined by the consideration whether he has the possession. While the decisions which we have to consider bear almost entirely upon the latter distinction, that between tenant and licensee, they are applicable as well to the distinction between a tenant and the owner of a servitude.

The question of tenancy *vel non* is to be determined by a construction of the language used in the grant of the right in question, as to whether it shows an intention to confer possession, and consequently the use of particular words is not necessarily conclusive. A tenancy may be created by the word "license,"¹¹⁸ and, on the other hand, though an instrument purports to lease or demise the property, it may appear from its construction as a whole, that it is a license only.¹¹⁹

Occasionally the fact that the rights conferred are, by express provision, to continue for a certain time has been referred to as showing that a tenancy and not a license was intended to be created.¹²⁰ But it does not appear why such a provision should have this effect. On the one hand, a lease is perfectly effective though naming no term, that is, it operates to create a tenancy at will if not for life,¹²¹ and, on the other hand, a license may well specify the "term" of its enjoyment and still be legally revocable at any time. Even if full effect be given to a provision as to the term of enjoyment under the grant, that can of itself show no intention to transfer the right of possession so as to create a tenancy, but it would at most, if the instrument is properly executed for the purpose, make it operative as a grant of an easement or of a right of profit.

The fact that a periodical sum is to be paid by the beneficiary of the grant, even though it is called "rent," cannot be regarded as conclusive that a tenancy is created, since a licensee may well

¹¹⁸ Bro. Abr., License, pl. 19; Bac. Ala. 240, 25 So. 834; Holladay v. Chi. Abr., Leases (K); Right v. Proctor, 4 Burrow, 2209; Anonymous, 11 App. 463.

Mod. 42; Tisdale v. Essex, Hob. 35; ¹²⁰ Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. 744; Duxbury v. Sandiford, 80 Law T. (N. S.) 552; Kunkle v. Philadelphia Rifle Club, 10 Phila. (Pa.) 52, 30 Leg. Int. 200.

¹¹⁹ Oxford v. Leathe, 165 Mass. 254, 43 N. E. 92; Reynolds v. Van Beuren, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129; Ferris v. Hoglan, 121 ¹²¹ See post, § 13 a (4).

agree so to pay for the enjoyment of the license, and the word "rent" is frequently used otherwise than in its strictly technical sense.¹²² And conversely, the fact that there is no express agreement that a rent shall be paid by the beneficiary of the grant does not of itself show that there is only a license and not a lease,¹²³ since a lease is perfectly valid without any reservation of rent.¹²⁴

If language is used which would otherwise call for the construction that the grant of an estate and of the consequent right of possession is intended, the fact that the person to whom the grant is made agrees not to use the land for specified purposes, or even agrees to use it for only one purpose, as for instance for a residence, does not show that a license only is intended, though his agreement has the effect of imposing on him a personal obligation as to the use of the land, a breach of which will render him liable in damages,¹²⁵ and may even be restrained by injunction.¹²⁶ On the other hand, if the language used purports to give another the right to use the land only for a specific purpose, and there is nothing to show an intention to give the right of possession, a tenancy cannot be regarded as arising. In order to give language of the latter character the effect of a demise of

¹²² See *Lowell v. Strahan*, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422; *Holladay v. Chicago Arc Light & Power Co.*, 55 Ill. App. 463; *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129; *Goldman v. New York Advertising Co.*, 29 Misc. 133, 60 N. Y. Supp. 275; *Hancock v. Austin*, 14 C. B. (N. S.) 634. But the fact that a yearly sum was to be paid was regarded as tending to show a lease, in *Kunkle v. Philadelphia Rifle Club*, 10 Phila. (Pa.) 52, 30 Leg. Int. 200.

¹²³ In *Branch v. Doane*, 17 Conn. 402, there are expressions to the effect that the absence of an agreement for compensation is conclusive that not a lease but a license is intended. The decision, however, was merely that if a witness is sought

to be disqualified as being the tenant of a party in interest, he must be shown to be a tenant. There are similar *dicta* in *Burnett v. Caldwell*, 76 U. S. (9 Wall.) 290; *Berry v. Potter*, 52 N. J. Eq. 664, 29 Atl. 323, and perhaps in *Simpkins v. Rogers*, 15 Ill. 397.

¹²⁴ See post, § 165.

¹²⁵ See post, § 123 e. So a lease of land for a hunting preserve (*Kellogg v. King*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; *Shafter Estate Co. v. Alvord*, 2 Cal. App. 602, 84 Pac. 279) presumably imposes merely a personal obligation on the lessee to use it for no other purpose, the mention of the purpose involving in effect a covenant to that effect.

¹²⁶ See post, § 123 l.

the land, it would be necessary to hold that the grant of the right to use land for a single purpose is to be construed as a grant of the right of possession, which in itself involves a general right of user, and that the mention of the purpose is merely to have the effect of imposing a personal obligation on the beneficiary not to use it for any further purpose, that is, as constituting a covenant or contract, or that the mention of the purpose in effect constitutes a "special limitation"¹²⁷ terminating the tenancy upon the use of the land for another purpose. One cannot be a tenant in possession of land and at the same time be restricted to using the land for a single purpose, unless there is a covenant, condition or limitation by which such restriction may be enforced.

That the question whether one is a licensee or a lessee is to be determined by a consideration of whether the right of possession has been transferred appears from several English cases. For instance, it has been there decided that an agreement by which the owner of a music hall purported to let it to another for a series of entertainments to be given on specified days did not constitute a lease, it appearing that such owner was to retain the possession.¹²⁸ And when the owner of a factory gave permission to another to place certain machines in a room in the factory with a right to power to work them and free ingress and egress for the purpose of inspecting and operating them, the relation of landlord and tenant was held not to have been created.¹²⁹ And the letting at a weekly rent of a stall at an exhibition from which the person taking it was excluded for a certain time every day was regarded as a license and not a lease.¹³⁰ So it has been decided that an agreement by which one obtains exclusive possession operates as a lease and renders the beneficiary thereunder liable to be "rated," that is, taxed, as an occupant,¹³¹ while, if the grantor retains control of the premises, the agreement is a license merely and he remains liable for the rates.¹³²

¹²⁷ See post, § 12 d.

¹²⁸ *Taylor v. Caldwell*, 3 Best & S. 826.
¹²⁹ *Hancock v. Austin*, 14 C. B. (N. S.) 634.

¹³⁰ *Rendell v. Roman*, 9 Times Law R. 192.

¹³¹ *Taylor v. Overseers of Poor of Pendleton*, 19 Q. B. Div. 288.

¹³² *London & N. W. R. Co. v. Buckmaster*, L. R. 10 Q. B. 70. See, also, *Watkins v. Overseers of Milton-Next-Gravesend*, L. R. 3 Q. B. 350; *Grant v. Oxford Local Board*, L. R. 4 Q.

In this country, likewise, there are a number of cases in which it is stated expressly or by implication that a tenancy, as distinguished from a license, can exist only when there is a right of possession or exclusive possession,¹³³ and there are other cases which are apparently decided on such a view.¹³⁴ So it has been said, in connection with grants of rights in mining lands, that "in order to ascertain whether an instrument must be construed

B. 9; *Cory v. Bristow*, 2 App. Cas. 262.

¹³³ *Ferris v. Hoglan*, 121 Ala. 240, 25 So. 834; *Holladay v. Chicago Arc Light & Power Co.*, 55 Ill. App. 463; *De Montague v. Bacharach*, 181 Mass. 256, 63 N. E. 435; *Central Mills Co. v. Hart*, 124 Mass. 123; *Owen v. Doty*, 27 Cal. 502, per Rhodes, J.; *Boone v. Stover*, 66 Mo. 430; *Sterling v. Heiman*, 108 Mo. App. 40, 82 S. W. 539; *Callen v. Hilty*, 14 Pa. 286; *Eaton v. Hall*, 43 Misc. 153, 88 N. Y. Supp. 260; *Markowitz v. Greenwall Theatrical Circuit Co.* (Tex. Civ. App.) 75 S. W. 74; *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 73 N. E. 523.

In *Callen v. Hilty*, 14 Pa. 286, it was decided that one to whom the owner "doth let or give the privilege of living four years on his farm" in consideration of his clearing the wood land thereon, the owner still remaining on the farm, was a licensee and not a tenant. Here the court clearly states the distinction between a tenant and a licensee as consisting in the exclusive possession of the latter. So in *Johns v. McDaniel*, 60 Miss. 486, one cultivating land by permission was held to be a mere licensee. In *Rowland v. Voechting*, 115 Wis. 352, 91 N. W. 990, it was held that one placed in exclusive possession of a farm, he paying one-half of the net income as rent, was a tenant. The court refers to this provision for compensation, and to

the use of the words "lease, demise and let," as well as to the fact of exclusive possession, as showing him to be tenant. The latter alone, it is submitted, was sufficient for this purpose.

¹³⁴ In *Crane v. Patton*, 57 Ark. 340, 21 S. W. 466 it was held that an agreement by which the owner "rents" certain lands to another till a certain date, "for which" such other agrees to pay all the taxes and to cut the timber, was a lease and not a license, since it "passed the right of possession." In *Heywood v. Fumer*, 158 Ind. 658, 32 N. E. 574, 18 L. R. A. 491, it was held that an instrument reading "Received of X \$175 in payment of sand bar for the year 1890. This is for the exclusive right to all gravel and sand for the year above named, and excluding all other parties from the premises," was a lease and not a license. In *Rollins v. Riley*, 44 N. H. 9, it was decided that one allowed by his father to have the use of the latter's farm and of one-half the house thereon, in consideration of his support of the father, was not a tenant, since it appeared that the father "intended to retain the possession." And, see, for other cases apparently involving an application of the same principle, *People v. Cushman*, 1 Hun (N. Y.) 73; *Daniels v. Cushman*, 3 Thomp. & C. (N. Y.) 125; *Brown v. Schiappacassie*,

as a lease or a license, it is only necessary to determine whether the grantee has acquired by it any estate in the land, in respect of which he might bring ejectment. If the land is still to be considered in the possession of the grantor, the instrument will only amount to a license."¹³⁵ The same distinction is clearly illustrated by decisions to the effect that one who is given the right to go upon another's premises to place signs thereon is a licensee and not a tenant;¹³⁶ and so it has been decided that a railway

115 Mich. 47, 72 N. W. 1096; *Nelson v. Howison*, 122 Ala. 573, 25 So. 211; *Carver v. Palmer*, 33 Mich. 342; *Hess v. Roberts*, 124 App. Div. 328, 108 N. Y. Supp. 894; *Cluett v. Sheppard*, 131 Ill. 636, 23 N. E. 589; *Steel v. Frick*, 56 Pa. 172; *Henry v. Perry*, 110 Ga. 630, 36 S. E. 87; *Shaw v. Cummiskey*, 24 Mass. (7 Pick.) 76.

¹³⁵ *Knight v. Indiana Coal & Iron Co.*, 47 Ind. 105, 17 Am. Rep. 692; *Funk v. Haldeman*, 53 Pa. 229. Approximately similar language is used in *Boone v. Stover*, 66 Mo. 430; *Doe d. Hanley v. Wood*, 2 Barn. & Ald. 736.

¹³⁶ *Chapman v. Boardman*, 69 Conn. 93; *Lowell v. Strahan*, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422; *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129 (semble); *Goldman v. New York Advertising Co.*, 29 Misc. 123, 60 N. Y. Supp. 275; *Wilson v. Taver* [1901] 1 Ch. 578.

The view is adopted in *O. J. Gude Co. v. Farley*, 28 Misc. 184, 58 N. Y. Supp. 1036, and in *Pocher v. Hall*, 50 Misc. 639, 98 N. Y. Supp. 754, that the grant of a right to place a signboard on property involves a lease of the property, while the grant of a right to place signs on walls or on a signboard already erected involves a license. This view is in terms based on *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E.

763, 42 L. R. A. 129, which case at most merely suggests such a distinction. In *San Filippo v. American Bill Posting Co.*, 188 N. Y. 514, 81 N. E. 463, the court speaks of the defendant as having "a formal lease which gave to it the right to maintain the signs now on the roof and side walls of a certain building," but there was no consideration of the question whether more than a license was granted.

In *Oakford v. Nixon*, 177 Pa. 76, 35 Atl. 588, 34 L. R. A. 575, an instrument giving such a right is spoken of by the court as a "lease," and it was decided that the erection of a structure by the adjoining owner which shut off the view of the wall "leased" was not an eviction excusing nonpayment of rent. So in *Pickering v. O'Brien*, 23 Pa. Super. Ct. 125, it is clearly decided that an instrument giving one the right to erect signboards on land constitutes a lease. The court says that "the agreement in giving the right to maintain the boards, necessarily gave him the right to occupy the quantum of land required for such maintenance." Conceding that a lease might be valid though it is left to the lessee to locate the particular land to be covered thereby (post, § 25 c), the grant in question could not be a lease if it gave a right to use the land merely for the erec-

company given a right to place a track on certain land was a licensee merely.¹³⁷ On the other hand, there are several cases in which the distinction above asserted is apparently ignored.^{137a} For instance, one has occasionally been decided to be a tenant at will when, from the nature of the grant under which he has entered, it would seem that his grantor retains the right of possession to the same extent as before, the so-called tenant being given the right to enter and occupy for certain purposes only.¹³⁸

tion of signboards. There may, in connection with a lease, be a covenant on the lessee's part that he shall use the premises for a particular purpose only, making him liable in damages if he uses them for another purpose (post, § 123 e); but so far as the conveyance by way of lease is concerned, it giving him the possession, he may use the land for any purpose.

¹³⁷ *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338. The decision is based on the fact that there was no exclusive possession given of any part of the land, that no rent was reserved, and no consideration given. The lack of exclusive possession alone, it is submitted, was sufficient to determine that no tenancy existed. So in *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 94 Ill. 83, it was decided that a company given the right to construct and use tracks over another's land was not a tenant, but had merely an easement in the land. But in *New York Cent. & St. L. R. Co. v. Randall*, 102 Ind. 453, 26 N. E. 122, it was held that a grant to a railroad company of the right to construct a track on a particular piece of land was not a license but a lease.

In *Asher v. Johnson*, 26 Ky. Law Rep. 586, 82 S. W. 300, a grant of a right to enter "at the lower end" of the grantor's land and construct

a tramway was regarded as giving the grantee the possession of the land occupied by the tramway, and as consequently creating a tenancy.

^{137a} In *Alexander v. Gardner*, 29 Ky. Law Rep. 958, 96 S. W. 818, it was held that one to whom all the timber on a tract of land was conveyed, the instrument giving him rights of way and all lumbermen's privileges, and requiring him to remove the timber within three years, and to leave all his fixtures, was a lessee, and not a licensee. See, also, cases cited in notes 136, 137, ante.

¹³⁸ So it has been held that a relative of the owner, going on the premises merely to take charge of them, and allowed to live there, is such a tenant. *Jones v. Shay*, 50 Cal. 508; *Mahoney v. Farley*, 17 N. Y. Wkly. Dig. 277. And persons who went on premises to take care of the owner have also been regarded as tenants at will. *Herrell v. Sizeland*, 81 Ill. 457. In *White v. Elwell*, 48 Me. 360, 77 Am. Dec. 231, one person cut another's hay and put it into the latter's barn, under an agreement that one-half the hay should belong to each, and it was held that the former was a tenant at will to the latter; and in *Duley v. Kelley*, 74 Me. 556, it was decided that if the owner of a landing place allowed another to pile wood there at

And there are some cases in which one to whom permission to hold an entertainment or series of entertainments in a public hall or auditorium was regarded as a tenant of the hall, or the permission was referred to as a lease.¹³⁹ This can be so only if the proprietor of the hall or auditorium thereby relinquishes all right of possession.

There is one decision to the effect that a person to whom the owner of land has given the right to "flow" the land was a tenant of the land,¹⁴⁰ while a contrary view has been elsewhere asserted.¹⁴¹ The first of these decisions appears to be based on an entirely erroneous conception of the nature of a tenancy, it being asserted that one may be tenant of land without having exclusive possession.¹⁴²

c. **License to take minerals.** One having an estate in land may grant to another the right to take minerals therefrom for a definite or indefinite period, such right constituting a *profit a prendre*.¹⁴³ He may, on the other hand, give merely a license to take minerals,¹⁴⁴ the effect of which is not to confer any right in the land or in the minerals but merely to relieve the

a certain price per cord, the latter "a tenancy does not necessarily imply a right to complete and exclusive possession; it may, on the other hand, be created with implied or express reservation of a right to possession on the part of the landlord, for all purposes not inconsistent with the privileges granted to the tenant." No authority is cited to support this statement.

¹³⁹ See *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92; *Portage Grange v. Masonic Lodge*, 141 Mich. 402, 12 Det. Leg. N. 464, 104 N. W. 667; *Camp v. Wood*, 76 N. Y. 92, 32 Am. St. Rep. 382; *Edwards v. New York & H. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659.

¹⁴⁰ *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124.

¹⁴¹ *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192. There may be a "lease," no doubt, of the right to flow land (*Smith v. Simons*, 1 Root [Conn.] 318, 1 Am. Dec. 48. See post, § 24 a), but the lessee would not be a tenant. One cannot be the "tenant" of a mere right to use another person's land.

¹⁴² *Cooley, J.*, in delivering the opinion in *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124, says that

¹⁴³ *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105; *Boone v. Stover*, 66 Mo. 430; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Grubb v. Bayard*, 2 Wall. Jr. 81, Fed. Cas. No. 5,849; *Baker v. Hart*, 123 N. Y. 470, 25 N. E. 948, 9 L. R. A. 844; *Grubb v. Grubb*, 74 Pa. 25.

¹⁴⁴ See *Inhabitants of Rockport v. Rockport Granite Co.*, 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779.

licensee from liability for taking them so long as the license is unrevoked. If, however, a right to take minerals is conferred by an instrument sufficient to create a right of *profit a prendre*, that is, to take effect as a common-law grant, it will, it is conceived, ordinarily be regarded as so operating, and not as conferring merely a license revocable at the will of the owner of the land. Occasionally an instrument operating as a lease or demise of land, creating a tenancy therein, contains a provision authorizing the tenant to open mines and take minerals from the land,¹⁴⁵ the tenant being thus relieved from the liability for waste which he would otherwise have incurred by so doing.¹⁴⁶ Another mode in which one may acquire rights as regards minerals in land is by a conveyance of them "in place," that is, a conveyance of the part of the land consisting of minerals.¹⁴⁷ It is to be remarked that the courts in discussing grants of rights to take minerals use the expressions "license" and "lease" with a very considerable degree of looseness, without, indeed, any clear line of distinction between them.¹⁴⁸

A grant merely of a right to take minerals does not, unless it is expressly so provided, exclude the owner of the land from also taking them,¹⁴⁹ or from making other uses of the land.¹⁵⁰ In the case of a lease of the land, on the other hand, the possession being in the tenant, the landlord has no right to go upon or into the land for the purpose of extracting minerals or for any other purpose, except as there may be an express reservation of such right in the lease, in which case he would be in the position

¹⁴⁵ *Shaw v. Wallace*, 25 N. J. Law (1 Dutch.) 453; *Patton v. Axley*, 50 N. C. (5 Jones Law) 440; *Baker v. Hart*, 52 Hun, 363, 5 N. Y. Supp. 345; *Sheets v. Allen*, 89 Pa. 47; *Brown v. Beecher*, 120 Pa. 590, 15 Atl. 608; *Ganter v. Atkinson*, 35 Wis. 48. *Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Silsby v. Trotter*, 29 N. J. Eq. (2 Stew.) 228; *Johnston Iron Co. v. Cambria Iron Co.*, 32 Pa. 241, 72 Am. St. Rep. 783; *Algonquin Coal Co. v. Northern Coal & Iron Co.*, 162 Pa. 114, 29 Atl. 402.

¹⁴⁶ See post, § 109 a (11).

¹⁴⁷ See 1 *Tiffany*, Real Prop. § 219; *Barringer & Adams, Mines*, 36 et seq.

¹⁴⁸ *Barringer & Adams, Mines*, 53 et seq.

¹⁴⁹ *Montjoy's Case*, Co. Litt. 164 b, And. 307, *Moore*, 197; *Chetham v. Williamson*, 4 East, 469; *Rutland*

¹⁵⁰ See *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880, 52 Am. St. Rep. 305; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105; *Boone v. Stover*, 66 Mo. 430; *Doe d. Hanley v. Wood*, 2 Barn. & Ald. 736.

of one having a right in another's land, or at least a license to go thereon.¹⁵¹

One having merely a right to take minerals from another's land without being a tenant thereof cannot, it would seem, bring ejectment against one who interferes with the exercise of his right by ousting him from the land.¹⁵² The purpose of the action of ejectment is to recover possession of land or of what is regarded as land, and consequently a thing on which an entry cannot be made, or of which the sheriff cannot deliver possession, such as a mere right to go on another's land to take minerals, would seem not to be a proper subject for such an action.¹⁵³ The person having such a right is not entitled to the possession even of the minerals until they are removed by him from their natural position in the ground, when they cease to be a part of the land and become personalty. It seems somewhat surprising that there should have been any decision that one so entitled merely to take minerals has a right to maintain ejectment, but there is at least one decision to that effect in this country,¹⁵⁴ and perhaps more than one in England.¹⁵⁵

As before stated, the owner of mining land, instead of making a lease of the land as a whole, or giving a mere right to take

¹⁵¹ See ante, § 3 b (1).

¹⁵² *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105; *Boone v. Stover*, 66 Mo. 430; *Clement v. Youngman*, 40 Pa. 341; *Carnahan v. Brown*, 60 Pa. 23.

¹⁵³ See *Adams, Ejectment*, 18; *Sedgwick & Wait, Trial of Title to Land*, § 95.

¹⁵⁴ In *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. St. Rep. 546, it is held that one who has expended money under a parol license to mine can thereafter bring ejectment. The court quotes from *Adams, Ejectment* (p. 20), to the effect that "when a grant of mines is so worded as not to operate as an actual demise, but only a license to dig, search for, and take metals and mineral within a certain district, it seems that a party claiming under such a grant, and

who shall open and work, and be in actual possession of any mines, may, if ousted, maintain ejectment with respect to them." Mr. Adams cites in support of this only *Whittingham v. Andrews*, 1 Salk. 255, *infra*, note 155.

¹⁵⁵ In *Comyn v. Kyneto*, Cro. Jac. 150, it is decided that ejectment will lie for a coal mine, "for it is a profit well known, and whereof the law takes *bon consueance*." That ejectment will lie for a coal mine is assumed in *Harebottle v. Placock*, Cro. Jac. 21, and *Whittingham v. Andrews*, 1 Salk. 255, 4 Mod. 143, though in the latter case it does not appear that the mine did not consist of minerals in place. In *Doe d. Hanley v. Wood*, 2 Barn. & Ald. 724, the court refuses to decide whether

minerals, may transfer the ownership of all the minerals in the land or of a defined portion thereof, the ownership of the balance of the land or minerals remaining in the grantor. Such a conveyance would ordinarily convey a fee simple estate in the minerals,¹⁵⁶ but sometimes the conveyance in terms undertakes to convey an interest for a limited term only. In Pennsylvania it is held that though a conveyance is so expressed to be for a limited term, it conveys a fee simple estate in the minerals, the grantee, however, having a right to remove them during the term named only.¹⁵⁷ In New York this view, that such a conveyance for a limited period passes a fee simple interest, has been said to apply, if it is to be accepted at all, only when the whole body of minerals is considered as of cubical dimensions and is capable of descriptive separation from the earth above and around it,¹⁵⁸ and, in other states, in discussing such a conveyance for a limited period, no suggestion is made that it is other than what it purports to be, a lease for such period, with a reversion in the lessor as to so much of the minerals as are not mined during that period.¹⁵⁹ One to whom the minerals in the land are thus conveyed "in place" acquires the right to the possession of such part of the land and could no doubt maintain ejectment against one excluding him therefrom.

a licensee, who had been "actually in possession of" a mine and had worked it, could bring ejectment, but decided that he could not do so if he had not been "in possession."

¹⁵⁶ *Stoughton v. Leigh*, 1 Taunt. 402; *Adams v. Ore Knob Co.*, 7 Fed. 634; *Williams v. Gibson*, 84 Ala. 228, 4 So. 350, 5 Am. St. Rep. 368; *Manning v. Frazier*, 96 Ill. 279; *Chester Emery Co. v. Lucas*, 112 Mass. 424; *Wardell v. Watson*, 93 Mo. 107, 5 S. W. 605; *Hartwell v. Camman*, 10 N. J. Eq. (2 Stockt.) 128, 64 Am. St. Rep. 448; *Canfield v. Ford*, 28 Barb. (N. Y.) 336; *Edwards v. McClurg*, 39 Ohio St. 41.

¹⁵⁷ *Montooth v. Gamble*, 123 Pa. 240, 16 Atl. 594; *Sanderson v. Scranton*, 105 Pa. 469; *Hope's Appeal*, 29

Wkly. Notes Cas. (Pa.) 365; *Kingsley v. Hillside Coal Co.*, 144 Pa. 613, 23 Atl. 250; *Lazarus' Estate* 145 Pa. 1, 23 Atl. 372.

¹⁵⁸ *Genet v. Delaware & Hudson Canal Co.*, 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127.

¹⁵⁹ *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937 (semble); *Hartford Iron Min. Co. v. Cambria Min. Co.*, 93 Mich. 90, 53 N. W. 4, 32 Am. St. Rep. 488; *Austin v. Huntsville Coal & Min. Co.*, 72 Mo. 535, 37 Am. St. Rep. 446; *Massot v. Moses*, 3 S. C. (3 Rich.) 168; *Knight v. Indiana Coal & Iron Co.*, 47 Ind. 105, 17 Am. St. Rep. 692; *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120. See, also, *Doe d. Hanley v. Wood*, 2 Barn. & Ald. 724.

§ 8. Lodger distinguished from tenant.

One occupying a room or rooms in a house under a contract by which, while he has the exclusive right of enjoyment of such room or rooms, the care of the rooms and other attendance is to be furnished by the owner, is not a tenant. "A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass *quare clausum fregit*, the maintenance of the action depending on the possession."¹⁶⁰ In the case from which the foregoing quotation is made, it is not explicitly stated that such a lodger is not a tenant, but the language used therein is equivalent to such a statement; and in other English cases in which, as in this, the question involved was whether a person so enjoying the use of a part of certain property was an "occupant" thereof within the "rating" statutes, it is expressly or by implication stated that such a lodger does not hold as tenant under a demise.¹⁶¹ So it has been said, in determining whether one was the sole occupant of a house within an English statute giving the elective franchise to such an occupant, that "a lodger was never considered by any one as an occupier of the house. It is not the common understanding of the word, neither the house, nor even any part of it can be properly said to be in the tenure or occupation of the lodger."¹⁶² In this country, likewise, it is clearly the law

¹⁶⁰ *Allen v. Overseers of Liverpool*, L. R. 9 Q. B. 180, 192, per Blackburn, J.

¹⁶¹ See *Smith v. Overseers of St. Michael*, 3 El. & El. 383; *Stamper v. Overseers of Sunderland-Near-the-Sea*, L. R. 3 C. P. 388; *Watkins v. Overseers of Milton-next-Gravesend*, L. R. 3 Q. B. 350; *Queen v. Assessment Committee of St. George's Union*, L.

R. 7 Q. B. 90; *Smith v. Lambeth Assessment Committee*, 9 Q. B. Div. 585, *affd.* 10 Q. B. Div. 327; *London & N. W. R. Co. v. Buckmaster*, L. R. 10 Q. B. 70, 444; *Cory v. Bristow*, 2 App. Cas. 262; *Roads v. Overseers of Trumpington*, L. R. 6 Q. B. 56.

¹⁶² Lord Hardwick in *Fludier v. Lombe*, Lee t. Hardw, 307, approved in *Cook v. Humber*, 11 C. B. (N.

that a mere lodger is not a tenant. "When one contracts with the keeper of a hotel or boarding house for rooms and board, whether for a week or a year, the technical relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the real estate. If he is turned out of the rooms before the time expires, he cannot maintain ejectment; and while he remains, the hotel keeper cannot get his pay by distraining as for rent in arrear."¹⁶³ So it has been decided that a lodger has not an interest in land within the meaning of the statute of frauds, which he clearly would have were he a tenant.¹⁶⁴

Though an ordinary lodger is not a tenant, "an entire floor, or a series of rooms, or even a single room, may doubtless be let for lodgings, so separated from the rest of the house as to become in fact and in law the separate tenement of the lessee."¹⁶⁵ Such a case may occur when one takes rooms in a house without any contract or understanding with the owner that the latter is to care for the rooms or to furnish attendance, and if the intention is that the occupation, as against the owner, shall be exclusive, the occupant may, if disturbed by the owner, maintain an action

S.) 33, 46. So in *Brewer v. McGowen*, L. R. 5 C. P. 239, it was said, per Willes, J., that the lodger was "clearly not a joint occupier of the room in which he took his meals," and "with respect to the bed room he clearly had not an occupation as owner or tenant, but only an occupation as lodger."

¹⁶³ *Wilson v. Martin*, 1 Denio (N. Y.) 602, per Bronson, J. And see *Messerly v. Mercer*, 45 Mo. App. 327; *Linwood Park v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576; *Cochran v. Tuttle*, 75 Ill. 361.

¹⁶⁴ *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28, where it is said, in reference to *Inman v. Stamp*, 1 Starkie, 12; *Edge v. Strafford*, 1 Tyrw. 293, 1 Comp. & J. 391, which decided that agreements to take certain apartments in a house as lodg-

ings at a yearly rent were within the statute of frauds: "As suggested by the judges in *Wright v. Stavert*, 2 El. & El. 721, each appears to have been the case of an agreement, which, if perfected by entry, would have amounted to an actual demise, and would have given the occupant all the possession rights of a tenant." See *Wright v. Stavert*, 2 El. & El. 721, and *Wilson v. Martin*, 1 Denio (N. Y.) 602, to the effect that such an agreement is not within the statute.

¹⁶⁵ Per Gray, J., in *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28, referring to *Newman v. Anderton*, 2 Bos. & P. (N. R.) 224; *Fenn v. Grafton*, 2 Bing. N. C. 617, 3 Scott, 56; *Monks v. Dykes*, 4 Mees. & W. 567; *Swain v. Mizner*, 74 Mass. (8 Gray) 182, 69 Am. St. Rep. 244. See, also,

against the latter, not only for breach of contract but in trespass.¹⁶⁶ Such an occupant is properly "a housekeeper and not a lodger only."¹⁶⁷

Although it has never in this country been judicially suggested that the occupant of a room in an office building might be regarded otherwise than as a tenant, and it has been quite frequently assumed that he is a tenant, it is somewhat difficult to see why he should be in a different legal position from that of a lodger. In an office building, as in a lodging house, the proprietor of the building ordinarily takes care of the rooms, and it might be questioned whether the different character of the use made of the rooms in the two cases, and the fact that the occupant of an office ordinarily supplies his own furniture, would alone be sufficient ground for placing different constructions upon an agreement, expressed in similar terms, according as the agreement is for the use of a room in an office building or of a room in a lodging house. In the case of one occupying a room or rooms in such a building, as in the case of one occupying a room or rooms in a building used for dwelling purposes, the question whether he is a tenant would seem to be whether in the particular case the proprietor of the building has divested himself of the possession, and this is to be ascertained with reference to the language used and the surrounding circumstances.¹⁶⁸

§ 9. Servant distinguished from tenant.

A servant who is occupying land for the purpose of carrying out the purpose of his employment is not ordinarily a tenant. A

to this effect, *Oliver v. Moore*, 53 in question were used in part for Hun, 472, 6 N. Y. Supp. 413; *Porter v. Merrill*, 124 Mass. 534.

¹⁶⁶ *Lane v. Dixon*, 3 C. B. 776. And see *Stamper v. Sunderland-near-the Sea*, L. R. 3 C. P. 388; *McDowell v. Hyman*, 117 Cal. 67, 48 Pac. 984.

¹⁶⁷ *Swain v. Milzner*, 74 Mass. (8 Gray) 182, 69 Am. St. Rep. 244; *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28.

¹⁶⁸ In *Reg. v. Assessment Committee of St. George's Union*, L. R. 7 Q. B. 90, the rooms in the building

in question were used in part for offices. There the fact that the outer door was in the exclusive control of the owner of the building was regarded as strong evidence that the control of the entire building was in him, and that there was no demise, but merely a contract for occupancy; but in the same case the fact that a porter or janitor was provided, who was given a key to each apartment so that he might enter if occasion arose, was held not to take away from the occupants of the apart-

servant may be a tenant of his master as to particular property belonging to the latter,¹⁶⁹ but in such a case there is a lease or demise to him, and the mere fact that a servant is occupying his master's land or building, as when he is cultivating the land or doing other work thereon, or taking care of the building, does not show him to be a tenant.¹⁷⁰

The question whether one who is conceded to be a servant is also a tenant as regards particular land belonging to the master is discussed elsewhere.¹⁷¹ Occasionally, however, the question has arisen whether one is in possession in his own behalf as tenant, or in behalf of another, as servant or agent of the latter. One given the full control of a factory subject to a requirement that he should pay to the owner all the profits over a certain amount was regarded as a tenant and not an agent,¹⁷² as was one given control of a factory subject to an agreement to manufacture goods for the owner at a specified price.¹⁷³ Likewise, one who was given the use and control of a building under an agreement that he should "board" the owner's employees, the owner having no interest in the losses or profits but merely agreeing to deduct from each employee's wages the amount of his

ments the character of tenants, it appearing from the language of the agreements that he was to be regarded as the servant of the various occupants and not of the owner of the building.

¹⁶⁹ See post, § 48.

¹⁷⁰ "A servant or bailiff, or any person occupying land or buildings in a merely ministerial character, does not acquire possession." Pollock & Wright, Possession, 56. See, also, Lightwood, Possession of Land, 27; Seymour v. Warren, 86 App. Div. 403, 83 N. Y. Supp. 871; Cook v. Klenk, 142 Cal. 416, 76 Pac. 57.

The statement in Ward v. Small's Adm'r, 90 Ky. 198, 13 S. W. 1070, that "if one takes possession of land as agent and uses or controls it, the relation of landlord and tenant arises," seems incorrect. If one entering as agent uses and controls the

land for his principal, the possession is that of the latter. If he uses and controls it in his own behalf without permission, excluding his principal, he is a wrongdoer. If he uses and controls it in his own behalf by permission, while holding it as agent in behalf of the principal, such use and control is ordinarily but a form of compensation for services. Farrow's Heirs v. Edmundson, 43 Ky. (4 B. Mon.) 605, is cited in support of the statement. In that case the question was merely whether the agent could question his principal's title or assert adverse possession as against him.

¹⁷¹ See post, § 48.

¹⁷² Ault Wooden Ware Co. v. Baker, 26 Ind. App. 374, 58 N. E. 265.

¹⁷³ Fiske v. Framingham Mfg. Co., 31 Mass. (14 Pick.) 491.

board, was held to be a tenant, there being nothing to show that his possession was not to be exclusive.¹⁷⁴ On the other hand, one who was to cultivate another's land and to make the crop, and receive his compensation out of the proceeds, the surplus going to the owner, was regarded as a servant and not a tenant,¹⁷⁵ and one who agreed to manage an opera house for the owner, receiving a certain sum and a certain portion of the profits in addition, was decided not to be a tenant but merely an employee or partner, the possession not being transferred.¹⁷⁶

§ 10. "Cropper" distinguished from tenant.

Where the owner of land makes a contract with another whereby the latter is to cultivate the land and the crops produced are to be divided between the two parties in a certain proportion, the relation of landlord and tenant may or may not result. The question whether it does result is one of intention, to be determined upon a construction of the whole instrument if the contract is in writing, or from the language used by the parties and their acts in carrying out the contract if the agreement is oral. The various considerations which may operate in this connection, and the perplexing questions which may arise under such an agreement as to the ownership of the crops pending their division, will be reserved for future discussion,¹⁷⁷ and it is desired in this place merely to point out that the principle that only a tenant has possession and that an occupant in another capacity has not possession applies in this case as in others. That is, if the agreement involves a lease, making the cultivator of the land a tenant, he has the possession,¹⁷⁸ while if it is a mere

¹⁷⁴ *Lightbody v. Truelsen*, 39 Minn. 310, 40 N. W. 67. That the owner is not in such case a master, liable as such for injuries to the person in possession, see *Doyle v. Union Pac. R. Co.* 147 U. S. 413.

¹⁷⁵ *Ferris v. Hoglan*, 121 Ala. 240, 25 So. 834. And see post, § 10.

¹⁷⁶ *Markowitz v. Greenwall Theatrical Circuit Co.* (Tex. Civ. App.) 75 S. W. 74.

¹⁷⁷ See post, §§ 20, 253.

¹⁷⁸ *Appling v. Odom*, 46 Ga. 583; *Williams v. Cleaver*, 4 Houst. (Del.) 453; *Neal v. Brandon*, 70 Ark. 79, 66 S. W. 200; *Hatchell v. Kimbrough*, 49 N. C. (4 Jones Law) 163; *Johnson v. Hoffman*, 53 Mo. 504; *Rees v. Baker*, 4 G. Greene (Iowa) 461; *Chicago & W. M. R. Co. v. Linard*, 94 Ind. 319, 48 Am. Rep. 155; *Taylor v. Bradley*, 39 N. Y. 129; *Woodruff v. Adams*, 5 Blackf. (Ind.) 317, 35 Am. Rep. 122.

"cropping contract," the possession remains in the owner.¹⁷⁹ And, conversely, if the agreement shows an intention that the possession or the "exclusive possession," as it is frequently expressed,¹⁸⁰ shall remain in the landowner, it does not constitute a lease making the cultivator a tenant,¹⁸¹ while if it shows an intention that the cultivator shall have the possession or "exclusive possession," he is necessarily a tenant.¹⁸² In one or two cases the court refers to this right of possession as one of several considerations on the question of the relation of the parties,¹⁸³ but, it is submitted, if their intention in this regard is clearly established, it must necessarily be conclusive as to the relation.

¹⁷⁹ Hare v. Celey, Cro. Eliz. 143; he was liable in trespass *quare clausum fregit* if he did so.

Appling v. Odom, 46 Ga. 583; Decker v. Decker, 17 Hun (N. Y.) 13; Graham v. Houston, 15 N. C. (4 Dev. Law) 232; Denton v. Strickland, 48 N. C. (3 Jones Law) 61; Fry v. Jones, 2 Rawle (Pa.) 12; Steel v. Frick, 56 Pa. 172; Wanamaker v. Buchanan, 33 Pa. Super. Ct. 138; Cutting v. Cox, 19 Vt. 517; Woodward v. Conder, 33 Mo. App. 147; Warner v. Hoisington, 42 Vt. 94; Culley v. Taylor, 62 Neb. 651, 87 N. W. 334.

In Warner v. Hoisington, 42 Vt. 94, it was said that such a contract "did not divest the plaintiff (the landowner) of the legal possession any more than would a contract to permit the defendant to enter upon the field and dig and remove stone, or cut and draw away wood or timber," and it was there held that after the crop had been harvested and the landowner's share had been set apart in a certain place on the premises, the cropper had no longer any right to enter on that part, and

¹⁸⁰ See ante, § 3 a.

¹⁸¹ Creel v. Kirkham, 47 Ill. 344; Hansen v. Dennison, 7 Ill. App. (7 Bradw.) 73; Gray v. Robinson, 4 Ariz. 24, 33 Pac. 712; Herskell v. Bushnell, 37 Conn. 36, 9 Am. Rep. 299; State v. Page, 1 Speer Law (S. C.) 408, 40 Am. St. Rep. 608.

¹⁸² Steel v. Frick, 56 Pa. 172; Alwood v. Ruckman, 21 Ill. 200; Dixon v. Nicolls, 39 Ill. 372, 89 Am. Dec. 312; Wentworth v. Portsmouth & D. R. Co., 55 N. H. 540; Maverick v. Lewis, 3 McCord (S. C.) 2; Rakestraw v. Floyd, 54 S. C. 288, 32 S. E. 419; Whaley v. Jacobson, 21 S. C. 51; Warner v. Abbey, 112 Mass. 355; Lake v. Sweet, 63 Hun, 636, 18 N. Y. Supp. 342; Neal v. Brandon, 70 Ark. 79, 66 S. W. 200; Rowlands v. Voechting, 115 Wis. 352, 91 N. W. 990, 60 L. R. A. 585.

¹⁸³ See Reeves v. Hannan, 65 N. J. Law, 249, 48 Atl. 1018; Dixon v. Nicolls, 39 Ill. 372, 89 Am. Dec. 312; Strain v. Gardner, 61 Wis. 174, 21 N. W. 35.

CHAPTER II.

THE CLASSES OF TENANCIES.

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§ 11. Freehold tenancies.

a. **Tenancy in fee simple.** A conveyance in fee simple, in most jurisdictions, as before stated, creates no relation of tenure, it having been so expressly provided by the statute *Quia Emptores*,¹ and if the grantee is to be regarded as tenant at all, in the sense of holding under another, he is tenant under the state. The fact that a rent is reserved upon the conveyance cannot make the conveyance operate as creating a tenure, and, consequently, it is not strictly proper to say that the relation of landlord and tenant exists between the grantor and grantee upon a conveyance in fee simple reserving rent. In New York, though it is recognized that no right of reverter or escheat remains in the grantor in the case of such a conveyance,² the courts have occasionally referred to the grantor and grantee as standing in the relation of landlord and tenant, apparently on the erroneous theory that any person to whom rent is payable by another is the landlord of such other.³ And a conveyance in fee simple reserving rent has occasionally been referred to as a "lease" or a "perpetual lease."⁴ In Pennsylvania, the statute of *Quia*

¹ Ante, § 1.Barb. (N. Y.) 104; *Tyler v. Heidorn*,² *De Peyster v. Michael*, 6 N. Y. 46 Barb. (N. Y.) 439.

(2 Seld.) 467; *Van Rensselaer v. Hays*, 19 N. Y. 76, 75 Am. St. Rep. 278; *Van Rensselaer v. Read*, 26 N. Y. 558; *Van Rensselaer v. Dennison*, 35 N. Y. 393.

⁴ See *Folts v. Huntley*, 7 Wend. (N. Y.) 210, and cases cited in *Tyler v. Heidorn*, 46 Barb. (N. Y.) 439. Compare *Towle v. Remsen*, 70 N. Y. 303. The expression "perpetual

³ *Van Rensselaer v. Read*, 26 N. Y. 558; *Van Rensselaer v. Smith*, 27 83 Ga. 34, 9 S. E. 787.

Emptores is apparently not in force, and there, it seems, the relation of landlord and tenant might be regarded as existing between the grantor and grantee in such a conveyance without reference to whether a rent is reserved.⁵

In a number of states there are statutes prohibiting a grant of land reserving a rent for more than a specified number of years,⁶ and these would obviously preclude a conveyance in fee reserving a rent.

b. Tenancy for life. The relation of landlord and tenant is created by a conveyance, by one having a greater estate, of an estate for the life of the grantee, or for the life or lives of some other person or persons, or for the lives of the grantee and of some other person or persons.⁷ Such a lease "for life" or "for lives" occurs quite occasionally in England, but in this country is most unusual, a person creating a life estate ordinarily disposing of his whole interest by the same instrument by way of remainder, in which case no reversion exists and no relation of landlord and tenant is created.⁸ The principles determining the mutual rights and liabilities of the landlord and tenant are the same when the relation is created by a lease for life as when created by a lease for any other period.

At common law a lease for life, as it involves the creation of a freehold estate, was valid only if accompanied by livery of seisin, but, if so accompanied, no words of limitation were necessary, the rule being that in the absence of such words a conveyance sufficient to pass a freehold created a life estate in the grantee.⁹

⁵ Cadwallader, *Ground Rents*, c. 1; *estate for life.* Co. Litt. 42 a. So Gray, *Perpetuities*, § 16. it is said in Comyn, *Landl. & Ten.*

⁶ See post § 12 c (1).

⁷ See Challis, *Real Prop.* (2d Ed.) 311-331, as to the various classes of estates for life or lives. (at p. 6), that "sometimes a demise of lands is made without any limitation in respect of time. Where the form of the grant is such as will pass an estate of freehold, it will, though indefinite as to time, operate as an estate for life." In *Com. Dig.*,

⁸ Challis, *Real Prop.* 22.

⁹ Litt. § 1; Co. Litt. 8 b; 2 Blackst. *Comm.* 121. Estates (E 1), it is said that an estate for life is created "if lands are demised or granted to a man, generally, and delivery be made"; and in *Bac. Abr.*, *Estate for Life* (A), that "if a man leases lands to an-

"If one grant lands or tenants, reversions, remainders, rents, advowsons, commons, or the like and express or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an

At the present time the necessity of livery in order to create such an estate no longer exists, but certain formalities are necessary in the execution of the conveyance, differing in the different states. Provided these requirements are satisfied, a lease to a person without words of limitation would, as at common law, create an estate for life,¹⁰ unless, in view of local statutes dispensing with words of inheritance for the creation of an estate in fee simple, the conveyance be construed as passing an estate of the latter character.¹¹

Doubt has been expressed whether a lease for life reserving rent is within a statutory provision, such as we have before referred to,¹² prohibiting a grant or lease reserving rent for a period greater than a named number of years.¹³

The common-law rule that an estate of freehold cannot be created to take effect *in futuro*¹⁴ presumably still precludes, in a considerable number of jurisdictions, a lease for life which is not immediately to vest in possession.

A lease for life which fails to mention *whose* life will be regarded as one for the life of the grantee, though if the lessor might rightfully create an estate for his own life, but not for the life of the lessee, it will be construed as for the former's life.^{14a} A lease to one during the lives of two other persons will continue until the death of the survivor of such persons,^{14b} and a like

other without saying how long the lessee shall enjoy them, he shall have them for his own life, if livery be made, because every man's gift is taken most strongly against himself, and for the benefit of the grantee, to avoid all equivocation."

¹⁰ Doe d. Dixie v. Davies, 7 Exch. 89; Wood v. Davis, 6 L. R. Ir. 50; Curtis v. Gardner, 54 Mass. (13 Metc.) 457; Edwardsville R. Co. v. Sawyer, 92 Ill. 377; Clearwater v. Rose, 1 Blackf. (Ind.) 137; Adams v. Ross, 30 N. J. Law, 505, 82 Am. St. Rep. 237; Miles' Lessee v. Fisher, 10 Ohio, 1, 36 Am. Rep. 61; Jackson v. Van Hoesen, 4 Cow. (N. Y.) 325; Jordan v. Neece, 36 S. C. 295, 15 S. E. 295, 31 Am. St. Rep. 869; Hunter v. Bryan, 24 Tenn. (5 Humph.) 47; Taylor v. Cleary, 29 Grat. (Va.) 448; Gray v. Packer, 4 Watts & S. (Pa.) 17.

¹¹ See 1 Tiffany, Real Prop. §§ 20, 31.

¹² See ante, § 11 a.

¹³ See Parish v. Rogers, 20 App. Div. 279, 46 N. Y. Supp. 1058; Wegner v. Lubernow, 12 N. D. 95, 95 N. W. 442, 102 Am. St. Rep. 572.

¹⁴ Challis, Real Prop. (2d Ed.) 93; Co. Litt. 217 a.

^{14a} Co. Litt. 42 a.

^{14b} Brudnel's Case, 5 Coke, 9 a.

construction has been put on a lease for "the life" of the lessees.^{14c}

A tenancy for life may be subject to a "special limitation," the effect of which is to terminate the estate upon the happening of a particular contingency named before the death of the person by whose life the tenancy is otherwise measured. So a lease might be made to one to continue so long as he resides on the premises, or to a widow so long as she remains unmarried or conducts herself properly, in which case the lessee would have, at common law, an estate for life subject to termination upon a change of residence, remarriage or improper behavior, respectively.^{14d}

§ 12. Tenancy for years.

a. **The nature of the tenancy.** Tenancy "for years" is not, as might be inferred from its name, necessarily a tenancy for a certain number of years, but the expression is applied to any tenancy for a certain time, as for one or more years, for a half or quarter of a year, for a month, or for any greater or less period of a fixed duration.¹⁵

The estate or interest of the tenant for years is frequently called a "term," from the Latin word *terminus*, and this word is also used to describe the period of time during which the estate or tenancy is to continue.¹⁶ The tenant's interest is also not infrequently spoken of as a lease, thus "putting, by a sort of metonymy, the instrument by which an estate for years is granted for the estate itself."¹⁷

^{14c} Kenney v. Wentworth, 77 Me. 203. v. Vaughan, 6 Dowl. & R. 349; Cottee v. Richardson, 7 Exch. 143; Grizzle

^{14d} Co. Litt. 42 a, 214 b. See post, § 12 d. v. Pennington, 77 Ky. (14 Bush) 115; St. Joseph & St. L. R. Co. v. St.

¹⁵ Litt. §§ 58, 67; 2 Blackst. Comm. 140; 1 Cruise's Dig. tit. 8, c. 1, § 3; Stoppelkamp v. Mangeot, 42 Cal. 316; Brown's Adm'rs v. Bragg, 22 Ind. 122; Casey v. King, 98 Mass. 503; Shaffer v. Sutton, 5 Bin. (Pa.) 228. Louis, I. M. & S. R. Co., 135 Mo. 173, 36 S. W. 602, 33 Am. St. Rep. 607; Young v. Dake, 5 N. Y. (1 Seld.) 463, 55 Am. Dec. 356; Finkelmeier v. Bates, 92 N. Y. 172; Baldwin v. Thibadeau, 28 Abb. N. C. 14, 17 N. Y. Supp. 532; Harding v. Seeley, 148

¹⁶ See Co. Litt. 45 b; 1 Cruise's Dig. tit. 8, c. 1, § 6; Rector of Ched-

ington's Case, 1 Coke, 153 a; Wright v. Cartwright, 1 Burrow, 282; Evans

¹⁷ Heydrick, J., in Harding v. Seeley, 148 Pa. 20, 23 Atl. 1118.

The interest of a tenant for years has always been regarded as personal and not real property, passing to the personal representatives of the tenant and not to the heir.¹⁸ Consequently, such interests are frequently referred to as chattels real. In one or two states, however, there are statutory provisions modifying this view.¹⁹

This misuse, if it may be so termed, of the word "lease," is not of recent origin. In Sheppard's Touchstone, 266, it is said: "This word (lease) also is sometimes, although improperly, applied to the estate, i. e., the title, time or interest the lessee has to the thing demised, and then it is rather referred to the thing taken or had and the interest of the taker therein."

¹⁸ Co. Litt. 118 a; 2 Blackst. Comm. 386; 2 Pollock & Maitland, Hist. Eng. Law, 115, 329; Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 45 Pac. 680; Goodwin v. Goodwin, 33 Conn. 314; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Lake v. Campbell, 18 Ill. 106; Shipley v. Smith, 162 Ind. 526, 70 N. E. 803; Cade v. Brownlee, 15 Ind. 369, 77 Am. Dec. 95; Averill v. Taylor, 8 N. Y. (4 Seld.) 44; In re Gay, 5 Mass. 419; Hutchinson v. Bramhall, 42 N. J. Eq. 372, 7 Atl. 873; Lewis' Heirs v. Ringo, 10 Ky. (3 A. K. Marsh.) 248; Faler v. McRae, 56 Miss. 227; Mulloy v. Kyle, 26 Neb. 313, 41 N. W. 1117; Keating v. Condon, 68 Pa. 75. It is immaterial that a privilege of purchase in fee is given the lessee. Hazard Powder Co. v. Loomis, 2 Disn. (Ohio) 544.

A lease for ninety-nine years, renewable forever, creates an interest constituting part of the personal assets of the lessee. Doe d. Allender v. Sussan, 33 Md. 11, 3 Am. Rep. 171; Murdock v. Ratcliff, 7 Ohio, 119.

See Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290, 873.

¹⁹ Ga. Code 1895, § 3109 (An estate for years passes as real estate). Mass. Rev. Laws 1902, c. 129, § 1 (If land is demised for the term of one hundred years or more, the term, so long as fifty years thereof remain unexpired, is to be regarded as an estate in fee simple as regards the descent and devise thereof, as well as in certain other connections). Ohio Rev. St. 1906, § 4181. (Permanent leasehold estates, renewable forever, subject to the same laws of descent as estates in fee.)

In Colorado, the general provision that, in the construction of the statutes, the words "land" or "lands" and the words "real estate" shall be construed to include lands, tenements and hereditaments, and all rights thereto and all interests herein, and the substantially similar provisions in the chapters on conveyances and executions, were regarded as showing that an estate for years was to be regarded, upon the tenant's death, as real and not as personal property. McKee v. Howe, 17 Colo. 538, 31 Pac. 115. And so in Tennessee a provision that "'real estate,' 'real property,' 'land,' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein," was held to render a leasehold "real estate." Kelley v. Shultz, 59 Tenn. (12 Heisk.) 218.

Formerly, one to whom a lease for a term of years was made was regarded as having merely a right of action against the lessor on his covenant in case of wrongful ouster by the latter, and no right of action against a third person wrongfully ejecting him, that is, he had rights *in personam* merely and not *in rem*. Early in the thirteenth century, however, by the introduction of the writ of *quare ejecit infra terminum*, the lessee was given the right to recover the land as against a grantee of the lessor, and later he was given a right of action when ejected as against all the world by the writ of *ejectione firmæ*, this latter writ being that on which the later action of ejectment was based.²⁰ At first this latter writ was regarded as giving a right to the lessee to recover damages only against the person interfering with his possession but, eventually about the middle or latter part of the fifteenth century the courts began to give judgment in his favor for possession as well as for damages.²¹ "Thus the interest of the termor or lessee for years, instead of resting at best upon a covenant with his lessor, and therefore being enforceable only as against him, became a right of property which could be enforced against any wrongdoer, by a remedy analogous to that provided for a wrongful ouster of a freeholder from his possession, and thus these interests became estates or rights of property in land."²² But even after the property rights of the lessee for years became thus established for most purposes, the "term" could still in some cases be destroyed at the will of the reversioner having the freehold by the latter's suffering a default to go against him in a collusive action (common recovery), in which the lessee for years, having no freehold, could not intervene,²³ and it has been suggested that until this state of things was remedied by a statute passed in the second quarter of the sixteenth century,²⁴ the lessee for years could not well be regarded as having an

²⁰ Adams, Ejectment, 2; Digby, & E. 750. See, also, Adams, Eject-Hist. Real Prop. (4th Ed.) 175; ment, 3; Smith, Landl. & Ten. (3d "The Seisin of Chattels" by Prof. Ed.) 120.

Maitland, 1 Law Quart. Rev. 335 et seq.; 2 Pollock & Maitland, Hist. Eng. Law, 106 et seq.

²² Digby, Hist. Real Prop. (4th Ed.) 176.

²³ Co. Litt. 46 a; 2 Co. Inst. 321,

²¹ The old authorities bearing on 322.

the question are collected in the note 24 21 Hen. 8, c. 15 (A. D. 1529).
to Doe d. Poole v. Errington, 1 Adol.

estate, since "an estate which could not, by the common law, be defended at law, seems at common law to have been no estate."²⁵

b. **The commencement of the term**—(1) **May be subsequent to lease.** A lease for years, not involving any transfer of the seisin, was never subject to a rule similar to that which, at common law, precluded the creation of an estate of freehold to take effect *in futuro*,²⁶ and so, at the present day, the term may be made to commence either on the date of the delivery of the lease or on a subsequent date.

A term of years to commence *in futuro* is not an estate but merely an *interesse termini*.²⁷ So if one makes a "reversionary lease," that is, a lease to take effect in possession after the expiration of an existing tenancy, the lessee has a mere *interesse termini*.²⁸

Such an interest may be assigned,²⁹ but it cannot, it is said, be surrendered otherwise than by implication of law.³⁰ It will not merge in a greater estate unless it becomes itself an estate while it and such estate are vested in one person,³¹ nor will an estate merge in it.³²

(2) **Requirement of certainty.** It is said that the date of the commencement of the term must be certain,³³ but it is seldom that the courts have regarded a lease as lacking in the element of certainty in this respect, and it seems reasonable to conclude that an uncertainty arising from the use of indefinite language in specifying the time of commencement will have no greater effect than an uncertainty arising from the absence of any statement

²⁵ Challis, Real Prop. (2d Ed.) 47. (1 Seld.) 463, 55 Am. Dec. 356;

²⁶ 2 Blackst. Comm., 143, 1 Cruise's 2 Preston, Conveyancing, 149.
Dig. tit. 8, c. 1, § 18; Young v. Dake, 28 Smith v. Day, 2 Mees. & W. 684; 5 N. Y. (1 Seld.) 463, 55 Am. Dec. Lewis v. Baker [1905] 1 Ch. 46.
²⁷ Elliott v. Stone, 67 Mass. (1 29 Bro. Abr., Grants, pl. 110; Plowden, arguendo, in Browning v. Beston, Plowd. 142 b.
Gray) 571; Field v. Howell, 6 Ga. 30 Co. Litt. 338 a.
423; Johnston v. Corson Gold Min. 31 Doe d. Rawlings v. Walker, 5 Co. (C. C. A.) 157 Fed. 145. Barn. & C. 111.

²⁸ Smith v. Day, 2 Mees. & W. 684; 32 Hyde v. Warden, 3 Exch. Div. 72.
Copeland v. Stephens, 1 Barn. & Ald. 593, 606; Joyner v. Weeks [1891] 2 33 Co. Litt. 45 b; Sheppard's Touchstone, 272; 2 Platt, Leases, 50.
Q. B. 31; Young v. Dake, 5 N. Y.

whatever in this regard,^{33a} causing the term to commence upon the nominal date or upon the date of delivery.^{33b}

The time of the commencement of the term need not be ascertained at the date of the execution of the lease, but it is sufficient if it can be ascertained when such time arrives, in accordance with the maxim *id certum est quod certum reddi potest*. Accordingly, a term may be created to commence on the death of a third person named,³⁴ on the death of the lessor himself,³⁵ on the expiration or sooner termination of a term already existent,³⁶ upon the payment by the lessee of a certain sum to the lessor,³⁷ upon the completion of a building on the premises,³⁸ or when the premises are made suitable for occupation.³⁹ In North Carolina, however, it has been decided that a lease to commence when the lessee begins to cut timber on the premises is void as failing to fix the time for commencement of the term with sufficient certainty.⁴⁰

(3) **Ascertainment of day of commencement—(a) Commencement on past day.** The lease may name a day which is past as that of the commencement of the term.⁴¹ In such case the lease has regard to that date for the purpose of computing the end

^{33a} See post, § 12 b (3) (d).

^{33b} In *Jenkin's Centuries*, 301, case 69, it is said that if the date of commencement is uncertain the term will commence immediately. In *Anonymous*, 1 Mod. 180, the judges were equally divided upon this point. See post; at notes 57- 59 a.

³⁴ *Goodright v. Richardson*, 3 Term R. 462.

³⁵ *Bro. Abr.*, Grants, pl. 154; *Grute v. Locroft*, Cro. Eliz. 287; 2 Platt, Leases, 50.

³⁶ *Bishop of Bath's Case*, 6 Coke, 34 b. See post, § 12 b (3) (f).

³⁷ *Co. Litt.* 45 b.

³⁸ *Colclough v. Carpeles*, 89 Wis. 239, 61 N. W. 836; *Hammond v. Barton*, 93 Wis. 183, 67 N. W. 412; *Noyes v. Longhead*, 9 Wash. 325.

³⁹ *Murray v. Cherrington*, 99 Mass. 229; *Clarke v. Spaulding*, 20 N. H.

313; *McClain v. Abshire*, 72 Mo. App. 390.

⁴⁰ *Gay Mfg. Co. v. Hobbs*, 128 N. C. 46, 38 S. E. 26. In this case there was a sale of standing timber, with a right in the purchaser to have five years from the time at which he began to cut it in which to remove it, and it was held that this was a lease for a term of five years, uncertain as to its commencement.

⁴¹ *Enys v. Donnithorne*, 2 Burrow, 1190.

In *Bird v. Baker*, 1 El. & El. 12, where there was a lease for fourteen years from a date past, it was held that a provision authorizing either party to terminate the "demise at the expiration of the first seven years thereof" authorized such a termination seven years from such

of the term only, and it takes effect in point of interest not at such past date, but at the time of delivery.⁴²

(b) **Lease "from the date."** There have been numerous decisions upon the question whether a tenancy in terms limited "from the date," "from the day of the date," "from the making," "from the time of the making," or in like terms, was to be regarded as commencing on the day of the date or on the day next following the date. This question frequently arose in the older English cases in connection with a lease for life, which was void if the tenancy was to commence on the day after the making, as involving the creation of a freehold *in futuro*,⁴³ but the question has not infrequently arisen in connection with a tenancy for years in ascertaining the last day of the tenancy. The older English decisions upon the question were exceedingly contradictory, and it was finally determined, in a case frequently referred to,⁴⁴ that no absolute rule can be laid down but that such expressions are to be construed as exclusive or inclusive of the day of the date, according to the text and subject-matter, so as best to effectuate the intention of the parties, and to support rather than defeat the instrument. In this country, likewise, there are decisions to the effect that the question whether such expressions are inclusive or exclusive of the date is one of the construction of the particular instrument to be resolved by reference to the context and surrounding circumstances.⁴⁵ Thus, the fact that installments of rent are made payable on days corresponding to the day of the date has been regarded as ground for construing such a lease as creating a term commencing on that date,⁴⁶ as has the fact that possession was delivered on

date, and not from the date of the lease.

⁴² *Shaw v. Kay*, 1 Exch. 412; *Jervis v. Tomkinson*, 1 Hurl. & N. 195; *Cooper v. Robinson*, 10 Mees. & W. 694.

⁴³ The older cases are enumerated in 2 Platt, Leases, 55, and in the opinions in the cases next referred to.

⁴⁴ *Pugh v. Leeds, Cowp.* 714. See *Ackland v. Lutley*, 9 Adol. & E. 879.

⁴⁵ See *Buchanan v. Whitman*, 151

N. Y. 253, 45 N. E. 556; *Higgins v. Halligan*, 46 Ill. 173; *Donaldson v. Smith*, 1 Ashm. (Pa.) 197.

⁴⁶ *Meeks v. Ring*, 51 Hun, 329, 4 N. Y. Supp. 117; *Deyo v. Bleakley*, 24 Barb. (N. Y.) 1. But in *Ackland v. Lutley*, 9 Adol. & E. 879, it was considered that the fact that the rent was payable on days corresponding to the date of the lease was ground for construing the lease as creating a term to begin the next day, since otherwise the last installment of rent

that day,⁴⁷ or that it was understood that it should be then delivered,⁴⁸ and the custom of the community may be controlling in this connection.⁴⁹ But occasionally the cases have undertaken to assert a rule on the subject, to apply at least in the absence of any thing in the context or surrounding circumstances to aid in determining the intention of the parties, it being stated sometimes that a tenancy for a certain period "from the date" of the lease commences on that date,⁵⁰ and some times that it commences on the following day.⁵¹ The question would seem to involve, to a considerable extent, the application of the general rule prevailing in that particular jurisdiction in regard to the computation of time from a particular date or event.

The question whether a lease expressed to run "from" a particular date named, other than the date of the lease, creates a tenancy commencing on that date is likewise, it seems, a question of the construction of the particular instrument.⁵²

The cases do not discuss the question whether, when the date of the lease as named and the actual date of the delivery of the lease are different, such an expression as "from the date" refers to the former or the latter. The expressions "from the making" and "from henceforth" have been regarded as referring

would not be payable until the day after the last day of the term. This case is followed in *McCallum v. Snyder*, 10 U. C. C. P. 191.

⁴⁷ *Buchanan v. Whitman*, 151 N. Y. 253, 45 N. E. 556.

⁴⁸ *Meeks v. Ring*, 51 Hun, 329, 4 N. Y. Supp. 117.

⁴⁹ *Wilcox v. Wood*, 9 Wend. (N. Y.) 346; *Goode v. Webb*, 52 Ala. 452; *Fox v. Nathans*, 32 Conn. 348. See post, § 12 c (3) (b).

⁵⁰ *Buchanan v. Whitman*, 76 Hun, 67, 29 N. Y. Supp. 604, distinguishing *Mack v. Burt*, 5 Hun, 28, where the term was to begin "from and after" a certain date; *Donaldson v. Smith*, 1 Ashm. (Pa.) 197; *Marys v. Anderson*, 24 Pa. 272; *Nesbit v. Godfrey*, 155 Pa. 251, 25 Atl. 621.

⁵¹ *Goode v. Webb*, 52 Ala. 452; *Atkins v. Sleeper*, 89 Mass. (7 Allen) 487.

⁵² In *Gray v. Shields*, 26 Nova Scotia, 363, it was held that a lease "from the 30th of April" created a tenancy commencing the day after the day named.

In *I. X. L. Furniture & Carpet Installment House v. Berets*, 32 Utah, 454, 91 Pac. 279, where the lease was expressed to be "from Dec. 1, 1904, to Dec. 1, 1906, a term of two years," whether it began on the first or second day of the month was regarded as a question of construction to be settled by reference to the time that possession was actually given and taken.

to the date of delivery rather than to the nominal date.⁵³ And the day of delivery and not the nominal date have been regarded as the time with reference to which to compute the commencement of the term when limited to commence on a certain day of March "now last past."⁵⁴ On the other hand, it is said that if the lease contains a possible and sensible date, a reference to the date means, *prima facie* at least, the date named and not that of delivery.⁵⁵ And it would seem ordinarily in conformity with the intention of the parties, when they state that the term is to endure for a certain period, "from the date" of the lease, to construe this as referring to the date named by them in the lease rather than to the date on which the lease may happen to be delivered. The lease cannot indeed take effect in point of interest before delivery, but as before stated, it may so take effect for the purpose of computing the period of enjoyment.⁵⁶

(c) **Impossible date for commencement.** It is said that if the term be limited to begin from an impossible date, such as the

⁵³ Clayton's Case, 5 Coke, 1, where it is said that "'from henceforth' should be accounted from the day of the delivery of the indentures, and not by any computation of date, for 'from henceforth' is as much as to say 'from the making or from the time of the delivery of the indentures,' or '*a confectione praesentium*'; for the confection or making of the lease does begin by the delivery, and these words ('from henceforth'), or any other words of the indenture, are not of any effect or force until delivery." Compare Hicks v. Harvey, Comb. 399, where it is said that to hold from date and from making is all one.

⁵⁴ Steele v. Mart, 4 Barn. & C. 272. In Doe d. Cox v. Day, 10 East, 427, it was decided that where a lease was dated February 17, 1802, to hold from the 25th of March next ensuing, but was not executed until the following April, the term might be construed to commence on the 25th

of March, 1802, for the purpose of upholding the lease, which was made under a power to make leases in possession and not *in futuro*.

⁵⁵ Styles v. Wardle, 4 Barn. & C. 908.

⁵⁶ That the word "date" in such case refers to the nominal date would seem to be the opinion of Coke, who says (Co. Litt. 46 b) that "if a lease be made by indenture, bearing date the twenty-sixth of May, etc., to have and to hold for twenty-one years from the date, or from the day of the date, it shall begin on the twenty-seventh day of May. If the lease bear date the twenty-sixth day of May, etc., to have and to hold from the making hereof, or from henceforth, it shall begin on the day on which it is delivered, for the words of the indenture are not of any effect until the delivery, and thereby from the making, or from henceforth, take their first effect." Thus he distinguishes in this re-

thirtieth day of February or the fortieth day of March, it shall begin from the delivery as if there had been no date at all,⁵⁷ and a rather delicate distinction has been taken between such a case and one in which the term is limited to begin on a certain day in a certain month without naming the year, the lease being regarded as void in the latter case for lack of certainty as to the time of the commencement of the term.⁵⁸ At the present day a lease of the latter class would presumably be upheld as creating a term to commence either on its delivery⁵⁹ or on the next ensuing day corresponding to the day named.^{59a}

(d) **Day of commencement not named.** When no time is named for the commencement of the term, it will ordinarily commence upon its nominal date if this is the same as the date of delivery.⁶⁰ But in case the date of delivery is different from that inserted in the instrument of lease, there arises the question which date is to control. It is said by Coke that "if the *habendum* be for the term of twenty-one years, without mentioning when it shall begin, it shall begin on the day on which it is delivered, for there the words take effect."⁶¹ But in this case, as when the term is limited to commence "from the date," it would seem to be quite as conformable to the probable intention of the parties to consider the date named by them as that of the commencement of the term for the purpose of computation.⁶² There are several cases⁶³ in which it is said that the term will commence, if no time of commencement is stated, on the date of the lease, but in all these the nominal date and that of delivery were, so far as appears, the same.

Occasionally, it seems, even though the lease does not name any date for the commencement of the term, it will commence on

gard between the "date" and the "making" of the lease. Doe d. Cox v. Day, 10 East, 427, ante, note 54.

⁵⁷ Co. Litt. 46 b; Bac. Abr., Leases (L. 1). ⁶⁰ See citations in the three following notes.

⁵⁸ Anonymous, 1 Mod. 180.

⁶¹ Co. Litt. 46 b.

⁵⁹ See 2 Platt, Leases, 65.

⁶² See ante, at note 55.

^{59a} In *Huffman v. McDaniel*, 1 Or. 259, it was held that a lease "from — day of —, A. D. 1856," for a term of eighteen months, expired at furthest eighteen months from the last day of the year 1856. Compare *Doe d. Phillip v. Benjamin*, 9 Adol. & E. 644; *Furness v. Bond*, 4 Times Law R. 457; *Sandill v. Franklin*, L. R. 10 C. P. 377; *Keyes v. Dearborn*, 12 N. H. 52. See *Donaldson v. Smith*, 1 Ashm. (Pa.) 197.

neither the nominal date of the lease, nor on the date of delivery, in view of provisions in the lease showing a different intention. Thus, it has been decided that the dates named for the periodical payment of rent might show that it was intended that the term should commence on a corresponding date.^{64, 65} But if the lease clearly states the day of the commencement of the term, this cannot be affected by the times named for the payment of rent.⁶⁶ And it makes no difference that the lease is not executed till the day named, so that the tenant does not enjoy the possession for the whole of that day.⁶⁷

(e) **In case of oral demise.** Ordinarily, in the case of an oral letting, the lease has been regarded as taking effect from the time the tenant's entry thereunder.⁶⁸ It has, however, been decided in England that when one entered between the regular quarter days, and upon the next quarter day paid a proportionate part of the rent, and thereafter paid upon the regular quarter days, his tenancy should be regarded as commencing with the first quarter day following his entry.⁶⁹

In one case in this country it is said that in determining when a verbal lease began the jury may consider the time of entry, the time from which the lessee paid the rent, and all the other circumstances,⁷⁰ and this would seem a proper and reasonable view of the matter.⁷¹

(f) **Commencement on termination of prior lease.** If a lease is made in terms to commence upon the termination of a previous lease, the tenancy will begin immediately if there is no such previous lease, and if the term created by the previous lease terminates prematurely, the term created by the second lease will then begin.⁷² A lease of land which is to begin at the termination

^{64, 65} *Sandill v. Franklin*, L. R. 10 C. P. 377.

⁶⁶ *Sidebotham v. Holland* [1895] 1 Q. B. 378.

⁶⁷ *Sidebotham v. Holland* [1895] 1 Q. B. 378. And see *Meeks v. Ring*, 51 Hun, 329, 4 N. Y. Supp. 117.

⁶⁸ *Doe d. Cornwall v. Mathews*, 11 C. B. 675; *Kemp v. Derrett*, 3 Camp. 510; *Eberlein v. Abel*, 10 Ill. App. (10 Bradw.) 626; *Feyreisen v. Sanchez*, 70 Ill. App. 105.

⁶⁹ *Doe d. Holcomb v. Johnson*, 6 Esp. 10; *Doe d. Savage v. Stapleton*, 3 Car & P. 275.

⁷⁰ *Pendill v. Neuberger*, 67 Mich. 562, 35 N. W. 249.

⁷¹ *Walker v. Gode*, 6 Hurl. & N. 594, seems to be to this general effect.

⁷² Co. Litt. 45 b; Bac. Abr., Leases (L) 1. See post, § 146 d, at notes 18-23.

of existing leases of separate parts of it will commence as to each part as soon as the existing term therein comes to an end.⁷³

c. **The duration of the term—(1) Statutory restrictions.** At common law there is no restriction upon the length of the term which may be created,⁷⁴ but in several states there are statutory provisions in this regard.⁷⁵ The Alabama statute,⁷⁶ providing that no leasehold estate can be created for a longer term than twenty years, has been regarded as invalidating the lease only as to the excess over the period named,⁷⁷ but a different view has been taken in New York as to a statutory provision that no lease of lands for over twelve years, reserving rent, shall be valid, and such a lease was there held to be void *in toto*.⁷⁸

A provision restricting the duration of a lease of agricultural lands has been held to apply even though the lands were not leased for purposes of agriculture, if they are agricultural in

⁷³ Windham's Case, 5 Coke, 7 a.

⁷⁴ Co. Litt. 45 b; 2 Blackst. Comm. 142. See 2 Pollock & Maitland, Hist. Eng. Law, 112.

A lease for nine hundred and ninety-nine years is valid. Morrison v. St. Paul & N. P. R. Co., 63 Minn. 75, 65 N. W. 141, 30 L. R. A. 546; Todhunter v. Des Moines, I. & M. R. Co., 58 Iowa, 205, 12 N. W. 267; In re Gay, 5 Mass. 419; Montague v. Smith, 13 Mass. 396; Lilley v. Fifty Associates, 101 Mass. 432. In Caldwell v. Ground Rents, 101, there is a full statement as to long term leases and rent reserved on conveyance in fee in different parts of this country, as well as in Europe.

⁷⁵ Leases and grants of agricultural land, reserving a rent, are in four jurisdictions void if for over ten years (Cal. Civ. Code, § 717; Mont. Rev. Codes 1907, § 4465; N. D. Rev. Codes 1905, § 4746; S. D. Civ. Code 1903, § 226), in two if for over twelve years (Mich. Const. art. 18, § 12; N. Y. Const. art. 1, § 13), in one, if for over fifteen years (Wis.

Const. art. 1, § 14), in one, if for over twenty years (Iowa Const. art. 1, § 24). In Nevada a lease of such lands, if for over ten years, is void without reference to whether rent is reserved (Comp. Laws 1900, § 2717).

Leases of city lots are void, if for over twenty years, by the provisions of S. D. Civ. Code 1903, § 226; Nev. Comp. St. 1900, § 2717, if for over fifty years, by those of Cal. Civ. Code, § 718; and, if for over ninety-nine years, by those of N. D. Rev. Codes 1905, § 4706; provided, except in Nevada, a rent is reserved.

⁷⁶ Code 1907, § 3418.

⁷⁷ Robertson v. Hayes, 83 Ala. 290, 3 So. 674.

⁷⁸ Clark v. Barnes, 76 N. Y. 301, 33 Am. Rep. 306. But in Parish v. Rogers, 20 App. Div. 279, 46 N. Y. Supp. 1058, a majority of the court held that such provision, if applicable at all to leases for life, rendered a lease of agricultural land for life invalid only as to the excess over the twelve years.

character,⁷⁹ but it has also been decided that an express provision of the lease excluding such use of the land will render it valid.⁸⁰

Where two leases were made at one time and as parts of one transaction, one for twelve years and the other for eight years, the latter to commence on the termination of the former, both were held void, this being an evident attempt to avoid the prohibition of a lease for over twelve years.⁸¹

A statutory provision invalidating a lease for more than a certain period in which a rent is reserved was decided not to apply to a conveyance made in consideration of the grantee's promise to support the grantor during her life, this not involving any reservation of rent,⁸² and this view was taken of a lease, by the owner of a farm, of the farm and the personal property thereon to his grandchild, the latter to cultivate it and keep it in repair, the two to share in the proceeds, and the grandchild to have the farm on the other's death,⁸³ and also of a lease granted in consideration of a gross sum.⁸⁴ In a recent case a lease which was delivered in escrow to take effect upon the lessor's death was held to be invalid under such a statute, by reason of the fact that the lessor's death occurred at such a time that more than twelve years would intervene between it and the time named by the lease for the termination of the tenancy.^{84a} Ordinarily, the question of the invalidity of a lease by reason of such a statute would, it seems, be a matter to be ascertained as of the time of the making of the lease.

In Maryland there are statutory provisions, hereafter referred to,⁸⁵ which, while not restricting the period for which a lease may

A lease for twelve years, with a covenant to renew every twelve years, was held to be good for twelve years, while the covenant was void. *Hart v. Hart*, 22 Barb (N. Y.) 606.

A judgment foreclosing a mortgage on the leasehold was held to estop the lessee from alleging that the lease was void under the constitutional provision. *Witherbee v. Stow-er*, 23 Hun (N. Y.) 27.

⁷⁹ *Odell v. Durant*, 62 N. Y. 524.

⁸⁰ *Massachusetts Nat. Bank v. Shinn*, 163 N. Y. 360, 57 N. E. 611.

⁸¹ *Clark v. Barnes*, 76 N. Y. 301, 33 Am. Rep. 306. See post, § 219.

⁸² *Stephens v. Reynolds*, 6 N. Y. (2 Seld.) 454.

⁸³ *Parsell v. Stryker*, 41 N. Y. 480.

⁸⁴ *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. 442; *Rutherford v. Graham*, 4 Hun (N. Y.) 796.

^{84a} *Waldo v. Jacobs*, 152 Mich. 425, 15 Det. Leg. N. 316, 116 N. W. 371.

⁸⁵ See post, § 269.

be made, give the tenant the absolute right to purchase the reversion after a certain number of years for a price equal to the capitalization of the rent at a certain percentage named.

(2) **Requirement of certainty**—(a) **Lease must show duration.** The duration of the term must appear with certainty from the lease creating it.⁸⁶ Otherwise, it is insufficient to create a term of years, and the person entering thereunder will be either a tenant at will or a periodic tenant,⁸⁷ or if the lease be executed with such formalities as are necessary for the creation of a freehold estate, he will be, it seems, a tenant for life.⁸⁸ The lease need not, however, actually name the period during which the tenancy is to endure, but it may fix such period by reference to some collateral fact or event. So a demise to hold for as many years as a person named has in other property,⁸⁹ or “during the minority of B,” a living person, whose age is ascertainable,⁹⁰ or until certain fixed yearly payments amount to a sum named,⁹¹ is valid to create a term. Such collateral fact or event must however be itself certain as regards its duration or time of happening, in order that a reference thereto may give the requisite certainty of duration to the tenancy.⁹²

In one case a lease for a “season” was regarded as creating an estate for years,⁹³ and in another a lease for the purpose of raising a crop of “winter” wheat was construed to create a tenancy to endure until the time for harvesting such a crop.⁹⁴ In the former case it could be shown by oral evidence what was meant by the expression “season” in that vicinity and in that connection, and so there would seem to be the requisite degree of certainty as to duration, but in the latter case there would

⁸⁶ *Say v. Smith*, Plowd. 272;

⁹⁰ Co. Litt. 45 b.

Bishop of Bath's Case, 6 Coke, 35;
Reed v. Lewis, 74 Ind. 433, 39 Am.
Rep. 88; *Gilmore v. Hamilton*, 83
Ind. 196; *Melhop v. Meinhardt*, 70
Iowa, 685, 28 N. W. 545; *Corby v.*
McSpadden, 63 Mo. App. 648.

⁸⁷ See post, §§ 13 a (4), 14 b (2).

⁸⁸ See ante, § 11 b; post, 13 a (4).

⁸⁹ *Bishop of Bath's Case*, 6 Coke,
35; Co. Litt. 45 b; *Eubank v. May &*
Thomas Hardware Co., 105 Ala. 629,
17 So. 109.

⁹¹ *Bishop of Bath's Case*, 6 Coke,
35; *Say v. Smith*, Plowd. 273; *Bar-*
ret v. Johnson, 2 Ind. App. 25.

⁹² See next subsection, § 12 c (2)
(b).

⁹³ *Kelly v. Waite*, 53 Mass. (12
Metc.) 300. See *Fraser v. Drynan*, 9
New Br. (4 Allen) 74.

⁹⁴ *Rees v. Baker*, 4 G. Greene
(Iowa) 461.

seem necessarily to be a considerable degree of uncertainty as to duration until the crop was actually harvested.

There is a decision that a lease was one for years when, though the duration of the tenancy was not stated, it was limited to commence in the future, so that a freehold could not be regarded as created, and other provisions showed that a lease for years was intended.⁹⁵ This decision can be supported only on the theory that a lease which appears to be intended to take effect as a lease for years, without explicitly naming any period of time, is equivalent to a lease expressed to be "for years," and is, consequently, in accordance with the view stated in some of the old books,⁹⁶ good as a lease for two years. It seems, however, most questionable whether a lease should be regarded as equivalent to a lease expressed to be "for years" merely because it indicates an intention that it shall create a tenancy for years, in the absence of a statement, expressly or by inference, of the length of the term.

In one case it was in effect decided that there was sufficient certainty as to the term if its duration could be ascertained at the time of its commencement, though not at the time of the making of the lease.⁹⁷ The opinion contains no discussion of the matter on principle, and the soundness of the view indicated may, it is submitted, be open to question.

(b) **Tenancy expiring only on contingency.** There are at least two cases to the effect that there is a sufficient certainty as to the duration of the tenancy if it is to endure until a particular event, though the time of such event cannot be ascertained in advance. In one of the cases referred to the lease was regarded as creating a term when made to endure so long as the lessee should use the premises for a particular purpose,⁹⁸ and in the

⁹⁵ *Barney v. Keith*, 4 Wend. (N. Y.) 502. the lessee at the rent stipulated," and this was regarded as giving sufficient certainty.

⁹⁶ See post, at note 125 a.

⁹⁷ *Flagg v. Dow*, 99 Mass. 18. There a lease for eight years provided that if at the end of that time the lessors did not pay the appraised value of the buildings which might be erected by the lessee the latter might retain possession "till the said sum, without interest, is realized by the lessee at the rent stipulated," and this was regarded as giving sufficient certainty.

⁹⁸ *Horner v. Leeds*, 25 N. J. Law (Dutch.) 106. There though the lease was in terms expressed to be merely "for any term of years the said lessee may think proper," it appearing from the evidence that the lease was made for the purpose of manufacturing salt, the court de-

other when made to endure until the receipts from the premises amounted to a certain sum.⁹⁹ There are other cases in which the effectiveness of such a limitation upon a contingency has been recognized, without, however, any statement as to the character of the tenancy, as when the tenancy was to endure until other premises were made suitable for the lessee's occupancy,¹⁰⁰ "during the life of the building" in which the rooms leased were situated,¹⁰¹ until the issues and profits of the land have amounted to a certain sum,¹⁰² so long as oil shall be found in the land,¹⁰³ until the lessor pays a certain debt,¹⁰⁴ until the land is sold,¹⁰⁵ or so long as the premises are used for a certain purpose.¹⁰⁶

If a lease which so undertakes to create a tenancy to terminate

cided that it was "a lease for so long a term as the lessee shall use the premises for the purpose of manufacturing salt," that is, that a term existed though there was no term named, a most singular view, it would seem. It may be noted that the court in this case, in citing a statement from Comyn, Landl. & Ten. 88, to the effect that "the duration of a term, if not definitely expressed in a lease, may be fixed by reference to collateral or extrinsic circumstances," seems to assume that this means that the court can go into oral evidence to aid the uncertainty of the lease in this respect, while it evidently means merely what has been stated in the text above, that a reference in the lease to extrinsic circumstances may be a sufficient statement of the length of the term.

⁹⁹ Wilcox v. Bostick, 57 S. C. 151, 35 S. E. 496.

¹⁰⁰ D'Arcy v. Martyn, 63 Mich. 602, 30 N. W. 194. So in Stevens v. Pantlind, 95 Mich. 145, 54 N. W. 716, a lease of a sawmill for so long a time as it shall take the lessees to cut certain designated logs was regarded as valid, nothing being said, however, as to the character of the tenancy.

¹⁰¹ Ainsworth v. Mt. Moriah Lodge, 172 Mass. 257, 52 N. E. 81. Here it was held that "life of the building" was terminated, within the provision of the lease, when the lessee could not rebuild the rooms leased, as required by the covenant to keep in repair, without rebuilding other parts of the building.

¹⁰² Batchelder v. Dean, 16 N. H. 265.

In Thomas v. Wright, 9 Serg. & R. (Pa.) 87, it was said that one holding under a lease at a fixed rent, to hold till he had reimbursed himself for repairs, was a tenant from year to year. This seems sound in principle, since his holding was for an uncertain time, and consequently, assuming that the lease was not sufficient to create a freehold, a tenancy at will would have existed had it not been for the reservation of rent. See post, § 14 b (2).

¹⁰³ Harley v. O'Donnell, 9 Pa. Co. Ct. R. 56.

¹⁰⁴ Wells v. Sheerer, 78 Ala. 142; Nugent v. Riley, 42 Mass. (1 Metc.) 117, 35 Am. Dec. 355; Hunt v. Comstock, 15 Wend. (N. Y.) 665.

¹⁰⁵ Aydlett v. Pendleton, 114 N. C. 1, 18 S. E. 971.

¹⁰⁶ Kugel v. Painter, 166 Pa. 592, 31 Atl. 338.

only upon the happening of a certain contingency, the time of which cannot be ascertained in advance, is executed with formalities sufficient to pass a freehold, it would, according to the common-law authorities, have that effect, creating an estate in fee or for life in the lessee, subject to a special limitation¹⁰⁷ terminating the estate upon such a contingency, that is, for instance, when the premises cease to be used for such purpose, the other premises are made suitable, or the life of the building comes to an end. Such cases fall clearly within the principle of Coke's statement that "if a man grant an estate to a woman while she remains single, or during her widowhood, or so long as she behave well, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay forty pounds, etc., or until the grantee be promoted to a benefice, or for any like uncertain time, which time, as Bracton saith, is *tempus indeterminatum*, in all these cases if it be of lands or tenants, the lessee hath in judgment of law an estate for life determinable, if livery be made."¹⁰⁸ If on the other hand the lease is not executed so as to pass a freehold, it can create but a tenancy at will, since the duration of the tenancy is absolutely uncertain until it has come to an end. But even if it be a tenancy at will, the limitation of a contingency for the termination of the tenancy may be effective as a special limitation, there being on principle no objection to such a limitation in connection with a tenancy at will.¹⁰⁹ Such a lease, not naming any term but limited to endure until the happening of a contingency, cannot properly be regarded as a lease for years.

The view just stated appears to be equivalent to the statement in one of the older authorities that, in order to support a lease for years by reference, the reference must be "to a thing which has express certainty at the time of the lease made, and not to a possible or casual certainty,"¹¹⁰ in accordance with which it was held that a lease to endure until the child of I came to full age,

In *Beham v. Ghio*, 75 Tex. 87, 12 S. W. 996, it was held that when a lease of premises for use as a court house provided that the tenancy should come to an end if at any time the commissioners should select another court house, it would be presumed that upon the destruction of the building on the premises by fire another court house was selected.

¹⁰⁷ See 1 Tiffany, Real Prop. § 30.
¹⁰⁸ Co Litt. 42 a.

¹⁰⁹ See post, § 13 b (5).

¹¹⁰ Bishop of Bath's Case, 6 Coke, 35 b.

such child being *in ventre sa mere* at the time of the lease, was lacking in certainty,¹¹¹ as was a lease to one who had execution under a statute merchant until he was satisfied the duty for which he had issued execution,¹¹² and also a lease of lands to endure until the total issues and profits amounted to a certain sum.¹¹³ And so a lease to endure for so many years as A shall live¹¹⁴ or "as the coverture between A and B shall continue,"¹¹⁵ or for so long as C shall be parson of D,¹¹⁶ is stated not to be good as a lease for years by reason of the uncertainty. In all of these cases, it is to be observed, when the contingency happens which is to terminate the tenancy, the duration of the tenancy will be known, but this is not to be regarded as making its duration certain within the rule. If it were otherwise, a tenancy for life or at will might be regarded as a tenancy for years, since, when the life ceases or the will is exercised, the duration of the tenancy will be known.

It may be suggested that a tenancy to endure till the happening of a contingency named might be upheld as a tenancy for years by the application of the principle, stated by the older authorities, that a term uncertain at the time of the lease may be rendered certain by matter *ex post facto*, the only instance of which specifically mentioned, being that of a lease for so many years as a third person may name, in which case, if such person name a certain term, the lease will be good *ab initio*.¹¹⁷ That a lease until a contingency named was not within this principle, as understood by these authorities, appears with sufficient clearness from the cases above referred to. This doctrine, that the term may be rendered certain by matter *ex post facto*, it should be mentioned, was itself subject to a restriction to the effect that the reduction to a certainty must occur within the lifetime of both the lessor and the lessee¹¹⁸ on the theory, apparently, that no interest passed until the certainty appeared.¹¹⁹

111 Bishop of Bath's Case, 6 Coke, 35 b.

112 Say v. Smith, Plowd. 273.

113 Bishop of Bath's Case, 6 Coke, 35 b.

114 Co. Litt. 45 b; Sheppard's Touchstone, 275.

115 Bac. Abr., tit. Leases (L 3).

116 Co. Litt. 45 b.

117 Bishop of Bath's Case, 6 Coke, 35 b; Say v. Smith, Plowd. 273.

118 Rector of Chedington's Case, 1 Coke, 155 a; Say v. Smith, Plowd. 273; Western Transp. Co. v. Lansing, 49 N. Y. 499.

119 See argument in Savell v. Cordell, Godb. 24.

The view above stated, that the mere fact that a future event is named, on the happening of which the tenancy is to terminate, does not, if the time of such happening is uncertain, create the certainty of duration necessary for an estate for years, is recognized in a number of cases in this country, it having been decided that there was no sufficient certainty to create a term of years in the case of a lease for so long as the lessee "may please,"¹²⁰ "for so long as a certain business may be carried on by the lessee,"¹²¹ "until the party of the first part is prepared to improve the ground with new buildings,"¹²² or until the premises are sold.¹²³ And it has been decided that a lease not naming any term is not a lease for two years because it provides that the lessor may repossess himself of the property at the end of two years.¹²⁴ So a lease "during and for the whole time that the lessee may be postmaster" was construed as referring to his present term in such office, since, if it was regarded as including the term which he might afterwards have by reappointment, the lease would be lacking in certainty sufficient to create a term.¹²⁵

(c) **Lease for uncertain number of years.** It is said in some of the older books that if a man in terms leases his land "for years" or "for term of years," it is a good lease for two years, because for more there is no certainty, and for less there can be no sense in the words.^{125a} To a certain extent in accordance with this view is that expressed in a modern case that a lease for one or more years is a lease for two years.¹²⁶ Perhaps a lease in

¹²⁰ *Western Transp. Co. v. Lansing*, 49 N. Y. 499.

¹²¹ *Melhop v. Meinhart*, 70 Iowa, 685, 28 N. W. 545.

¹²² *Corby v. McSpadden*, 63 Mo. App. 648.

¹²³ *Lea v. Hernandez*, 10 Tex. 137.

¹²⁴ *Murray v. Cherrington*, 99 Mass. 229. The decision in this case was however, on the ground that the lessee was not bound for the two years. But by other decisions the lessor might be bound for a certain period though the lessee is not so

bound, he having the right to terminate the lease at will. See post, § 12 f.

¹²⁵ *Easton v. Mitchell*, 21 Ill. App. 189.

^{125a} *Bishop of Bath's Case*, 6 Coke, 36; *Bac. Abr., Leases (L) 3*; *Bro. Abr., Lease*, pl. 13, citing dictum of Fitzherbert, J., in *Y. B. 14 Hen. 8*, 10. But Brooke, J., apparently thought that such a lease was one at will only. See *Bro. Abr., Lease*, pl. 22.

¹²⁶ *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 68 Pac. 715. The

this latter form might be regarded as a lease for two years with an option in the lessee to terminate the tenancy at the end of one year.¹²⁷

A lease for seven, fourteen, or twenty-one years, as the lessee shall think proper, has been regarded as sufficiently certain,¹²⁸ as was a lease, made in 1775, for "three, six, or nine years, determinable in 1788, 1791 or 1794," it being decided that the lessee had the option whether to terminate it at either of the earlier dates.¹²⁹ Ordinarily, the same end would be attained by making a lease for the longest period named, with an option in the lessee to terminate it at the end of one of the shorter periods.¹³⁰

(3) **Ascertainment of day of expiration—(a) General rule of computation.** In the case of a term limited to endure, not for a certain number of days but for a year or a month, the lease does not terminate upon the day corresponding to the day on which the term commences but upon the day preceding that day, that is, the term is regarded, for the purpose of computation, as commencing at the midnight preceding the day named for its commencement.¹³¹ So a lease for a year, commencing the first day of April, expires at the end of the last day of March,¹³² and a lease for a month, commencing the first day of the month, expires the last day of the month.¹³³ The same rule holds good, no doubt, when the tenancy is for two or more years or for

opinion merely cites *Wood, Landl. & Ten.* § 291, stating that a lease for one year certain, and so on from year to year, creates a tenancy for two years at the least. (See post, § 14 b [1]), and *Gear, Landl. & Ten.* § 25, stating that a demise for more than one year, without saying how many years, is for two years certain. Mr. Gear cites only *Denn v. Cartwright*, 4 East, 29; *Doe d. Chadbourne v. Green*, 9 Adol. & E. 658, and *Doe d. Monck v. Geekie*, 5 Q. B. 841, none of which, it is submitted, supports his statement. Compare post, § 12 c (3) (d).

¹²⁷ See post, § 12 f, and cases next cited.

¹²⁸ *Ferguson v. Cornish*, 2 Burrow,

1032. The decision is probably more correctly reported in 3 Term R. 463, note.

¹²⁹ *Goodright v. Richardson*, 3 Term R. 462.

¹³⁰ See post, § 12 f.

¹³¹ *Say v. Smith*, Plowd. 271; *Sidbotham v. Holland* [1895] 1 Q. B. 378; *Marys v. Anderson*, 24 Pa. 272 (semble); *Duffy v. Ogden*, 64 Pa. 240; *Buchanan v. Whitman*, 151 N. Y. 253, 45 N. E. 556; *Donaldson v. Smith*, 1 Ashm. (Pa.) 197; *Higgins v. Haligan*, 46 Ill. 173.

¹³² *Fox v. Nathans*, 32 Conn. 348.

¹³³ *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 214.

two or more months.¹³⁴ So in the case of a periodic tenancy, each period begins on the day corresponding to that of the day named for the commencement of the holding, and terminates on the previous day.¹³⁵ In the case of a tenancy from month to month, for instance, which began on the first day of the calendar month, each month of the tenancy ends on the last day of the calendar month, and the succeeding monthly period begins on the following day.¹³⁶ It has in one state been said that a lease to end "on May 1st" expires at noon of that day, while one "to May 1st" expires at midnight on April 30th.¹³⁷

(b) **Effect of custom.** The exact time of the expiration of the tenancy under a lease for a particular period may, it seems, be affected by the custom and common understanding of the community in this regard.¹³⁸ In New York it is said to be settled by custom, which has acquired the force of law, that a tenancy for the term of one year, commencing on a first day of May, shall terminate on the next first day of May at twelve o'clock noon.¹³⁹

(c) **Statutory provisions.** In several states there are statutory provisions to the effect that in the case of leases not naming any period the tenancy shall come to an end at a certain time in the calendar year, or shall be construed as intended to endure for a period named in the statute.¹⁴⁰ The effect of such

¹³⁴ So if a term of two years is limited to commence on December 1st, it ends on November 30th.

¹³⁵ *Sidebotham v. Holland* [1895] 1 Q. B. 378.

¹³⁶ *Petsch v. Biggs*, 31 Minn. 392, 18 N. W. 101; *Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549.

¹³⁷ *People v. Robertson*, 39 Barb. (N. Y.) 9.

¹³⁸ See *Fox v. Nathans*, 32 Conn. 348; *Marys v. Anderson*, 24 Pa. 272; *Wilcox v. Wood*, 9 Wend. (N. Y.) 346; *Doe d. Moore v. Eason*, 33 N. C. (11 Ired. Law) 568.

¹³⁹ *Marsh v. Masterson*, 15 Daly, 114, 3 N. Y. Supp. 414; *Wilcox v. Wood*, 9 Wend. (N. Y.) 346; 2 McAdam, Landl. & Ten. (3d Ed.) 578.

In *Frost v. Akron Iron Co.*, 1 App. Div. 449, 37 N. Y. Supp. 374, it is said that by custom, when a lease expires on the second day of May, the landlord is entitled to possession at twelve o'clock noon. See, also, *People v. Robertson*, 39 Barb. (N. Y.) 9, ante, note 137.

¹⁴⁰ Cal. Civ. Code, §§ 1943, 1944 (A hiring of real property other than lodgings and dwelling houses, in places where there is no usage on the subject, is presumed to be for one year from its commencement. A hiring of lodgings or a dwelling house for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of rent.

a statute would seem to be to substitute in certain cases a tenancy for years for what might otherwise be a tenancy at will or a periodic tenancy.

(d) **Inconsistent limitations.** It has been decided that when the commencement and duration of the tenancy are clearly stated, an inconsistent statement as to the date upon which it will come to an end will be disregarded as being the result of mistake.¹⁴¹

Thus a hiring at a monthly rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly). See *Gabel v. Page*, 6 Cal. App. 618, 92 Pac. 749. Conn. Gen. St. 1902, § 4043 (Parol leases reserving monthly rent, in which the time of termination is not agreed on, shall be construed to be leases for one month only). See *Corbett v. Cochrane*, 67 Conn. 570, 35 Atl. 509. Del. Rev. Code 1893, p. 866, § 2. (If no term expressly limited, demise shall be construed as for a year). Ga. Code 1895, § 3132 (where no time specified for the termination of the tenancy, the law construes it to be for the calendar year, but if it is expressly a tenancy at will, then either party may terminate it at will). Iowa Code 1897, § 2991. "In case of tenants occupying and cultivating farms, the notice must fix the termination of the tenancy to take place on the first day of March, except in cases of mere croppers, whose leases shall be held to expire when the crop is harvested; if the crop is corn, it shall not be later than the first day of December, unless otherwise agreed upon"). It was held that under this statute the tenant who has husked his corn cannot thereafter pasture his cattle on the stalks. *Kyte v. Keller*, 76 Iowa, 34, 39 N. W. 928; *Tantlinger v. Sul-* *livan*, 80 Iowa 218, 45 N. W. 765. 2 N. J. Gen. St. p. 1924, § 37 (When no term is agreed upon and the rent is payable monthly, so long as the tenant pays the rent agreed, it shall be unlawful for the landlord to dispossess the tenant before the first day of April succeeding the commencement of the letting without giving the tenant three months' notice to quit). N. Y. Real Prop. Law, § 202 (An agreement for the occupation of real property, in the city of New York, not particularly specifying the duration of the occupation, shall be deemed to continue until the first day of May next after the possession commences under the agreement). A tenancy expressed to be at the will of either party was held not to be within the statute. *Jennins v. McCarthy*, 40 N. Y. St. Rep. 678, 16 N. Y. Supp. 161. See, also, *Hebberd v. Mayo*, 97 N. Y. Supp. 396. N. D. Rev. Codes 1905, §§ 5529, 5530. (Same as Cal. Civ. Code, §§ 1943, 1944, *supra*, omitting "and dwelling houses" and "or a dwelling house"). S. D. Civ. Code 1903, §§ 1435, 1436 (same as North Dakota). ¹⁴¹ *Biddle v. Vandeventer*, 26 Mo. 500; *Nindle v. State Bank*, 13 Neb. 245, 13 N. W. 275. In *Siegel, Cooper & Co. v. Colby*, 176 Ill. 210, 52 N. E. 917, the lease was expressed to be for a term to commence January 1, 1886, to run until December 31, 1889, but it pro-

In one case, however, it was held that under such circumstances the lessee had the option to elect between the two dates.¹⁴² And elsewhere it has been said that in case of doubt the construction of the lease in regard to the duration of the term must be in favor or the tenant.¹⁴³

If the limitations of the lease be divisible, and by part thereof a term is set forth with certainty while the rest are uncertain, the lease will, it has been decided, be upheld as to the latter. So it has been held that if a man grant another a lease for ten years with a provision that if, at the end of every ten years, the grantee shall pay the lessor a certain quantity of tiles he shall have a perpetual demise from ten years to ten years continually following, this is a good lease for ten years and bad as to the balance.¹⁴⁴ And a lease to hold for one year, and so for two or three years, or such term as the parties should think fit, was held to be for a year only.¹⁴⁵ Likewise, in the case of a lease for a year with provision that it should run so long as the parties should agree, and that when the parties failed to agree the lessor should have immediate possession, it was held that the lessee had no right to hold after the year against the will of the lessor.¹⁴⁶ But in one case it was held that, on a construction of the whole instrument, a lease in terms to run from a day named to the corresponding day in the next year, with a provision that if either party elected to terminate the lease the party so electing should give six months' prior notice, the latter provision was controlling, and such notice was necessary to terminate it at the end of the first or any subsequent year.¹⁴⁷

The rule above stated, that if a term is clearly defined other ambiguous limitations in the lease should be disregarded, might, it is conceived, have been advantageously applied in certain cases

vided for a total rental of \$36,000, to be paid in equal monthly instalments of \$1,000, and allowed the lessee to renew from January 1, 1889. A renewal was actually granted, reciting that it was to begin December 31, 1889. It was held that the intention was in the first place to make a lease to expire December 31, 1888, and that the renewal was then to take effect.

¹⁴² Murrell v. Lion, 30 La. Ann. 255.

¹⁴³ Com. v. Sheriff, 3 Brewst. (Pa.) 537.

¹⁴⁴ Say v. Smith, Plowd. 271; Gwynn v. Mainestone, 3 Car. & P. 302.

¹⁴⁵ Harris v. Evans, Amb. 329.

¹⁴⁶ Dunphy v. Goodlander, 12 Ind. App. 609, 40 N. E. 924.

¹⁴⁷ Brady v. Flint, 23 Neb. 785, 37 N. W. 647.

in which a lease, which after limiting a certain term gave a "right of refusal" to the lessee for further like periods, was apparently held to create a succession of terms, each term to commence upon the expiration of the previous term, until the parties or one of them indicated an intention to the contrary.¹⁴⁸ Such a construction placed upon the language of the demise seems in effect to involve the creation of a periodic tenancy terminable without the notice ordinarily required in the case of such a tenancy, and should, it is conceived, be adopted only when the intention to that effect is clearly apparent. The rule referred to might also have been applied, it seems, to leases limiting a term and also providing that the lessee might retain possession so much longer as he desired, which were, however, construed to allow him to retain possession after the term.¹⁴⁹ Such a result could be

¹⁴⁸ In *Drinkard v. Heptinstall*, 55 W. Va. 320, 47 S. E. 72, it was held that a lease for a term, "with the refusal of said premises from month to month thereafter so long as said (lessee) may desire to occupy said premises," ~~did not create~~ a periodic tenancy after the end of the term, but merely gave to the lessee the right to the property so long as the lessor continued to lease it, and that the lessee's "term ends with his month each time, unless it is renewed by the assent of the parties, expressed or implied, and no notice to quit is necessary." *Crawford v. Morris*, 5 Grat. (Va.) 90, is cited, but that case merely decided that a "preference" to the lessee as to future leases after the term created by the lease did not make it a tenancy from year to year.

In *Whetstone v. Davis*, 34 Ind. 510, a lease provided that the tenant should have the premises for one year from a date named "and to have the privilege of said farm two or three years, if said farm is for rent, if (the lessee) suits (the lessor), and they can agree on said

rent," and it was held that if the tenant remained in possession after the first year he could be turned out at the end of the second year without any notice to quit, his continued holding being "a new tenancy for another year, and not from year to year." In one part of the opinion the court seems to think that the tenant's continued holding was under the lease, and in another that it was under the lessor's subsequent consent to his continuance in possession. But it is impossible from the opinion to form a clear idea of what the court did mean. It would have been a simple, and, it is submitted, a correct solution of the difficulty to regard the provision in the lease for a continuance of possession if the lessee "suited" the lessor, and they could agree on rent, as absolutely nugatory, in which case the holding by the tenant after the first year, if consented to by the lessor, would have been at will or as a periodic tenant.

¹⁴⁹ *Sweetser v. McKenney*, 65 Me. 225; *Holley v. Young*, 66 Me. 520. See post, chapter XXII.

obtained, it seems, only by regarding the lessee as having a freehold estate, the effect of which would be to render the limitation of a term absolutely nugatory.

(e) **Oral evidence.** In accordance with the general rule that extrinsic evidence is inadmissible to contradict a writing, it is not admissible to show that the intention was to limit a term other than that actually named in the instrument of lease.¹⁵⁰ If, however, no term is named in the writing and the statute of frauds does not apply, there is, it seems, no objection to showing by oral testimony the length of the intended term.¹⁵¹

In the case of an oral letting, if the evidence as to the intended duration of the term is conflicting, the question is properly left to the jury.¹⁵²

(f) **Lease covering separate tracts.** Occasionally the question has arisen, in connection with a lease which covered different tracts of land and contemplated the breaking or clearing thereof and the taking of a certain number of crops therefrom, whether the lease was to terminate as to all the tracts at one time, and it has been held, on a construction of the terms of the particular instrument, that it was so intended.¹⁵³

d. **Contingent expiration—Special limitation.** The tenant's estate for years, like a life estate,¹⁵⁴ may be subject to a "special limitation," or, as it is sometimes called, a "conditional limitation," by which such estate may come to an end before the regular end of the term upon the happening of some contingency.¹⁵⁵ So a lease may be made for a certain number of years, if the lessee

¹⁵⁰ Doe d. Spicer v. Lea, 11 East, 312; Keegan v. Kinnaire, 12 Ill. App. 484; Elizabeth Town Law Inst. v. Conroy, 4 N. J. Law J. 189; Wheeler v. Cowan, 25 Me. 283; Equitable Life Assur. Soc. v. Schum, 40 Misc. 657. 83 N. Y. Supp. 161.

If the lease is expressed to be for a term, it cannot be shown that it was intended to be from month to month. Dodd v. Pasch, 5 Cal. App. 686, 91 Pac. 166.

¹⁵¹ Reynolds v. Davidson, 34 Md. 662.

¹⁵² Kerwin v. James, 43 Ga. 397.

And see Humphreys v. Franks, 18 C. B. 323.

¹⁵³ Dodson v. Hall, 58 Tenn. (11 Heisk.) 198, 203; Burris v. Jackson, 44 Ill. 345. See Baxter v. Mattox, 106 Ga. 344, 32 S. E. 94; Perkins v. Peterson, 110 Ga. 24, 35 S. E. 319.

¹⁵⁴ Ante, § 11 b.

¹⁵⁵ See 1 Tiffany, Real Prop. § 78, as to estates on special limitation. As to the distinction between a special limitation and a condition, see post, § 194 c.

lives so long,¹⁵⁶ if another person lives so long,¹⁵⁷ if B shall continue parson of Dale,¹⁵⁸ if the lessee,¹⁵⁹ or his licensee, being of a specified character,¹⁶⁰ continues to occupy the premises, or if the lessee continues in the lessor's service,¹⁶¹ and in such cases the tenancy will come to an end before the expiration of the term named, in case the lessee or other person dies, removes from the premises, or leaves the lessor's employment as the case may be. Further examples of such a limitation occur in the case of a lease for years to cease on condemnation of the premises for public use,¹⁶² until machinery on the premises breaks down,¹⁶³ or

¹⁵⁶ Co. Litt. 45 b, 214 b; Hughes' Case, 13 Coke, 66.

A lease "for the space of twenty years, or during our (the lessees') natural lives," was construed to be a lease for twenty years, provided the lessees lived so long, the tenancy coming to an end if they should die before the expiration of the twenty years, and not a lease for twenty years in any case, and, if the lessees lived longer, during their lives. *Sutton v. Hiram Lodge*, 83 Ga. 770, 10 S. E. 585, 6 L. R. A. 703.

¹⁵⁷ *Randle v. Lory*, 6 Adol. & E. 218.

¹⁵⁸ *Sheppard's Touchstone*, 274.

¹⁵⁹ *Doe d. Lockwood v. Clarke*, 8 East, 185. See *Hardy v. Seyer*, Cro. Eliz. 414; *Sawer v. Hardy*, Owen, 107. The tenancy will terminate even if the cessation of occupation is caused by a sale under legal process. *Doe d. Lockwood v. Clarke*, 8 East, 185.

¹⁶⁰ *Kehoe v. Marquess of Lansdowne* [1893] App. Cas. 451.

¹⁶¹ *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Wrenford v. Gyles*, Cro. Eliz. 643. In this latter case a majority of the judges held that, in the case of a lease to one, so long as he continued in the lessor's service, the tenancy did not terminate by reason of the ending of

the service owing to the lessor's death, this not being the fault of the lessee. This seems questionable.

Morris Canal & Banking Co. v. Mitchell, 31 N. J. Law, 99, and *McGee v. Gibson*, 40 Ky. (1 B. Mon.) 105, are to the effect, it seems, that in the case of a lease to an employe, a special limitation is to be implied, terminating the tenancy on cessation of the employment. In the first named case no term appears to have been mentioned, and the decision is based partly on the fact that the employe knew that the lessor's employes were always required to leave on the termination of the employment.

¹⁶² *Munigle v. City of Boston*, 85 Mass. (3 Allen) 230; *Kohl v. U. S.*, 91 U. S. 367, 23 Law. Ed. 449.

In *Pinckney v. Day*, 41 N. Y. St. Rep. 676, 16 N. Y. Supp. 433, it was held that a lease of property abutting on an ungraded street, which provided that it should terminate in case the city took possession of the street for purposes of improvement, did not come to an end because the city, without the passage of any grading ordinance, removed a fence which obstructed the street and dumped dirt and refuse there.

¹⁶³ *Scott v. Willis*, 122 Ind. 1, 22 N. E. 786.

until the dissolution of a partnership to which the lessor and lessees are parties.¹⁶⁴

When the lease is made for a named number of years to two persons, if they shall live so long, or to A for so many years, if he and B shall live so long, or, if the lessor and J.S shall live so long, in all these cases, it is said, the death of either of them terminates the lease, because their lives are the collateral measure and limitation of the continuance of the term, and this differs from a lease to two persons for their lives, for this gives an estate to both for their lives and both have an estate of freehold therein in their own right.¹⁶⁵

e. **Option in the lessor to terminate**—(1) **Particular stipulations.** Not infrequently the lessor is given the right to terminate the tenancy before the expiration of the term named, such a right being sometimes absolute in character, and sometimes authorizing him to terminate only for some particular reason,¹⁶⁶ as when he desires the land for building purposes,¹⁶⁷ or when he has sold the land,¹⁶⁸ because it has become unfit for occupation,¹⁶⁹ or because of the use made of the premises by the lessee.¹⁷⁰ A right to terminate, otherwise absolute in character, may be restricted as regards the time at which the right may be exercised.¹⁷¹

¹⁶⁴ Russell v. McCartney, 21 Mo. (Bro. Abr., Lease, pl. 13) recognized App. 544; Doe d. Waithman v. Miles, 1 Starkie, 181.

A lease by one partner to the members of the firm for partnership business comes to an end, it has been decided, upon a dissolution of the firm, without, it seems, any express provision to that effect. Doe d. Colnaghi v. Bluck, 8 Car & P. 464; Johnson v. Hartshorne, 52 N. Y. 173.

¹⁶⁵ Bac. Abr., Leases (L) 4.

¹⁶⁶ See Pratt v. Paine, 119 Mass. 439; Lord v. Walker, 49 Mich. 606, 14 N. W. 564; Ex parte Miller, 2 Hill (N. Y.) 418; Loddiges v. Lister, 1 Law T. (N. S.) 548; Liddy v. Kennedy, L. R. 5 H. L. 134.

The cases recognizing such a right in the lessor would rather seem to overrule the *dictum* of Brooke, J.

(Bro. Abr., Lease, pl. 13) recognized in Bac. Abr., Leases (L) 3, that "if one makes a lease for ten years at the will of the lessor, the word "will" is void, for it is repugnant to the lease." In Morton v. Woods, L. R. 4 Q. B. 293, Kelly, C. B., referred to this *dictum* without approval or disapproval, holding it inapplicable to the particular facts. See post, § 13 a (1).

¹⁶⁷ See post, notes 174-176.

¹⁶⁸ See post, § 12 e (3).

¹⁶⁹ Hunnewell v. Banks, 161 Mass. 132, 36 N. E. 751. Or in case of damage by fire. Browning v. Garvin, 48 App. Div. 140, 62 N. Y. Supp. 564. See post, § 182 m (6) (d).

¹⁷⁰ Schwoerer v. Connolly, 44 Misc. 222, 88 N. Y. Supp. 818.

¹⁷¹ As when there was an option

A clause giving the landlord a right to terminate the tenancy whenever he should deem the tenancy undesirable has been held to entitle him to terminate it without stating why he deems it undesirable.¹⁷² On the other hand, a clause authorizing him to terminate it when he shall have use for part of the premises has been regarded as authorizing its termination only when he needs it for his own purposes, and not in order that he may lease to another.¹⁷³

A provision allowing the lessor to terminate the tenancy if he wishes the land for rebuilding obviously does not apply if he wishes the land for some other purposes,¹⁷⁴ and when the lease gave the landlord the right to the possession if he needed the premises for building, it was held that equity would restrain an action at law by him to recover the possession on his mere statement that he wanted it without any showing that he did want it.¹⁷⁵ It has been decided that, in such case, the tenant is entitled to a reasonable notice of the landlord's intention to build, and that, if the latter enters and builds without such notice, he is guilty of trespass.¹⁷⁶

A provision that if either of the parties should see fit to terminate the lease before its expiration he shall pay a sum named has been held to authorize either party to terminate it by paying

in either party to terminate "at the expiration of one year on sixty days' notice." The lease could be terminated only at the end of the first year by notice given sixty days before. *Fine Realty Co. v. City of New York*, 53 Misc. 246, 103 N. Y. Supp. 115.

¹⁷² *Manhattan Life Ins. Co. v. Gosford*, 3 Misc. 509, 23 N. Y. Supp. 7.

¹⁷³ *Woodland Cemetery Co. v. Carvill*, 9 Leg. Int. (Pa.) 98.

In *Donahue v. City of New York*, 54 Misc. 415, 105 N. Y. Supp. 1069, an injunction was issued to prevent the city lessor from terminating such a lease made by it, it appearing that the contemplated improvement was merely planned, and that, even if immediately begun, the leased prem-

ises would not be needed for some time.

¹⁷⁴ *Hodgkins v. Price*, 137 Mass. 13.

¹⁷⁵ *Russell v. Coggins*, 8 Ves. Jr. 34.

In *Doe d. Wilson v. Abel*, 2 Maule & S. 541; it was decided that, where the lessee covenanted that if the lessor should be desirous of taking any part of the land for building, it should be lawful for him to enter on all or any part of the land to build and to do all such acts as might be necessary, the lessor might resume possession of the whole land for the purpose of building, and that the covenant was not merely that the lessor might go on the land with materials and workmen for the purpose of building.

¹⁷⁶ *Shaw v. Hoffman*, 25 Mich. 162.

such sum.¹⁷⁷ And the same construction has been placed on a provision that "if the lessor requires the premises before the term expires, he is to pay" a sum named to the lessee "for possession, otherwise, should the lessee require to leave before the term, he is to pay" a like sum.¹⁷⁸

A stipulation which gives the lessor power to terminate the tenancy or to resume possession as to "any part" of the premises gives him such power as to the whole,¹⁷⁹ and it is immaterial that the lease, in stipulating for a reduction of rent in a certain sum per acre for such part as may be resumed, names such a sum that the whole rent might be gone although the whole of the land is not resumed.¹⁸⁰ But a stipulation in general terms does not authorize the termination of the tenancy as to part of the premises.¹⁸¹

There is in one state a decision that a municipality which has leased to an individual the municipal waterworks for a certain time may, without any provision to that effect in the instrument of lease, put an end to the tenancy on account of the drunkenness and incapacity of the lessee.¹⁸² This in effect involves the inference of a special limitation to that effect from the circumstances of the case. The decision is difficult to support on any recognized principle.

In one case a provision that if the lessor failed to furnish sufficient power the lessee should have the right, on giving thirty days' notice, to declare the lease at an end, was construed to give the lessor thirty days after notice in which to furnish such power, after which period the lessee would have a reasonable time for the removal of his property.¹⁸³

(2) **Theory of operation.** Occasionally a stipulation that the lessee shall give up possession upon demand or notice from the lessor has been construed as a covenant merely, giving a right of action for damages to the lessor in case of breach, but not in

¹⁷⁷ *Small v. Clark*, 97 Me. 304, 54 Atl. 758.

¹⁷⁸ *Eckhardt v. Raby*, 20 U. C. Q. B. 458.

¹⁷⁹ *Doe d. Gardner v. Kennard*, 12 Q. B. 244; *Doe d. Wilson v. Abel*, 2 Maule & S. 541.

¹⁸⁰ *Liddy v. Kennedy*, L. R. 5 H. L. 134.

¹⁸¹ *Doe d. Rodd's Lessee v. Archer*, 14 East, 245.

¹⁸² *Mahon v. City of Columbus*, 58 Miss. 310, 38 Am. Rep. 327.

¹⁸³ *Channel v. Merrifield*, 206 Ill. 278, 69 N. E. 32.

any way affecting the estate of the lessee.¹⁸⁴ In other cases a stipulation that the lessee should relinquish possession upon demand of possession by the lessor or upon some particular contingency within the lessor's control has been regarded as entitling the lessor to recover possession upon the making of the demand or the happening of the contingency.¹⁸⁵ And the view has also been taken that if the provision for the relinquishment of possession by the lessee on demand was accompanied by a provision that the lessor might then take possession, the lessor was authorized to maintain ejectment.¹⁸⁶ In several cases it has been decided that the stipulation in question was a covenant within the statute of 32 Hen. 8, c. 34,¹⁸⁷ so that the benefit thereof would pass with the reversion, but it was at the same time in effect decided that the transferee might maintain proceedings for possession by reason of the stipulation.¹⁸⁸ Properly speaking, a mere covenant could not give a right to maintain such proceedings.¹⁸⁹

Assuming that the stipulation for the termination of the tenancy is not to be regarded as a mere covenant on the part of the lessee to give up possession, but as enabling the landlord to terminate the tenancy by a notice to that effect, the principle upon which such a stipulation operates is not clear. Occasionally the assertion by the landlord of his desire to resume possession is regarded as terminating the tenancy by way of a special limitation to that effect,¹⁹⁰ and the theory of a special limitation has

¹⁸⁴ *Doe d. Wilson v. Phillips*, 2 Bing. 13; *Dennison v. Read*, 33 Ky. (3 Dana) 586; *Wheeler v. Dascomb*, 57 Mass. (3 Cush.) 285; *Sloan v. Cantrell*, 45 Tenn. (5 Cold.) 571; *Bergland v. Frawley*, 72 Wis. 559, 40 N. W. 372.

¹⁸⁵ *Eckhard v. Raby*, 20 U. C. Q. B. 458 (semble); *Baxter v. City of Providence (R. I.)* 40 Atl. 423; *Manhattan Life Ins. Co. v. Gosford*, 3 Misc. 509, 23 N. Y. Supp. 7.

¹⁸⁶ *Doe d. Gardner v. Kennard*, 12 Q. B. 244, distinguishing *Doe d. Willson v. Phillips*, 2 Bing. 13, on the ground that the lease in the earlier case did not provide that the lessor might take possession.

¹⁸⁷ See post, § 149 b (1).

¹⁸⁸ *Roberts v. McPherson*, 62 N. J. Law, 165, 40 Atl. 630; *Id.*, 63 N. J. Law, 352, 43 Atl. 1098; *Douglaston Realty Co. v. Hess*, 124 App. Div. 508, 108 N. Y. Supp. 1036; *Hadley v. Bernero*, 97 Mo. App. 314, 71 S. W. 541; *McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13.

¹⁸⁹ See post, § 194 b.

¹⁹⁰ *Manhattan Life Ins. Co. v. Gosford*, 3 Misc. 509, 23 N. Y. Supp. 7; *Cottle v. Sullivan*, 8 Misc. (N. Y.) 184.

been adopted when the provision was that the lessee should surrender possession upon a sale by the lessor,¹⁹¹ or that the lessor might terminate the lease by giving sixty days' previous notice in case he should sell,¹⁹² the tenancy thus coming to an end, in the one case, upon a sale, and, in the other, upon a sale and the expiration of the notice. And the same construction has been put on a provision that in a certain contingency the lessee "agrees to cancel the lease."¹⁹³ In a case in the highest court of England,¹⁹⁴ two of the members thereof appear to have regarded a clause declaring it lawful for the lessor, upon giving to the lessee three months' previous notice of an intention to resume possession for building purposes, to enter into possession, as in the nature of a clause creating a power of revocation in the lessor,¹⁹⁵ while another member thereof appears to have regarded it as in the nature of a clause of re-entry enforceable by ejectment without any actual entry.¹⁹⁶ But there are occasional decisions

¹⁹¹ *Baxter v. City of Providence* (R. I.) 40 Atl. 423.

¹⁹² *Miller v. Levi*, 44 N. Y. 489; *Ronginsky v. Grantz*, 39 Misc. 347, 79 N. Y. Supp. 839.

¹⁹³ *Bruder v. Geisler*, 47 Misc. 370, 94 N. Y. Supp. 2.

¹⁹⁴ *Liddy v. Kennedy*, L. R. 5 H. L. 134.

¹⁹⁵ Lord Chelmsford says: "What is the character of the clause in question? Is it a condition, is it a covenant, is it an agreement, or is it (which appears to be more clearly a description of it) a power which is agreed upon between the parties that the lessor shall possess, of determining the interest of the tenant, and resuming possession on giving notice," and later he speaks of "the power or condition or whatever it may be called." Lord Westbury says: "In this lease there is a proviso entirely collateral to the demise. It is a proviso enabling the lessor, on giving a certain notice, to resume possession of any part of the land; and it is most material to

observe that the proviso goes on to give the remedy consequent upon that notice, namely, that it shall be lawful for the lessor, his heirs and assigns to enter into the land described in the notice. The ejectment brought by the landlord, and the remedy of the landlord, are therefore remedies not to be attributed to the general powers of a condition of re-entry, but are to be attributed to the special power given by this particular reservation."

¹⁹⁶ Lord Hatherley says: "When you find a power in the lessor to resume possession for building purposes on giving notice, and the effect of that notice is to declare it lawful for him, the lessor, his heirs and assigns, to enter into possession, the necessary conclusion is that possession shall be delivered up by the tenant from the moment of the condition being fulfilled which is to give to the lessor the right of resuming possession. The lessor, by giving that notice, and by asserting his right by action of ejectment, does what is

that such a clause is not one of re-entry.¹⁹⁷

As appears from the cases above referred to, the courts have not followed, nor even asserted, any general rule as to the theory of operation of a provision empowering the landlord to terminate the tenancy, and it may perhaps be said to be a question of the construction of the particular language in each case. The particular language used, however, has, in the adjudications, been but slightly adverted to, the courts having been apparently governed rather by consideration of what they regarded as desirable under the circumstances of the case. A mere agreement by the lessee to give up possession upon demand by the lessor, or upon a certain contingency within the latter's control, does not seem readily susceptible of construction as a limitation or a condition, giving the lessor a right to recover possession rather than damages. But if the language of the lease is susceptible of such construction, there is, it seems, on principle, no objection to construing it as creating a special limitation upon the contingency of the lessor's exercise of his volition to terminate the tenancy, indicated either informally or in the manner specified, as by notice, or merely by a particular disposition of the property, such as a sale. If the tenancy, however, is limited to terminate upon a sale, it must so terminate without reference to the landlord's wishes in that regard. It would seem, therefore, to the advantage of the lessor to provide that the tenancy shall come to an end upon a sale or upon some other contingency named only when a notice of the lessor's desire, or of the vendee's desire, to that effect is given to the lessee. If the language is construed as giving the lessor merely a right of re-entry upon the lessor's notification of his desire to end the tenancy, the tenancy would continue until the right is legally enforced.¹⁹⁸

equivalent in law to entry, and establishes his right to recover possession through the medium of ejectment."

There is, no doubt, a considerable resemblance between a power of revocation, created in connection with an estate for years, which can operate at common law, apart from the statute of uses, and a common-law condition of re-entry, and indeed,

for some purposes, a power of revocation operating even by force of the statute of uses has been assimilated to such a condition. See *Chance, Powers*, § 279; *Sugden, Powers* (8th Ed.) 363.

¹⁹⁷ *Miller v. Levi*, 44 N. Y. 489; *Manhattan Life Ins. Co. v. Gosford*, 3 Misc. 509, 23 N. Y. Supp. 7.

¹⁹⁸ See post, § 194 d.

In *Millan v. Kephart*, 18 Grat.

The question as to the mode of operation of the stipulation for the termination of the tenancy at the lessor's option might have a bearing on the question whether a transferee of the lessor is entitled to the benefit of such an option. If it be regarded as a covenant, such transferee would seem to have the right to demand the performance of the covenant as of any other covenant affecting the land,¹⁹⁹ and it has apparently been so decided.²⁰⁰ And it would also be enforceable against an assignee of the lessee. In the English case above referred to in the House of Lords, one of the members of the court, who apparently regarded the clause as creating a "power," said that it is "a thing taken out of the demise by the individual owner who makes the demise, and it is, therefore, a thing incidental to the estate vested in him, and passes with that estate to his grantees or alienees of the reversion."²⁰¹ In that case, however, the right of the lessor, after having transferred his reversion in part of the land, to join with his transferee in giving notice of an intention to resume possession, and in enforcing their right to possession, was supported under a local statute giving every landlord the same remedies as the original lessor upon the agreements contained in the lease. Ordinarily, a power of disposition or of revocation is personal and cannot be transferred.²⁰² There are other cases in which the right of a transferee of the lessor's reversionary estate to exercise the option to terminate has been recognized, without, however, any clear statement of the theory on which this is to be regarded as based.²⁰³ In two cases the right of the lessor so to

(Va.) 1, it was decided that, the instrument of lease having been destroyed, it was a question for the jury whether a stipulation for relinquishment of possession by the lessee was a collateral limitation, a condition, or a covenant. A question more unsuited for decision by a body of laymen could not readily be found.

¹⁹⁹ See post, § 149.

²⁰⁰ *Roberts v. McPherson*, 62 N. J. Law, 352, 43 Atl. 1098; *Hadley v. Bernero*, 97 Mo. App. 314, 71 S. W. Law, 165, 40 Atl. 630; *Id.*, 63 N. J.

541; *McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13. But see ante, at note 189.

²⁰¹ Lord Westbury in *Liddy v. Kennedy*, L. R. 5 H. L. 152.

²⁰² See 1 *Tiffany*, Real Prop. § 282.

²⁰³ *McDaniel v. Callan*, 75 Ala. 327; *Aydlett v. Pendleton*, 114 N. C. 1, 18 S. E. 971; *Roe d. Baneford v. Hayley*, 12 East, 464. In the latter case it was held to be exercisable by a devisee of the lessor, though in terms given only to the lessor, "his executors or administrators."

In *McClintock v. Loveless*, 5 Pa.

do after having made a conveyance has been denied.²⁰⁴

A provision of this character has been decided to be enforceable against an assignee of the lessee.²⁰⁵ In one case it was held that where the lessor was given the right to terminate the tenancy on paying the value of the tenant's improvements, and the leasehold had been assigned and reassigned with the result that the lessor was uncertain as to who was entitled to payment of the sum, the lessor, having given the stipulated notice to the original lessee before the assignment by the latter, might implead the various claimants of the leasehold, tendering in court the value of the improvements, and so obtain an adjudication that the tenancy was terminated.^{206,207} The lease in this case contained a provision that its covenants and agreements should be succeeded to by and be binding upon the respective assigns of the parties.

In any case in which the provision for the termination of the leasehold estate at the lessor's option can be construed as a special limitation, it would obviously operate as against such estate in the hands of an assignee of the lessee as well as in the hands of the lessee himself. As regards the rights of a transferee of the lessor, a special limitation terminating the leasehold at the option of the "lessor" might, it seems, be quite readily construed as terminating it at the option of the lessor or of one substituted in his place by means of a transfer by him.

(3) **In case of sale.** A provision empowering the landlord to terminate the tenancy on making a sale of the premises, or

Dist. R. 417, it was held that such a provision did not enure to the benefit of the lessor's transferee, since it was not a covenant or condition, but a "reservation," and should be strictly construed. It is certainly not a "reservation" in the common-law meaning of the term.

49 N. Y. Supp. 1021; *Small v. Clark*, 97 Me. 304, 54 Atl. 758.

²⁰⁵ *Aydlett v. Pendleton*, 114 N. C. 1, 18 S. E. 971.

So in *Douglaston Realty Co. v. Hess*, 124 App. Div. 508, 108 N. Y. Supp. 1036, where the termination by sale was conditioned on payment of compensation for the tenant's repairs and improvements. There reference is made to the fact that the covenant was in terms binding on the lessees "legal representatives," and hence bound assigns.

^{206, 207} *Estabrook v. Stevenson*, 47 Neb. 206, 66 N. W. 286.

²⁰⁴ *Griffin v. Barton*, 22 Misc. 228,

providing that such a sale shall have the effect of terminating the tenancy, is quite frequently found.²⁰⁸ That a sale shall have the effect of terminating the tenancy has been inferred from the presence of a stipulation for damages in case the lessor sells,²⁰⁹ and even, it seems, from a clause reserving the right to sell.²¹⁰ In one case, however, it was decided that a provision for payment by the lessor of the value of the lessee's improvements in case of sale did not involve any right to regard the tenancy as terminated by a sale.²¹¹

An oral stipulation, terminating the tenancy on a sale of the reversion, cannot be shown to alter the terms of a written lease.²¹²

We have before referred to the question of the mode in which such a clause shall be construed as operating, a question upon which the authorities give but little satisfaction.²¹³ We will here state a few cases in which the courts have decided whether, in the particular case, the provision operated to terminate the tenancy without reference to the landlord's desire in that regard. In one case it was held that where the term was limited to end on a sale of the premises, the term came to an end on such sale, so as to entitle the lessee to the stipulated compensation for his loss of the balance of the term, though the purchaser was willing to continue the lessee as tenant.²¹⁴ But on the other hand it has been decided that the lessee could not claim the benefit of a provision that in case of sale the landlord should give sixty days' notice and should return a deposit made to secure rent, and should pay a sum named to the tenant, the lessor having a right to sell

²⁰⁸ *Harrison v. Pinkney*, 6 Ont. App. 225; *Jochen v. Tibbels*, 50 Mich. 33, 14 N. W. 690. And see, as to provisions for compensation to the lessee, post, § 12 e (5).

In *Newell v. Magee*, 30 Ont. 550, it was held that, in a provision that if the place were sold, the lessee would give up possession at the end of any year and allow any incoming "tenant" to plough the land after harvest, the word "tenant" included purchaser.

²⁰⁹ *Johnston v. King*, 83 Wis. 8, 53 N. W. 28.

²¹⁰ *Wallace v. Bahlhorn*, 68 Mich. 87, 35 N. W. 834. And see *Callaghan v. Hawks*, 121 Mass. 298.

²¹¹ *Randolph v. Helps*, 9 Colo. 29, 10 Pac. 245.

²¹² *Randolph v. Helps*, 9 Colo. 29, 10 Pac. 245.

²¹³ See ante, § 12 e (2).

²¹⁴ *Morton v. Weir*, 70 N. Y. 247. And see *Childs v. Skillin*, 39 Misc. 825, 81 N. Y. Supp. 348.

In *Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 266, 82 Pac. 85, it was held, that under a provision that, in case of sale, the lessee would quit

subject to the tenancy if he so desired.²¹⁵ In another case it was decided that a provision that the lessee should give possession at the end of the then current year, in case the lessor should sell, did not terminate the tenancy on such sale, since it might be waived by the lessor, and that a relinquishment of possession would have to be made and accepted, or at least demanded, in order to terminate the tenancy.²¹⁶ And a provision for relinquishment of possession by the lessee in case of sale, on being paid a reasonable valuation for the unexpired term, was held not to terminate the tenancy upon the making of a sale and conveyance, so as to entitle the lessor to possession, the reasonable valuation not having been paid.²¹⁷

The question might arise whether, under a provision for the termination of the tenancy upon a sale and notice of a certain period, the landlord may, by refraining from giving the notice, continue the tenancy after the sale, but there appears to be no reported case in which this question is considered.

A provision that "this lease will expire after three years from" its date "if the leased property is sold" was construed as providing for the expiration of the lease at once on the sale of the property, if this took place after the three years, and not as providing that if a sale took place during the three years the lease should come to an end at the end of that period.²¹⁸ Under a provision that the lessee should vacate within a reasonable time after sale, a notice of sale given on the twenty-third day of April,

and surrender the premises upon his "desire to terminate the lease and thirty days' written notice, such repossess the" premises, and that sale terminated the lease. "thereupon" the lease might be term-

²¹⁵ *Foley v. Constantino*, 43 Misc. 91, 86 N. Y. Supp. 780. And in *Callaghan v. Hawkes*, 121 Mass. 298, it was decided that a clause giving the lessor a right to sell on giving two months' notice did not preclude a sale without notice, subject to the lease.

²¹⁶ *Dudley v. Estill*, 6 Leigh (Va.) 562.

²¹⁷ *McDaniel v. Callan*, 75 Ala. 327. But where the lease provided that at a certain point in the term the lessor might notify the lessee of

inated "in the following manner," and then provided that the parties should choose arbitrators to determine what damages should be paid on account of such termination, the notice terminated the lease before any arbitration, it being evidently intended that the act of the lessor alone should be effective to terminate the tenancy. *Smith v. Rasin*, 84 Md. 642, 36 Atl. 261.

²¹⁸ *Hickox v. Seegner*, 123 Wis. 128, 101 N. W. 357.

requiring the lessee to vacate on the first of June, was regarded as allowing a reasonable time.²¹⁹

An oral agreement for sale, not complying with the statute of frauds, has been regarded as a "disposing" of the premises within a clause providing that, in such case, the lessee would vacate.²²⁰

A merely colorable sale, that is, a transaction having the outward appearance of a sale but which is not intended actually to transfer the beneficial interest, is not within such a stipulation,²²¹ and the question whether there is an actual sale, or merely a colorable one, made for the purpose of getting rid of the lease, is one of fact on the evidence.²²² The sale may, it seems, be an actual one within this requirement, even though made to the lessor's wife,²²³ and in the case of a sale by the members of a firm, who had made a lease, the fact that the sale was to one of the firm has been held not necessarily to show it to be otherwise than in good faith, though on a nominal consideration, the character of the consideration bearing merely on the *bona fides* of the transaction.²²⁴ The tenant cannot, it has been held, question the *bona fides* of the sale if the purchaser offers to continue him as tenant.²²⁵ Nor can he object that the conveyance to the

²¹⁹ *Cooper v. Gambill*, 146 Ala. 184, 40 So. 827. There it is stated that the "reasonable time" is not to be determined with reference to the time which may be required by the tenant to find similar premises for purposes of occupancy. There was held to be a sale within such a provision when the lessor conveyed a life estate to his wife, which she conveyed to a trustee with power of sale, and he sold under the power. *Aydlett v. Pendleton*, 114 N. C. 1, 18 S. E. 971.

²²⁰ *Lumbers v. Gold Medal Furniture Mfg. Co.*, 30 Can. Sup. Ct. 55. ²²⁴ *Dunn v. Jaffrays*, 36 Kan. 408, 13 Pac. 781.

²²¹ *Muzzy v. Allen*, 25 N. J. Law (1 Dutch.) 471; *Ela v. Bankes*, 37 Wis. 89; *Budlong v. Budlong*, 31 Wash. 228, 71 Pac. 751; *Ogle v. Hubbel*, 1 Cal. App. 357, 82 Pac. 217. ²²⁵ *Allenspach v. Wagner*, 9 Colo. 127, 10 Pac. 802.

²²² See *Dunn v. Jaffray*, 36 Kan. 408, 13 Pac. 781; *Davis v. Schweikert*, 130 Cal. 143, 62 Pac. 411. Where the lease provided that the lessees should have a certain sum out of the proceeds if the building should be sold, and should retake certain fixtures in the building if it should not be sold, but should be demolished at the end of the term, it was held that in the absence of fraud the lessees had no right to complain of a sale by the lessor at

²²³ See *Ela v. Bankes*, 37 Wis. 89; *Budlong v. Budlong*, 31 Wash. 228, 71 Pac. 751; *Davis v. Schweikert*, 130 Cal. 143, 62 Pac. 411.

purchaser does not convey a perfect title.²²⁶

(4) **Notice to lessee.** The lessor should, it seems, in any case give notice of a reasonable length of his intention to terminate the tenancy,²²⁷ but quite ordinarily there is an express provision for a notice of a certain length. Such a provision must be strictly complied with as regards the time at which it is given,²²⁸ and it has been held that a provision for a notice of a certain number of days was not satisfied by a notice requesting the tenant to leave "as soon as practicable."²²⁹ Where the lease provided that the lessee should vacate if the lessor desired to sell, "upon notice of such desire being given to him," a notice to deliver possession under the provision of the lease which did not state a desire to sell was regarded as insufficient,²³⁰ as is obviously a notice given for another purpose with no idea of terminating the tenancy.^{230a} The person to give the notice is, it seems, the person who has the immediate reversion, whether the original lessor or his transferee.²³¹

The notice need not, it has been decided, be served personally as must a statutory notice, a service by mail being regarded as sufficient.²³² But where the lease provided for the giving of notice to "any person in possession of the" premises, a notice served on the tenant's mother, who happened to be on the prem-

any price which he might choose to after the time for completion of the accept. *Butterworth v. Bliss*, 52 harvesting of the crop, though not Barb. (N. Y.) 430. before.

²²⁶ *Dean v. Fail*, 8 Port. (Ala.) 491. ²³⁰ *Sloan v. Cantell*, 45 Tenn. (5

²²⁷ See *Shaw v. Hoffman*, 25 Mich. Cold.) 571.
162, per *Christianity, J.*; *Cooper v. Gambill*, 146 Ala. 184, 40 So. 827. ^{230a} *Anderson v. Hebbard*, 56 Misc. 664, 107 N. Y. Supp. 824.

²²⁸ *Aiken v. Appleby*, Morris (Iowa) 8. ²³¹ *Cooper v. Gambill*, 146 Ala. 184, 40 So. 827; *Aydlett v. Pendleton*, 114

²²⁹ *People v. Gedney*, 15 Hun (N. N. C. 1, 18 S. E. 971; *Griffin v. Barton*, Y.) 475. But in *Mitchell v. Mathe-* 22 Misc. 228, 49 N. Y. Supp. 1021.
son, 23 Wash. 723, 63 Pac. 564, where But in *McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13, the language was construed as calling for a notice by the lessor, and such a notice to remove within thirty days, "or as soon thereafter as you given after the lessor had trans-ferred the property.

your crop," was regarded as valid, ²³² *Bloom v. Wanner*, 25 Ky. Law
entitling the lessor to possession. Rep. 1646, 77 S. W. 930.

ises, was held to be insufficient.²³³ A notice to one of two tenants has been regarded as sufficient.²³⁴

(5) **Compensation to lessee.** The lease, in providing that the lessor may terminate the tenancy or that a sale by him shall have that effect, sometimes stipulates for compensation to the tenant. Where the stipulation is merely for the payment to the tenant of "damages" caused him by the sale he is, it has been held, entitled to the value of the term.²³⁵ Occasionally there is a stipulation for the payment to the tenant of a fixed sum as a "bonus" or liquidated damages in case of a sale. When it was stipulated that, on receipt of such sum and on notice of a certain period, the tenant should give up possession, and, on receipt of the notice, the tenant did give up possession, he could, it was held, recover the stipulated sum, although possession was not given until a few days after the date specified in the notice, and though the sale was not carried through.²³⁶ And when it was provided that, if the land was sold, and the purchaser required the lessee to give up possession, the lessor should pay a certain sum to the latter, and a purchaser did so require, the lessor was regarded as liable, although the land was expressly sold subject to the lease.²³⁷ A provision for a bonus to the lessee in case of sale was held not to apply when the sale was to the lessee himself.²³⁸ A provision that the lessor may terminate the lease upon paying a sum named does not, it has been held, entitle the lessee to that sum because he is evicted by the lessor's transferee under the mistaken

²³³ Baragiano v. Villani, 117 Ill. App. 372.

²³⁴ Barrett v. Merchants' Bank, 26 Grant. Ch. 409. But Adler v. Lowenstein, 52 Misc. 556, 102 N. Y. Supp. 492, is apparently *contra*.

²³⁵ Depew v. Ketchum, 75 Hun, 237, 31 Abb. N. C. 210, 27 N. Y. Supp. 8. See Taylor v. Trohock, 85 Ill. 584, for the construction of a particular stipulation in this respect.

²³⁶ Dierig v. Callahan, 35 Misc. 30, 70 N. Y. Supp. 210.

²³⁷ Hazen v. Hoyt (Iowa) 75 N. W. 647.

²³⁸ Seaman v. Civill, 45 Barb. (N. Y.) 267.

When there was, on the lease of a sawmill, a stipulation that in case of sale the lessor might terminate the lease, and that the lessee should have two months in which to finish sawing the logs on hand, and that if any remained unsawed after the two months the lessee should, at the lessor's option, have the privilege of remaining in possession till the logs on hand were all sawed, or should be allowed the cost of having the logs sawed at another mill, the lessor, by making a sale and demanding possession, thereby showed his election that the logs should be sawed at another mill, and became

supposition that the tenancy is one at will, such a clause not being in effect a provision for liquidated damages upon eviction.²³⁹

Occasionally the lease provides for compensation to the tenant for improvements made by him, in case of a termination of the tenancy by the landlord's exercise of an option to that effect or by a sale of the premises,²⁴⁰ and questions may arise as to the construction of such language. A provision that, in case the landlord terminated the tenancy under his option so to do, the tenant should be compensated for the loss sustained by expenditures incurred by him in fitting up the premises was held to entitle him to compensation for furnishings, such as carpets and window curtains, not, however, the entire cost of fitting up but only the loss sustained on account of such expenditures by the abridgement of the term.²⁴¹ And when the lease provided that, on a sale terminating the tenancy, the lessee should be entitled to payment for his improvements, the price to be settled by arbitration if they could not agree thereon, it was held that upon a sale the lessee's right to payment became absolute, and he had a right of action against the lessor in case the latter refused to submit to arbitration.²⁴² A provision for compensation to the tenant for his improvements in case of a sale within three years was held not to apply when a mere contract to sell was made within that time, the contract by its terms not to be consummated until after the three years.²⁴³ A provision that the lessee would vacate on thirty days' notice and that the lessor would pay him for any crops already planted does not entitle him to payment for his crops if he fails to vacate on such notice.²⁴⁴

It has been decided that the tenant is entitled to damages if the landlord, under a stipulation for a termination of the tenancy in case of a sale of the premises, obtains possession by a merely colorable sale,²⁴⁵ and a like decision was rendered when the lessor had a right to terminate the tenancy if he desired to cease using the land for particular crops, and obtained possession

Hable for the cost of such sawing. ²⁴² Morton v. Weir, 70 N. Y. 247, Crouch v. Parker, 40 Barb. (N. Y.) 26 Am. St. Rep. 583.
94. ²⁴³ Stewart v. Pier, 58 Iowa, 15,

²³⁹ Harrison v. Jordan, 194 Mass. 11 N. W. 711.

496, 80 N. E. 604.

²⁴⁰ See Estabrook v. Stevenson, 47 556, 106 N. Y. Supp. 246.

Neb. 206, 66 N. W. 286.

²⁴⁴ Outhouse v. Baird, 121 App. Div. 556, 106 N. Y. Supp. 246.
²⁴⁵ Davis v. Schweikert, 130 Cal. 143, 62 Pac. 411.

²⁴¹ Pratt v. Paine, 119 Mass. 439. 143, 62 Pac. 411.

by a notice to the tenant that he so desired, which was proven to be false.²⁴⁶ Recovery was in one of these cases based upon the theory that such a fraudulent ouster of the tenant constituted an eviction,²⁴⁷ but it might more properly, perhaps, be regarded as on account of the fraud or deceit involved in such a transaction.²⁴⁸ It has in one case been explicitly decided that a false representation, made in good faith by the landlord, that he has sold to another, does not involve an eviction or breach of the covenant for quiet enjoyment.²⁴⁹

f. **Option in the lessee to terminate.** In several cases a stipulation giving to the lessee the right to terminate the tenancy before the regular end of the term has been recognized as valid and enforceable,²⁵⁰ as has a provision, substantially similar in effect, in terms authorizing the lessee to "surrender" at his own volition.²⁵¹ In one state, however, such a power in the lessee has been regarded as of questionable validity.²⁵²

²⁴⁶ Salzgeber v. Mickel, 37 Or. 216, 60 Pac. 1009.

²⁴⁷ Salzgeber v. Mickel, 37 Or. 216, 60 Pac. 1009.

²⁴⁸ In Cowling v. Dickson, 5 Ont. App. 549, it was held that, even though the tenant did not relinquish possession in consequence of the landlord's false assertion of a sale, he could recover for loss occasioned by his consequent failure to plant crops. The case was clearly regarded as an action for deceit.

²⁴⁹ Lumbers v. Gold Medal Furniture Mfg. Co., 30 Can. Sup. Ct. 55.

²⁵⁰ Palmer v. Wallbridge, 15 Can. Sup. Ct. 650; Jenkins v. Clyde Coal Co., 82 Iowa, 618, 48 N. W. 970; Den d. Stedman v. McIntosh, 26 N. C. (4 Ired. Law) 291, 42 Am. Dec. 122; Cooke v. Norris, 29 N. C. (7 Ired. Law) 213; Hendry v. Squier, 126 Ind. 19, 25 N. E. 830, 9 L. R. A. 798 (semble); Hooks v. Forst, 165 Pa. 238, 30 Atl. 846. And see the cases involving the right of the lessee to terminate the tenancy on account of physical injury to the premises rend-

ering them unsuitable for occupation. Post, § 182 m, n.

In Lane v. Nelson, 167 Pa. 602, 31 Atl. 864, it was decided that a provision that the lessee should pay a certain rent so long as he should "occupy" the premises meant so long as he held under the lease, and did not enable him to relieve himself from liability for rent by relinquishing possession, especially in view of a provision authorizing either party to terminate the tenancy at the end of any year by three months' notice.

²⁵¹ Brown v. Fowler, 65 Ohio St. 507, 63 N. E. 76; Goelet v. Spofford, 55 N. Y. 647; Reich v. McCrea, 37 N. Y. St. Rep. 620, 13 N. Y. Supp. 650; Dierig v. Callahan, 35 Misc. 30, 70 N. Y. Supp. 210; Hooks v. Forst, 165 Pa. 238, 30 Atl. 846.

A provision allowing the tenant to abandon the property and to be relieved of all obligation does not require the lease to be cancelled of record. Van Meter v. Chicago & O. M. Coal Min. Co., 88 Iowa, 92, 55 N. W. 106.

²⁵² That such a provision renders

In England a provision authorizing the lessee to terminate the tenancy at any time is most unusual if not unknown, but it is frequently there provided, in the case of a lease for a term of years, twenty-one for instance, that the lessee may "break" it at the end of a shorter period, usually seven, or fourteen years, or both, upon giving a specified notice.²⁵³ Similar in effect is a lease for seven, fourteen, or twenty-one years, it being held that, in the case of such a tenancy for a term of uncertain duration, the option is with the tenant alone,²⁵⁴ unless it be expressly reserved to the lessor also,²⁵⁵ or to either party.²⁵⁶ Such a power to break "if the parties so think fit" cannot be exercised, it has been decided, without the consent of both.²⁵⁷

The theory on which such an option in the lessee to terminate is to be regarded as operative is not considered in the cases. It would seem that they must be based on the view that such a provision for the termination of the leasehold interest at the lessee's option is in effect a "special limitation,"²⁵⁸ the effect being that, without more, his interest expires upon a notice by him that such is his desire, or, if the lease requires a notice of a certain length, upon the expiration of the notice.

The right to exercise the option to terminate the tenancy under such a provision vests, it has been decided, in the assignee of the lessee,²⁵⁹ or in his personal representative on his death.²⁶⁰ The lessee cannot, after he has assigned, exercise the power, even

the lease absolutely invalid seems 399; *Doe d. Webb v. Dixon*, 9 East, to be the opinion of the court in 15; *Fallon v. Robins*, 16 Ir. Ch. 422; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923. In 253 *Goodright v. Mark*, 4 Maule & Reese v. Zinn, 103 Fed. 97, in the S. 30.

United States Court for West Vir- 256 *Lucas v. Rideout*, L. R. 3 H. ginia, it is stated that "the con- L. 153; *Roe d. Bamford v. Hayley*, 12 East, 464.

tract is void for want of mutuality," 257 *Fowell v. Tranter*, 3 Hurl. & C. 458.

citing numerous authorities, none of 258 See ante, § 12 d.

which appear to support the state- 259 *Halbert v. Bruce*, 9 Ky. (2 A. ment, with the exception of the case K. Marsh.) 60; *Roe d. Bamford v. Hayley*, 12 East, 464.

just referred to. 260 *Roe d. Bamford v. Hayley*, 12

253 See e. g., *Grey v. Friar*, 4 H. L. Cas. 565; *Bury v. Thompson* [1895] 1 Q. B. 696.

254 *Dann v. Spurrier*, 3 Bos. & P. East, 464.

though the result is that he is subjected to a continuing liability under his covenant for rent.²⁶¹

If the lease authorizes the lessee to terminate the tenancy only at a certain time, he cannot terminate it at any other time,²⁶² the question of his right in this respect being merely one of the construction of the lease.²⁶³ Likewise, it is a question of the construction of the particular lease whether a performance of all the covenants by the lessee is a condition precedent to the lessee's right to terminate the tenancy.²⁶⁴

It has been said that, even in the absence of any provision as to notice of an intention to exercise the power to terminate the tenancy, a reasonable notice to that effect must be given.²⁶⁵ Frequently, however, the lease contains a provision for notice, and this must be strictly complied with. So it has been held that where the lessee was authorized to terminate the tenancy at the end of fourteen years, by giving six month's notice immediately preceding the expiration of the fourteen years, a notice expiring at another time was not sufficient, even though the lessor understood what was intended.²⁶⁶ A provision authorizing the lessee to terminate by sixty days' notice is not satisfied by twenty days'

²⁶¹ *Seaward v. Drew*, 78 Law T. (N. S.) 19. construction of the particular leases, in *May v. Rice*, 108 Mass. 150, 11

²⁶² A right in the tenant to give up rooms the first day of February does not authorize him to give them up on the twenty-sixth. *Reich v. McCrea*, 37 N. Y. St. Rep. 620, 13 N. Y. Supp. 650. See, also, *Woodbridge Co. v. Hires Co.*, 19 App. Div. 128, 45 N. Y. Supp. 991, *afd.*, without opinion, 163 N. Y. 563, 57 N. E. 1129.

²⁶³ In *Baker v. Adams*, 59 Mass. (5 Cush.) 99, a lease made June 1, for five years, providing that rent should be paid by boarding the lessor and his family between November and May, and that either party might terminate the lease by giving six months' previous notice, was construed as requiring the notice to expire at the end of a year of the term. This case is distinguished, on the

construction of the particular leases, in *May v. Rice*, 108 Mass. 150, 11 Am. Rep. 328, where the tenancy was held to be terminable at any time.

²⁶⁴ *Porter v. Shephard*, 6 Term R. 665; *Grey v. Friar*, 4 H. L. Cas. 565.

In 2 *Platt, Leases*, 463, it is said that "whenever the power of determining the lease is given to the lessee, it is advisable, for the lessor's security, to make the exercise of it conditional on the lessee's previous payment of rent and performance of covenants, as the fear of being burdened with a continuance of the term is generally a powerful inducement to the faithful discharge of his duties."

²⁶⁵ *Goodright v. Richardson*, 3 Term R. 462.

²⁶⁶ *Cadby v. Martinez*, 11 Adol. & E. 720.

notice,²⁶⁷ and an oral notice is not sufficient when the lease provides for a written one.²⁶⁸ But a notice need not recite the provision authorizing the termination,²⁶⁹ and it is sufficient if clear and unambiguous in terms.²⁷⁰

A provision that the lease should expire upon the "abandoning" of a pier to be constructed by the lessee was decided not to enable the lessee to terminate the lease, as against his creditor who had a lien on the pier, by the execution of an instrument by which in terms he undertook to "abandon and yield up" the pier to the lessor.²⁷¹

g. The destruction of the term—(1) General considerations. We have considered thus far the case of the termination of a tenancy for years in accordance with the limitations of the lease by which it is created, whether this be at the end of the period named, or, by reason of a "special limitation," upon the happening of a contingency before the end of such period. We will now consider the various cases in which, without reference to the period named by the lease or to any special limitation thereof, the tenancy may come to an end either by the voluntary concurrent action of the landlord and tenant, the voluntary action of one of them, or the action of the law without reference to their desire or intention. Such premature termination of the tenancy

²⁶⁷ *Hendry v. Squier*, 126 Ind. 19, 25 N. E. 830, 9 L. R. A. 798.

²⁶⁸ *Legg v. Benion*, Willes, 43; *Kittie v. St. John*, 7 Neb. 73.

²⁶⁹ Where the lease provided for its termination by the lessee if it became impracticable to continue it, a notice reciting that he terminated it "as provided in the lease" was regarded as sufficient. *Jenkins v. Clyde Coal Co.*, 82 Iowa, 618, 48 N. W. 970. And see *Giddens v. Dodd*, 3 Drew. 485.

²⁷⁰ See post, § 199.

Where there was a proviso for termination by the lessee at the end of seven or fourteen years, on a six months' notice, a letter reading "I see my first seven years will be determined Dec. 25, 1894. I shall not

be able to stop unless" the rent is reduced, was regarded as sufficient. *Bury v. Thompson* [1895] 1 Q. B. 696. But it was held that, when the lease authorized the tenant to terminate it at any quarter day corresponding to the first day of the term by a six months' notice prior thereto, a notice that "I intend to surrender you the tenancy of this house on or before" such a quarter day was too uncertain and ambiguous, it meaning, apparently, that he intended to enter into negotiations to surrender, a thing which could be done only with the landlord's assent. *Garden v. Ingram*, 61 Law T. (N. S.) 729.

²⁷¹ *Hagan v. Gaskill*, 42 N. J. Eq. 215, 6 Atl. 879.

may be conveniently termed a "destruction" thereof as distinguished from its "expiration" in accordance with the intention of the parties as expressed at the time of the making of the lease.

(2) **Merger**—(a) **The general doctrine.** In case the tenant's estate and the estate in reversion come together in one person, the former estate is, ordinarily at least, "merged" in the latter and the tenancy thereby comes to an end.²⁷² So the estate of a subtenant may be merged in that of the original tenant.²⁷³

In equity, it is said, the doctrine of merger will apply only when it accords with the intention of the parties.²⁷⁴ If this be so, it would seem that in jurisdictions where equitable defenses are allowed at law, or where rules of equity are controlling upon all the courts, the operation of the doctrine may be considerably restricted.²⁷⁵ Presumably it will be applied even in equity, if no contrary intention appears and no evident injustice results. It does not appear that equity ever intervened to prevent the operation of merger at law, however great the resulting hardship.

(b) **Quantum of the reversionary estate.** As regards the *quantum* of the reversionary estate, it is necessary only that it be as great as or greater than the estate asserted to be merged. Hence, an estate for years may merge in a fee simple estate, an

²⁷² 2 Blackst. Comm. 177; Dynevor v. Tennant, 13 App. Cas. 279; Otis v. McMillan, 70 Ala. 46; Ferguson v. Etter, 21 Ark. 160, 76 Am. Dec. 361; Liebschutz v. Moore, 70 Ind. 142, 36 Am. St. Rep. 182; Carroll v. Ballance, 26 Ill. 9, 79 Am. St. Rep. 354; Collamer v. Kelley, 12 Iowa, 319; Denham v. Sankey, 38 Iowa, 269; Wahl v. Barroll, 8 Gill (Md.) 288; Story v. Ulman, 88 Md. 244, 41 Atl. 120; Gunn v. Sinclair, 52 Mo. 327; Higgins v. Turner, 61 Mo. 249; Hudson Bros' Commission Co. v. Glencoe Sand & Gravel Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722; Kershaw v. Supplee, 1 Rawle (Pa.) 131.

²⁷³ Webb v. Russell, 3 Term R. 393; Wahl v. Barroll, 8 Gill (Md.) 288.

²⁷⁴ Brandon v. Brandon, 31 Law J. Ch. 47; Snow v. Boycott [1892] 3 Ch. 110; Ingle v. Vaughan Jenkins [1900] 2 Ch. 368; Capital & Counties Bank v. Rhodes [1903] 1 Ch. 631; Bostwick v. Frank Field, 74 N. Y. 207; Spencer v. Austin, 38 Vt. 258. Wilbur v. Nichols, 61 Vt. 432, 18 Atl. 154, would seem to involve an application of such a doctrine.

²⁷⁵ The English Judicature Act, § 25, subs. 4 (36 & 37 Vict. c. 66), expressly provides that there shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. See, also, In re Stafford, 105 App. Div. 46, 94 N. Y. Supp. 194.

estate for life or an estate for years,²⁷⁶ and it may happen that an estate for years is merged in another estate for years of less duration. For instance, if immediately after making a lease for ten years the lessor makes a concurrent lease for five years, the second lessee becomes reversioner for the period of five years,²⁷⁷ and if his estate and that of the prior lessee become vested in one and the same person, the ten-year term is merged in the five-year term.²⁷⁸

(c) **Estates held in different rights.** In order that merger may occur, it is ordinarily necessary that the two estates be held by the same person in the same right. If, for instance, the reversioner obtains the leasehold as executor of the lessee,²⁷⁹ or if one has the term in his own right and the reversion in right of his wife,²⁸⁰ or if he has the leasehold in his own right and the reversion as another's administrator,²⁸¹ there is no merger. There is some authority for the view that this exclusion of merger when the estates are held by a person in different rights does not apply if a person having one estate in a fiduciary capacity or in right of another thereafter acquires the other estate in his own right by his voluntary act, as distinguished from the act of the law.²⁸²

(d) **No merger if estate intervenes.** The interest of a subtenant will not merge in that of the original landlord, since merger will not occur when, as it is expressed, an intermediate estate intervenes.²⁸³ For instance, if a lessor for years makes a concurrent lease for years,²⁸⁴ and thereafter conveys the fee simple to the first lessee, there is no merger.²⁸⁵ Nor is there any merger when a sublessee takes a conveyance of the reversion upon the original lease,²⁸⁶ or when the lessee, having made a sublease, makes a concurrent lease to his own lessor for the term of the

²⁷⁶ 3 Preston, Conveyancing, 182, 7 Hurl. & N. 507. The question is discussed at length in 3 Preston, Conveyancing, 273 et seq. See, also, 219.

²⁷⁷ See post, § 146 d.

²⁷⁸ Stephens v. Bridges, 6 Madd. & Challis, Real Prop. (2d Ed.) 82. Gel. 66; 3 Preston, Conveyancing, 195.

²⁷⁹ Co. Litt. 338 b.

²⁸⁰ Platt v. Sleap, Cro. Jac. 275.

²⁸¹ Chambers v. Kingham, 10 Ch. Div. 743.

²⁸² Jones v. Davis, 5 Hurl. & N. 766,

discussed at length in 3 Preston, Conveyancing, 273 et seq. See, also,

Challis, Real Prop. (2d Ed.) 82.

²⁸³ 3 Preston, Conveyancing, 107.

²⁸⁴ See post, 146 d.

²⁸⁵ 3 Preston, Conveyancing, 111, citing Bro. Abr., Exting., pl. 54.

²⁸⁶ Logan v. Green, 39 N. C. (4 Ired. Eq.) 370; Tolsma v. Adair, 32

Wash. 383, 73 Pac. 347.

sublease.²⁸⁷ An intervening *interesse termini*, however, that is, a right to a term of years to commence in the future, not being an estate, will not, it has been decided, prevent the merger of a prior term in the reversion,²⁸⁸ though the merger of such prior term does not affect the validity of the *interesse termini*.²⁸⁹

(e) **In case of *interesse termini*.** Upon the theory that an *interesse termini* will not merge, it has been held that if one having an estate for years takes a lease to commence on the expiration of his term, his interest under this second lease will not merge upon his acquisition of the reversion.²⁹⁰ However sound may be this view, using the expression *interesse termini* in the sense of a term to commence *in futuro*, it is difficult to see why, using the expression in the sense of a present term not yet reduced to possession,²⁹¹ such a term should not merge to the same extent before as after the lessee's entry.

Since a term to commence in the future is not an estate, a present estate for years will not merge in such a future term.²⁹²

(f) **On transfer under judicial process or decree.** It is immaterial, as regards the question of merger, whether the title to the reversion and that to the leasehold come together by reason of a voluntary conveyance, a conveyance under judicial process, on the foreclosure of a lien, or by act of the law, such as descent.^{293, 294} In the case, however, of a sale and conveyance under judicial process against the lessor or on foreclosure, a distinction should be noted as regards the date of the lien, the enforcement of which is involved in such sale and conveyance. For instance, in the case of a sale under a mortgage or judgment which existed as a lien prior to the lease, and of a purchase at such sale by the lessee, the latter acquires not the reversion but a paramount title, the same title which he would have acquired by a conveyance in fee made at the time of the creation of the lien, and there is no room for the application of the law of merger. There is at least one decision²⁹⁵ to the effect that merger occurs in such a case,

²⁸⁷ *Burton v. Barclay*, 7 Bing. 745.

²⁹⁰ *Doe d. Rawlings v. Walker*, 5

²⁸⁸ 3 *Preston, Conveyancing*, 207; *Barn. & C.* 111.

Doe d. Rawlings v. Walker, 5 *Barn.*

²⁹¹ See post, § 37.

& *C.* 111; *Anonymous*, 2 *Dyer*, 112 a;

²⁹² *Hyde v. Warden*, 3 *Exch. Div.*

Logan v. Green, 39 *N. C.* (4 *Ired.* 72.

Eq.) 370.

^{293, 294} See post, §§ 147, 150.

²⁸⁹ 3 *Preston, Conveyancing*, 208;

²⁹⁵ *Moston v. Stow*, 91 *Mo. App.* 554, citing *Gunn v. Sinclair*, 52 *Mo*

Anonymous, 2 *Dyer*, 112 a.

thereby ignoring, as is frequently done,²⁹⁶ the fact that, by a sale and conveyance under a lien prior to a lease, not the reversion but a paramount title passes.

It has been decided in one case that when the reversion passes to the tenant by reason of his purchase at a judicial sale or by reason of a conveyance from the purchaser at such sale, the merger is not affected by the existence of a right of redemption from the sale in the reversioner, which right is duly exercised.²⁹⁷ In some jurisdictions no conveyance would be made in pursuance of the sale until the expiration of the period of redemption, and there would be no legal title in the tenant to support a merger, which could then be supported on equitable principles alone.

(g) **Effect of contract to convey.** A mere contract by the landlord to convey the reversion to the tenant, or a contract by the tenant to convey the reversion to the landlord, vesting, as it does, only an equitable interest in the purchaser, would not ordinarily authorize the application of the doctrine of merger in a court at law, but in equity a different view would be taken, and the doctrine would be applied in such case, provided this was compatible with the apparent intention of the parties.²⁹⁸ The same view has apparently been adopted where there is no separate equity jurisdiction.²⁹⁹ The doctrine would not, however, it seems, be applied in favor of the intending purchaser until he had paid or tendered the price,³⁰⁰ and the fact that the contract of purchase calls for a conveyance only at a future time presumably shows the absence of any intention that a present merger shall occur.³⁰¹ The decisions on the question of the effect of

327; *Higgins v. Turner*, 61 Mo. 249, N. C. 35, 13 N. Y. Supp. 843; *Knerr v. Bradley*, 105 Pa. 190. And see *McMahon v. Jacoway*, 105 Ala. 585, 17 So. 39.
broadly that such a sale extinguishes the tenancy, without the suggestion of any distinction as regards the priority of the lien.

²⁹⁶ See post, §§ 73 c, 78 n.

²⁹⁷ *Otis v. McMillan*, 70 Ala. 46.

²⁹⁸ *Capel v. Girdler*, 9 Ves. Jr. 509. See ante, § 13 g (2) (a).

²⁹⁹ *Bostwick v. Frankfield*, 74 N. Y. 207; *Campbell v. Babcock*, 26 Abb.

³⁰⁰ See *Rooney v. Gillespie*, 88 Mass. (6 Allen) 74; *Campbell v. Babcock*, 26 Abb. N. C. 35, 13 N. Y. Supp. 843; *New York Bldg. Loan Banking Co. v. Keeney*, 56 App. Div. 538, 67 N. Y. Supp. 505; *Knerr v. Bradley*, 105 Pa. 190; *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169.

³⁰¹ *Smith v. Brannan*, 13 Cal. 107.

such a contract of sale as extinguishing the tenancy are, it may be remarked, almost entirely lacking in a discussion of the matter on principle, and the above statements in that regard are to be considered as inferences from the decisions rather than as based on the explicit language of the courts.

(h) **Partial merger.** A merger will take place as to a portion only of the leased premises whenever the reversion and the leasehold in such portion only meet in one person,³⁰² and the tenancy will continue as before in the residue of the premises. A partial merger will also frequently take place when an undivided interest in the reversion meets with an entire or partial interest in the leasehold, or an undivided interest in the leasehold meets with an entire or partial interest in the reversion.³⁰³ But if it appears that an undivided interest in the reversion is in a different share of the land from that in which an undivided interest in the leasehold exists, the meeting of these interests will not, it has been said, cause a merger. For instance if, A and B being tenants in common of land, A leases to C and B leases to D, the undivided interest of C would perhaps not merge in the reversion of B upon their meeting in one person, it clearly appearing that such reversion and leasehold are in different shares.³⁰⁴

(i) **Merger as regards third persons.** A merger will in some cases not be allowed to operate to the disadvantage of third persons.³⁰⁵ For instance, the estate created by means of a sublease will not be affected by the merger of the sublessor's estate in the original reversion.³⁰⁶ Nor will a lien or charge created by the tenant be affected by the fact that the leasehold is for other purposes thereafter merged in the reversion.³⁰⁷ The courts, how-

³⁰² *Badeley v. Vigurs*, 4 El. & Bl. 3: N. Y. Supp. 380; *Lansing v. Pine*, 71; *Yates v. Cole*, 2 Brod. & B. 4 Paige (N. Y.) 639. But see *Mar-660*; *Dighton v. Greenvil*, 2 Vent. tin v. Tobin, 123 Mass. 85.

³⁰³ *Higgins v. California Petrol- 304 3 Preston, Conveyancing, 89;*
eum & Asphalt Co., 109 Cal. 304, 41 *Challis, Real Prop. (2d Ed.) 77.*

Pac. 1087; *Nellis v. Lathrop*, 22 305 3 Preston, Conveyancing, 447,
Wend. (N. Y.) 121, 34 Am. Dec. 285. 454. See Denham v. Sankey, 38

³⁰⁶ 3 Preston, Conveyancing, 89; *Iowa, 269.*

Challis, Real Prop. (2d Ed.) 77; 306 Thre'r v. Barton, Moore, 94;
Hill v. Reno, 112 Ill. 154, 54 Am. St. *Webb v. Russell*, 3 Term R. 393.

Rep. 222; *Simmons v. MacAdaras, 307 3 Preston, Conveyancing, 447,*
6 Mo. App. 297; *Holmquist v. Bava- 454. So it is decided in Buffum v.*
rian Star Brew. Co., 1 App. Div. 347, Deane, 70 Mass. (4 Gray) 385, that an

ever, always gave full effect to the doctrine of merger for the purpose of destroying the interest of a contingent remainderman, although the merger was the result of collusion between the life tenant and the vested remainderman.³⁰⁸

(3) **Surrender.** If the tenant makes surrender of the leasehold estate, there is thereafter no estate to support the tenancy and the latter immediately comes to an end except as against third persons.³⁰⁹

(4) **Forfeiture.** Upon the enforcement by the landlord of a forfeiture of the tenant's estate for years, either for disclaimer of the landlord's title, by force of a condition of re-entry in the lease, or under a statute authorizing a recovery of possession for default in the payment of rent or performance of covenants, the tenant's estate comes to an end and the tenancy no longer exists.³¹⁰

(5) **Eviction.** In theory, an eviction of the tenant by the landlord does not bring the tenancy to an end, but it frequently has this effect, the tenant treating it as final for all purposes.³¹¹ An eviction under title paramount ordinarily brings the tenancy entirely to an end.³¹² But if the paramount title is based on a mortgage or on a sale under a lien or judicial process and a right of redemption exists, the tenancy will not come to an end, it seems, till the expiration of the time for redemption.³¹³

(6) **Taking under power of eminent domain.** The effect of a judgment in condemnation proceedings is ordinarily to vest the reversion and the leasehold in one legal person, either the state or the corporate entity to which the power of eminent domain has been delegated, and this, it would seem, presents a clear case for the application of the doctrine of merger. The courts have not, however, considered the possibility of applying this doctrine

attachment upon the leasehold is mortgagor could not, after acquiring not affected by a subsequent merger. the reversion, assert a claim for the

But it has been decided that a rent reserved.

mortgagee of the leasehold does not ³⁰⁸ Fearn, Contingent Remainders, c. 5; Challis, Real Prop. 84.

acquire a lien on the reversion if ³⁰⁹ See post, §§ 182 g, 191.

the mortgagor, after making the ³¹⁰ See post, chapter XIX.

mortgage, purchases the reversion, ³¹¹ See post, §§ 182 e (1), 185 h.

since the reversion is not merged in ³¹² See post, §§ 182 e (2), 186 a (3).

the lesser estate. Collamer v. Kelley, 12 Iowa, 319. It was there decided, however, in effect, that the ³¹³ See post, §§ 182 e (2), 186 a (3).

of merger in this connection, and have indeed not discussed the question of the cessation of the tenancy as a result of the condemnation proceedings except as such discussion might be involved in that of the discontinuance of the tenant's liability for rent; and upon this latter question the cases are by no means in unison, as will hereafter appear.³¹⁴ Any decisions to the effect that liability for rent still continues seem necessarily to involve the view that the tenancy is still in existence.

In case a part only of the premises is condemned for public use, the tenancy is still, it seems, to be regarded as existing in the residue. And the tenancy would still exist if an easement only is taken, this not divesting either the leasehold or reversionary estates.³¹⁵

There may be a "special limitation" in the lease providing that the tenancy shall cease upon the taking of the premises or a part thereof for public use.³¹⁶

(7) **Bankruptcy.** The bankruptcy of the lessee does not, by the great weight of authority, have the effect of terminating the tenancy,³¹⁷ provided the lease contains no provision to that effect,³¹⁸ and unless the trustee in bankruptcy refuses, as here-

³¹⁴ See post, § 182 k.

³¹⁵ See post, § 182 k.

³¹⁶ See *Munigle v. City of Boston*, 85 Mass. (3 Allen) 230, where it was held that this was the effect of a provision that "if the lessor shall sell the said house, or the city shall cut off said premises, the said tenant shall consent thereto."

³¹⁷ *In re Ells*, 98 Fed. 967; *In re Arnstein*, 101 Fed. 706; *In re Pennewell*, 119 Fed. 139; *Wildman v. Taylor*, 4 Ben. 42, Fed. Cas. No. 17, 654; *Oden v. Sassman*, 68 N. J. Eq. 799, 64 Atl. 1134, affg. 67 N. J. Eq. 239, 57 Atl. 1075, 91 Am. St. Rep. 423; *Woodward v. Harding*, 75 App. Div. 54, 77 N. Y. Supp. 969; *Witthaus v. Zimmerman*, 91 App. Div. 202, 86 N. Y. Supp. 315; *In re Curtis*, 109 La. 171, 33 So. 125, 78 Am. St. Rep. 445.

³¹⁸ The lease may contain a spe-

cial limitation providing for the cesser of the term upon bankruptcy, or may provide for re-entry in such case. See *Roe d. Hunter v. Galliers*, 2 Term R. 133; *Gray, Restraints on Alienation of Prop.* § 101; *Woodfall, Landl. & Ten.* (16th Ed.) 286. See post, § 194 e (5).

A proviso for re-entry "if the lessee, his executors, administrators or assigns shall become bankrupt" was held to refer to the bankruptcy only of the person who for the time being was possessed of the term, and there was no right of forfeiture upon the bankruptcy of the original lessee after having assigned the leasehold to another. *Smith v. Gronow* [1891] 2 Q. B. 394. A proviso in substantially the same language was held to apply in case of the bankruptcy of the survivor of certain executors to whom the ten-

after explained, to accept the leasehold interest, it will pass with the bankrupt's other property to such trustee.³¹⁹

The contrary *dicta* and decisions to the effect that the adjudication of the tenant's bankruptcy terminates the tenancy and re-vests in the landlord the right of present possession subject to the temporary requirements of the trustee are, it is submitted, absolutely unsound.³²⁰ In two of these cases the courts apparently regard the termination of the tenancy as a necessary result of the inability to prove, in the bankruptcy proceedings, a claim for rent thereafter accruing;^{320a} in one, no reason whatever is given for the *dictum*,³²¹ while, in still another, such view seems to be based on the theory that this would be the fairest practical result for all parties.³²² That the question of the right to prove a claim for future rent is independent of the question of the termination of the tenancy seems almost self-evident. The inability to prove such a claim is a result, as has been frequently stated, of the fact that such future rent is not a debt.³²³ As to the suggestion that to give the adjudication of bankruptcy the effect of terminating the tenancy will be fair at all parties, exactly the contrary is the case. Without reference to whether the bankrupt is the original lessee or his assignee, if the rental value of the property is less than the rent reserved, it may be a

ant had bequeathed his interest in assignment in violation of the covenant. See *Doe d. Bridgman v. David*, 1 Crompt. M. & R. 405.

³¹⁹ See post, § 158 a (2) (j).

³²⁰ In *In re Breck*, 8 Ben. 93, Fed. Cas. No. 1,822, Blatchford, J., says: "The lease was undoubtedly canceled by the bankruptcy, as, by its terms, it could not be assigned without the written consent of the landlord." The correctness of this statement depends on the words of the lease, which are not stated in the report. A covenant not to assign does not apply to an assignment by operation of law, such as by bankruptcy, unless it is expressly so stated (see post, § 152 f), and furthermore, even if in terms applying to such an assignment, the fact of

assignment in violation of the covenant would not terminate the lease unless the lease so provided, that is, unless the estate vested in the lessee was limited to expire on such an event. The landlord would not, in most states, even have the option of terminating the tenancy in the absence of a proviso for re-entry (post, § 152 j). In New York, at the present time, such right is given by the summary proceeding statute. See post, § 274 g.

^{320a} In *re Jefferson*, 93 Fed. 948; *Bray v. Cobb*, 100 Fed. 270.

³²¹ In *re Hinckel Brew. Co.*, 123 Fed. 942.

³²² In *re Hays, Foster & Ward Co.*, 117 Fed. 879.

³²³ See post, § 166.

decided hardship on the landlord to treat the tenancy as terminated. The theory of the bankrupt act, as construed by the courts, is to relieve the bankrupt from those debts only which can be asserted against him in the bankruptcy proceedings, but the effect of regarding the tenancy as ended is to relieve the bankrupt lessee from the liability for rent, which cannot be asserted against him in that proceeding.

When the leasehold has, before the adjudication, been assigned by the lessee to another, the possible hardship upon the landlord of regarding the bankruptcy of the tenant as terminating the tenancy is still more evident. It may be that the original lessee is perfectly solvent, and he, as is elsewhere stated, remains liable on the covenants of the lease. If the bankruptcy of his assignee is to end the tenancy and so terminate the landlord's right to enforce the covenant for rent or other covenants, one who has bound himself by a covenant in a lease may relieve himself from all liabilities thereon by the simple device of assigning the leasehold to a "man of straw" and subsequently procuring, directly or indirectly, an adjudication of bankruptcy as regards the latter. It does not seem to have been in any case suggested that the bankruptcy of the original lessee would terminate the tenancy if it occurs after he has assigned the leasehold, and that it could not have that effect is presumably conceded.

If the rental value of the property is greater than the rent reserved, the hardship involved in regarding the tenancy as ended falls upon the creditors of the tenant. A leasehold still having a number of years to run is frequently in itself a valuable asset, and may be the only asset of the estate. It is difficult to perceive why this asset should be presented to the reversioner, and such is evidently the effect of regarding the tenancy as terminated.³²⁴ It may furthermore be remarked that since an adjudication of bankruptcy has its legal existence only by reason of the bankrupt act, its operation should not be extended beyond the terms of the act. There is not the slightest suggestion in the act of an intention that an adjudication of bankruptcy should terminate a term of years previously vested in the tenant.

³²⁴ In *Atkins v. Wilcox*, 44 C. C. that if the leasehold is subject to a A. 626, 105 Fed. 595, 53 L. R. A. 118, merely nominal rent, it would not McCormick, J., suggests apparently be terminated by the adjudication of

That a tenant has made an assignment for the benefit of creditors is evidently no reason for regarding the tenancy as terminated,³²⁵ such assignee, as would any other assignee, becoming substituted in his place to the rights and liabilities incident to the relation of tenancy.³²⁶

(8) **Destruction of or injury to premises by unforeseen casualty.** The question has frequently arisen whether destruction of or injury to part of the premises, ordinarily a building upon the land leased, terminates the liability for rent, and the great majority of the decisions are, as elsewhere stated,³²⁷ to the effect that, apart from a statute or special stipulation to the contrary, the liability for rent continues as before. This view involves the view that the tenancy itself still continues. It has, however, been frequently decided in this country that the liability for rent ceases if the leased premises consist merely of a building or a part of a building without including any land, and the building is destroyed,³²⁸ and there are a number of cases in which it is specifically stated that the tenancy ceases in such a case, there being no longer any subject-matter on which the tenancy can operate.³²⁹

Not infrequently there is an express stipulation that the liability for rent shall cease upon the destruction of the building on the leased premises. The question whether such a stipulation has

bankruptcy, but that the rule might be otherwise if it is subject to a rent equal to the value of the premises.

³²⁵ See *Reynolds v. Fuller*, 64 Ill. App. 134.

³²⁶ See cases cited post, § 158 j.

³²⁷ See post, § 182 m.

³²⁸ See post, § 182 m (2).

³²⁹ *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Ainsworth v. Ritt*, 38 Cal. 89; *Stockwell v. Hunter*, 52 Mass. (11 Metc.) 448, 45 Am. Dec. 220; *Shawmut Nat. Bank v. City of Boston*, 118 Mass. 125; *Kerr v. Merchants' Exch. Co.*, 3 Edw. Ch. (N. Y.) 315; *Winton v. Cornish*, 5 Ohio, 477; *Harrington v. Watson*, 11 Or. 143, 3 Pac. 173, 50 Am. Rep. 465; *Macnair v. Ames* (R. I.) 68 Atl. 950;

Utah Optical Co. v. Keith, 18 Utah, 464, 56 Pac. 155; *Schmidt v. Pettit*, 8 D. C. (1 MacArthur) 179. But not if the part leased is only injured and is not destroyed. *Turner v. Mantonya*, 27 Ill. App. 500.

In *Ainsworth v. Mt. Moriah Lodge*, 172 Mass. 257, 52 N. E. 81, where the third story in a building had been leased "during the life of the building," the lessee covenanting to keep such part in good repair during the life of the building, the tenancy was regarded as terminated when fire substantially destroyed the third story and so much of the lower stories that it was impracticable to rebuild the third story without rebuilding other parts.

the effect of terminating the tenancy in that event is primarily a question of construction. The cases bearing thereon are considered elsewhere.³³⁰

(9) **Untenantable condition of premises.** In some states the view has been asserted that a mere untenable condition of the premises will justify the tenant in relinquishing possession and refusing to pay further rent.³³¹ It does not appear whether a relinquishment of possession under such circumstances involves a termination of the tenancy.

(10) **Expiration of the lessor's estate.** In the absence of a statutory power or of an express power to that effect in the creation of the estate, one having a limited estate in land cannot, as against the person entitled in reversion or remainder, create an estate to endure beyond the termination of his own estate. This self-evident principle has been applied in the case of the making of a lease for years by a tenant for his own or another's life, the rights of the remainderman or reversioner being recognized as superior to any claim on the part of the lessee.³³² And so the expiration of the lessee's estate by reason of a special limitation terminates the estate of his sublessee.³³³ It has also been decided that the expiration of the lessor's estate may be asserted by the tenant holding under the lease in defense to an action for rent or on covenants of the lease or by the landlord to recover possession. This question we consider elsewhere.³³⁴

(11) **Destruction of the lessor's estate.** Upon the question whether the tenancy is destroyed as a result of the destruction of the lessor's estate, the authorities are not entirely clear. It is recognized that a subtenant is not affected adversely by a surrender made by his landlord to the head landlord, that is, his right of possession under the sublease continues as before,³³⁵ and the same appears to be the case when the sublessor's estate is merged in the original reversion.³³⁶ In both these cases, at

³³⁰ See post, § 182 m (6) (d).

³³¹ See post, § 182 n.

³³² See e. g., *Coakley v. Chamberlain*, 8 Abb. Pr. (N. S.) 37, 38 How. Pr. 483, 31 N. Y. Super. Ct. (1 Sweeny) 676; *McIntyre v. Clark*, 6 Misc. 377, 26 N. Y. Supp. 744; *Guthmann v. Vallery*, 51 Neb. 824, 71 N. W. 734, 66 Am. St. Rep. 475; and

cases cited post, § 15 b, note 588.

³³³ *Eten v. Luyster*, 60 N. Y. 252;

Bove v. Coppola, 45 Misc. 636, 91 N. Y. Supp. 8; *Bruder v. Geisler*, 47 Misc. 370, 94 N. Y. Supp. 2.

³³⁴ See post, § 78 p (3).

³³⁵ See post, § 191 b; *Sutton's Case*, 12 Mod. 557.

³³⁶ *Thre'r v. Barton*, Moore, 94:

common law, the subtenant thereafter not only retained the possession but he was free from liability for rent or upon the covenants of the sublease, on the theory that the right to rent and the covenants could not exist after the destruction of the subreversion to which they were incident.³³⁷ This rule has been changed in England by statute.³³⁸ Whether it would ordinarily be recognized in this country does not appear. There are cases in which it is referred to without disapproval,³³⁹ while in one jurisdiction it has been decided that a subreversion which has been surrendered would not thus be regarded as extinguished in the original reversion to the disadvantage of the reversioner, but that it would still exist for the purpose of asserting the subtenant's liability under his covenant for rent as well as under other covenants.³⁴⁰ And it has been decided that if the tenant, in making a surrender, reserves to himself the rent, the rent is not extinguished by the extinguishment of the subreversion, and he may transfer this right to the reversioner, and so the reversioner will have the rent incident to the subreversion though the subreversion itself is extinguished.³⁴¹ Furthermore, it has been decided that the sublessee's liability for rent cannot be regarded as extinguished by the surrender of the subreversion when his conduct showed that he regarded his sublease as terminated and that he was holding as tenant at will of the original lessor,³⁴² and he is liable if he actually attorns to the original lessor.^{342a} A lessor who has accepted a conveyance of the leasehold from his tenant, if he treats the sublease as outstanding by collecting rent from the sublessee, cannot thereafter, it has been decided, contend that the subreversion has been merged.^{342b}

Webb v. Russel, 3 Term R. 393; 3 Grundin v. Carter, 99 Mass. 15; Pratt Preston, Conveyancing, 448. v. Richards Jewelry Co., 69 Pa. 53.

³³⁷ See cases cited in last preceding note.

³⁴⁰ Hessel v. Johnson, 129 Pa. 173, 18 Atl. 754, 15 Am. St. Rep. 716, 5 L. R. A. 851.

³³⁸ 8 & 9 Vict. c. 106, § 9.

³⁴¹ Beal v. Boston Car Spring Co., 125 Mass. 157, 28 Am. St. Rep. 216.

³³⁹ Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910; Krider v. Ramsay, 79 N. C. 354; McDonald v. May, 96 Mo. App. 236, 69 S. W. 1059. See Williams v. Michigan Cent. R. Co., 133 Mich. 448, 95 N. W. 708, 103 Am. St. Rep. 458. That the sublessor cannot recover rent after his surrender of the leasehold is decided in

³⁴² Appleton v. Ames, 150 Mass. 34, 22 N. E. 69, 5 L. R. A. 206.

^{342a} McDonald v. May, 96 Mo. App. 236, 69 S. W. 1059.

^{342b} Bailey v. Richardson, 66 Cal. 422, 5 Pac. 910.

The enforcement of a forfeiture of the subreversion for breach of a condition of the original lease will defeat the estate of the subtenant³⁴³ and so terminate his tenancy.

If a mortgagor having the legal title grants a lease subsequent to the mortgage, upon the foreclosure of such mortgage and the expiration of all right of redemption, the lessee has no interest which he can assert as against one claiming under the foreclosure,³⁴⁴ and the same rule applies in case of a sale under any other lien prior to the lease.³⁴⁵

If a mortgagee having the legal title makes a lease and the mortgagor redeems, the mortgagee's title thereupon coming to an end, the lessee or his assignee cannot retain the possession as against the mortgagor,³⁴⁶ and the same is true if a purchaser at execution sale leases and the execution defendant subsequently redeems.³⁴⁷

It has been decided that a tenancy under a lease made by a husband and wife of land held by them jointly does not come to an end because she obtains a decree of divorce depriving him of all interest in the land.³⁴⁸

(12) **War and military occupation.** It has been decided that the presence of hostile forces on or around the premises leased, rendering them incapable of occupation or utilization by the tenant, does not relieve him from liability for rent,³⁴⁹ and this involves the view that the tenancy is not terminated in such case.

(13) **Death.** The death of the landlord does not cause the tenancy to come to an end, but the reversion, with the rights incident thereto, passes to the devisee or legatee named in his will or, in case he dies intestate as regards this particular property, it passes to his heir or personal representatives, according to the character of the reversion as being realty or personalty.³⁵⁰

The death of the tenant, likewise, does not terminate the tenancy, his interest under the lease passing to his personal representative.³⁵¹

³⁴³ See post, § 194 h, at note 188.

³⁴⁴ See post, § 73.

³⁴⁵ See post, 78 n (3).

³⁴⁶ *Hungerford v. Clay*, 9 Mod. 1; (4 Cush.) 384, and cases cited post, *Willard v. Harvey*, 5 N. H. 252; *Holt* § 147.

v. Rees, 44 Ill. 30.

³⁴⁷ *Morris v. Beebe*, 54 Ala. 300.

³⁴⁸ *Emmert v. Hays*, 89 Ill. 11.

³⁴⁹ See post, § 182 s.

³⁵⁰ See *Jaques v. Gould*, 58 Mass.

³⁵¹ See *Alsup v. Banks*, 68 Miss. 664, 9 So. 895, 24 Am. St. Rep. 294,

(14) **Dissolution of corporation tenant.** It has in England been decided that, upon the dissolution of a corporation which has a leasehold, the term comes to an end and the land reverts to the lessor;^{351a} and it has in this country been asserted that if the leasehold is valueless, so that the receiver of the corporation refuses to accept it, the term comes to an end.^{351b} It being recognized that a receiver has the right to refuse to accept the leasehold,^{351c} and the corporation being no longer in existence so as to hold it, it seems inevitable that the estate itself should come to an end, it not being for the public good that such a *damnosa haereditas* should pass to the state.

§ 13. Tenancy at will.

a. **When the tenancy arises—(1) Lease at will of lessee.** A tenancy at will is stated by Littleton to exist "where lands or tenements are let by one man to another, to have and to hold at the will of the lessor by force of which lease the tenant is in possession."³⁵² Coke, in commenting on this passage, says: "It is regularly true that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also; for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the books that seem *prima facie* to differ, clearly reconciled."³⁵³ While the later of these writers does not profess to

13 L. R. A. 598; *Mickle v. Miles*, 1 Grant Cas. (Pa.) 320; *In re Walker's Estate*, 6 Pa. Co. Ct. R. 515; *Wilcox v. Alexander* (Tex. Civ. App.) 32 S. W. 562. And see post, § 150. In *Charles v. Byrd*, 29 S. C. 544, 8 S. E. 1, it was held that a lease was not so personal as not to pass to the personal representative of the lessee, on his death, merely because it contained stipulations as to the mode of cultivation, and provided that certain improvements be made by the lessee and that he should have

the use of certain cotton seed "so long as he remains on the place," a like quantity to be returned "at the close of his lease."

^{351a} *Hastings Corp. v. Letton* [1908] 1 K. B. 378.

^{351b} *Fidelity Safe Deposit & Trust Co. v. Armstrong*, 35 Fed. 567. See *New Hampshire Trust Co. v. Taggart*, 68 N. H. 557, 44 Atl. 751.

^{351c} See post, § 158 a (2) (1).

³⁵² Litt. § 68, adopted in 2 Blackst. Comm. 145.

³⁵³ Co. Litt. 55 a.

differ from the earlier one, there is to some extent a contradiction in so far as he asserts a tenancy at will to arise, not only in the case of a lease at the will of the lessor, but also when the lease is in terms at the will of the lessee, this being, he says "also at the will of the lessor;" and the question whether a lease thus in terms at the will of the lessee does necessarily create a tenancy terminable at the will of either party is one of some difficulty.

In several cases in this country the courts have accepted Coke's statement literally and without question, holding that if a lease, without naming any term of enjoyment, gives the tenant a right to leave at any time and thus terminate all liabilities on his part, the lessor may compel him to leave at any time, that is, that he is a tenant at will.³⁵⁴ On the other hand, at common law, if one having a fee simple estate made a conveyance or demise to another accompanied by livery of seisin, without words of inheritance or other limitation, a life estate was created in favor of the latter,³⁵⁵ and the fact that the lessee in such case was given the option to terminate his tenancy at any time should not, it seems, reduce his freehold interest to a mere tenancy at will, but rather he should be regarded as having an estate for life subject to a right in him to terminate it. That a lease in terms creating an estate for years contains such an option in the lessee does not render the latter a tenant at will merely,³⁵⁶ and no more should its presence in what would otherwise be a conveyance in fee simple or for life have such an effect. Not only is the opposite view apparently opposed to those cases recognizing the validity of a term of years subject to such an option in the lessee, but it also seems opposed to the numerous decisions to be found in this country to the effect that there may be a conveyance in fee for so long as the grantee may choose to occupy the

³⁵⁴ Doe d. Pidgeon v. Richards, 4 C. (3 Dev. Law) 414; Eclipse Oil Co. Ind. 374; Knight v. Indiana Coal & v. South Penn Oil Co., 47 W. Va. 84, Iron Co., 47 Ind. 105, 17 Am. Rep. 34 S. E. 923; Beauchamp v. Runnels, 692; Cheever v. Pearson, 33 Mass. 35 Tex. Civ. App. 212, 79 S. W. 1105; (16 Pick.) 266; Western Transp. Co. Corby v. McSpadden, 63 Mo. App. v. Lansing, 49 N. Y. 499; Cowan v. 648; Reese v. Zinn, 103 Fed. 97. Radford Iron Co., 83 Va. 547, 3 S. E. ³⁵⁵ See ante, § 11 b. 120; Den d. Mhoon v. Drizzle, 14 N. ³⁵⁶ See ante, § 12 f.

premises for a certain purpose, this in effect creating an estate terminable at the grantees' will.³⁵⁷

It has in England, apparently, in accordance with these views, been decided that a conveyance to one with a right in him to terminate the holding at any time creates in him a freehold estate.³⁵⁸ There the estate thus created in the absence of the insertion of the word "heirs" is a life estate merely, terminable at the will of the lessee, while under the rule prevailing in most of the states in this country, that the word "heirs" is not necessary for the creation of an estate in fee, the estate created would rather be one in fee terminable at the lessee's option, unless the terms of the conveyance show a different intention.³⁵⁹ There are several cases in this country which tend to support the view that such a conveyance creates an estate for life or in fee.³⁶⁰

³⁵⁷ See cases cited, 1 *Tiffany*, Real Prop. § 81.

³⁵⁸ *Beeson v. Burton*, 12 C. B. 647; *In re King's Leasehold Estates*, L. R. 16 Eq. 521; *Zimble v. Abrahams* [1903] 1 K. B. 577.

³⁵⁹ See *Reed v. Lewis*, 74 Ind. 433.

³⁶⁰ In *Effinger v. Lewis*, 32 Pa. 367, it was decided that a lease for a term of years, with a provision that the lessee, his heirs and assigns, might hold the premises as much longer as he and they should think proper after the end of the term, at the same rent, conveyed a fee simple. And in *Ely v. Randall*, 68 Minn. 177, 70 N. W. 980, a lease for five years, "with the privilege of holding it longer" provided the lessee kept a post-office and store, and no longer, was held to give the lessee an interest to endure so long as he personally kept the store, which could not be beyond the term of his life.

In *Gilmore v. Hamilton*, 83 Ind. 196, a written demise "for a certain rent, for such time as the lessee, his heirs and assigns may occupy the same for a sawmill yard," and providing that possession shall be yield-

ed to the lessor, his heirs or assigns, at the time of the expiration of the occupation of the said premises for sawmill purposes," was held not to create a tenancy at will, and by implication the court asserted that it created a fee simple. This seems not to be in accordance with *Doe d. Pidgeon v. Richards*, 4 Ind. 374 and *Knight v. Indiana Coal & Iron Co.*, 47 Ind. 105, 17 Am. Rep. 692, cited in note 354, supra. The only difference in the facts seems to be that in these latter cases the lessee asserts his will to give up the lease by notifying the lessor and by leaving, while in the other he asserts his will by ceasing to use the premises as a sawmill yard.

In *Cole v. Lake Co.*, 54 N. H. 242, 277, it was decided that when there was a lease to the lessees "and their legal representatives during their pleasure," since the words above quoted showed an intention to create an assignable estate, that is, not a tenancy at will, the fact that it was "during the pleasure" of the lessees did not render it a tenancy at will.

Coke's dictum that such a lease at the will of the lessee creates a tenancy at will is, it is conceived, to be regarded as applying only in the absence of livery of seisin, which was in his day necessary for the creation of an estate of freehold.³⁶¹ That, if accompanied by livery of seisin, such a lease created an estate for life is clearly asserted by high authority prior to his time,³⁶² and there is nothing in the decisions referred to by him to lead to a different conclusion. If, however, the instrument lacks any formality of execution, such as a seal, which may be in the particular jurisdiction necessary for the creation of a freehold estate, it will, as at common law, when unaccompanied by livery of seisin, create merely an estate at will.

(2) **Lease at will of lessor.** The other branch of Coke's statement that "when the lease is made, to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also," has been referred to with approval in several cases,³⁶³ and it seems that such a lease would at the present day ordinarily be construed as creating a tenancy at will.³⁶⁴ If, however, there is an express limitation of a greater estate, the mere fact that the lessor has an option to terminate the tenancy at any time will not, it seems, reduce the estate to one at will. For instance, if the lease in terms creates an estate for years, such an estate will

³⁶¹ That his statement is to be so understood see *Effinger v. Lewis*, 32 Pa. 367; *Sergeant Mannings* note, 7 Man. & G. 47; *Leake*, Dig. Prop. 207.

³⁶² "A man leases to J. S. at the will of the lessee, and held that if it be by livery he has an estate for life, and no livery, then it is in doubt; therefore *quaere*. Bro. Abr., Estates, pl. 72, citing *Y. B. 35 Hen. 6*, f. 63, pl. 3, where the first proposition seems to be assumed without question. In *Keilw.* 162, pl. 4, it was said that where a lease is at the will of the lessee, "it will be taken at the will of both the lessor and lessee, for if it be taken at the will of the lessee, peradventure, he would wish to have it for the term of his life,—and then this would be a freehold which in no way can pass without livery," thus asserting by implication that it would be otherwise were the requirement of livery satisfied. In *Y. B. 10 Edw. 4*, 18 b. pl. 22, *Littleton, J.*, says that "if lease be made at the will of the lessee or of a stranger, it is void, for then he would have freehold, which cannot be without livery of seisin."

³⁶³ *Doe d. Pidgeon v. Richards*, 4 Ind. 374; *Cheever v. Pearson*, 33 Mass. (16 Pick.) 266; *Den d. Humphries v. Humphries*, 25 N. C. (3 Ired. Law) 362; *Corby v. McSpadden*, 63 Mo. App. 648.

³⁶⁴ As in *Den d. Humphries v. Humphries*, 25 N. C. (3 Ired. Law) 362; *Post v. Post*, 14 Barb. (N. Y.) 253.

be created subject to an option to terminate it,³⁶⁵ and so if the lease in terms creates an estate for life, and is properly executed for the conveyance of a freehold, the fact that the lessor is given an option to terminate the lessee's estate does not, it would seem, make the holding one merely at will.³⁶⁶

(3) **Permissive possession.** A tenancy at will may be created by a lease which expressly undertakes to create a tenancy at the will of both parties,³⁶⁷ and, as above indicated, such may be the effect of a lease at the will of the lessor or of the lessee. But apart from such cases, in which there is a particular reference to the "will" of one or both parties, the tenancy may exist merely as a result of the taking of possession of land by permission, "permissive possession," as it may be called, without any understanding as to the duration of the possession.³⁶⁸ In such a case the tenant is under no obligation to remain in possession nor is the owner under any obligation to let him remain, and consequently the tenancy may be discontinued at the will of either. Frequently, however, a permissive possession which would otherwise constitute a tenancy at will is, as will be seen

³⁶⁵ See ante, § 12 e.

"All that the passage cited from Coke means is that if there is a demise with no term fixed between the parties except the will of the lessor, then it is implied by law to be also at the will of the tenant." Per Cotton, L. J., in *In re Threlfall*, 16 Ch. Div. 274.

³⁶⁶ See authorities cited in a learned note by Sergeant Manning in 7 Man. & G. at p. 45.

³⁶⁷ So it may be created by such words as to hold "as long as both parties please" (*Richardson v. Langridge*, 4 Taunt. 128), or "for so long as the parties shall mutually agree," with a provision that "either party may put an end to" the relation. *Say v. Stoddard*, 27 Ohio St. 478.

³⁶⁸ *Ellsworth v. Hale*, 33 Ark. 633; *St. Louis, I. M. & S. R. Co. v. Hall*, 71 Ark. 302, 74 S. W. 293; *Jones v. Shay*, 50 Cal. 508; *Goodwin v. Per-*

kins, 134 Cal. 564, 66 Pac. 793; *Herrell v. Sizeland*, 81 Ill. 547; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Packard v. Cleveland*, C. C. & St. L. R. Co., 46 Ill. App. 244; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Wilson v. Merrill*, 38 Mich. 707; *Appleton v. Buskirk*, 67 Mich. 407, 34 N. W. 708; *Goodenow v. Allen*, 68 Me. 308; *Sanford v. Johnson* 24 Minn. 172; *Leavitt v. Leavitt*, 47 N. H. 329; *Larned v. Hudson*, 60 N. Y. 102; *Sarsfield v. Healy*, 50 Barb. (N. Y.) 245; *Den d. Humphries v. Humphries*, 25 N. C. (3 Ired. Law) 362; *Howard v. Merriam*, 59 Mass. (5 Cush.) 563; *Johnson v. Johnson*, 13 R. I. 467; *Maher v. James Hanley Brew. Co.*, 23 R. I. 323, 50 Atl. 330; *Robb v. San Antonio St. R. Co.*, 82 Tex. 392, 18 S. W. 707; *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615; *Webb v. Seekins*, 62 Wis. 26, 21 N. W.

later,³⁶⁹ by reason of the reservation or payment of a periodic rent, changed into a tenancy from year to year or other periodic tenancy. In some states, on the other hand, what is ordinarily termed a tenancy from year to year or month to month is known as a tenancy at will, some qualifying terms being, however, ordinarily introduced to distinguish it from a tenancy at will of such character as we are now discussing.³⁷⁰

The permissive possession above referred to which constitutes a tenancy at will may arise under a variety of circumstances, frequently even though the parties intended to create a different relation. For instance, if one goes into possession under a void conveyance, the grantee or lessee is a tenant at will. This was the case at common law when a deed of feoffment was not accompanied by livery of seisin but the feoffee entered, since he entered by the consent of the feoffor.³⁷¹ And, likewise, if one enters under a conveyance in fee which is invalid under the statute of frauds, he becomes a tenant at will.³⁷²

The same principle has been quite frequently applied in the case of one entering under an invalid conveyance by way of lease,³⁷³ as when it was invalid under the statutes of mortmain,³⁷⁴ because unsealed,³⁷⁵ because not acknowledged or recorded,³⁷⁶ because an improper execution of a power,³⁷⁷ or because the lease was *ultra vires*,³⁷⁸ and such is primarily the status of one who enters under a lease which is invalid by reason

814; *Utah Optical Co. v. Keith*, 18 Utah, 464, 56 Pac. 155.

So the owner of a building who moved it on the land of another pending negotiations for its purchase by such other was held to be a tenant at will. *Michael v. Curtis*, 60 Conn. 363, 22 Atl. 949.

³⁶⁹ See post, § 14 b (2).

³⁷⁰ See post, § 14 a, at notes 443 a, 443 b.

³⁷¹ Litt. § 70; Co. Litt. 57 b.

³⁷² *Jackson v. Rogers*, 2 Caines Cas. (N. Y.) 314; *Ezelle v. Parker*, 41 Miss. 520. And so where one enters under an oral lease for life. *Hooton v. Holt*, 139 Mass. 54, 29 N. E. 221.

³⁷³ See *Hayes v. Atlanta*, 1 Ga. App. 25, 57 S. E. 1087.

³⁷⁴ *Magdalen Hospital v. Knotts*, 4 App. Cas. 324; *Bunting v. Sargent*, 13 Ch. Div. 330.

³⁷⁵ *Ecclesiastical Com'rs v. Merral*, L. R. 4 Exch. 162; *Arbez v. Exley*, *Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957.

³⁷⁶ *McCleran v. Benton*, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814; *Baltimore & O. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344.

³⁷⁷ *Doe d. Martin v. Watts*, 7 Term R. 83.

³⁷⁸ *City of Bay St. Louis v. Hancock County*, 80 Miss. 364, 32 So. 54 (city occupying under lease which it

of the statute of frauds.³⁷⁹ Other cases of such permissive possession rendering one a tenant at will may occur in the case of one who enters into possession by permission of the owner pending negotiations for a lease,³⁸⁰ or a sale³⁸¹ to him, and of one permitted to occupy pending the performance of an executory contract for a lease to him.³⁸²

(4) **Lease not naming duration of tenancy.** There are occasional decisions to the effect that a lease which fails to name the period for which the tenancy is to endure creates a tenancy at will.³⁸³ Such a lease, if insufficient to create a freehold estate because not in writing or for any other cause, will no doubt have such an effect. It will constitute merely a case of permissive possession such as we have just been discussing. But these decisions, so far as they may involve the view that a lease by one having an estate in fee, though sufficient in point of execution to create a freehold estate, will create a tenancy at will only, merely because no estate is expressly limited, are, it is conceived, erroneous. At common law such a lease, if accompanied by

had no power to accept). In *Rogers v. Hill*, 3 Ind. T. 562, 64 S. W. 536, one taking possession under a void Indian lease was held to be a tenant at will. In *Rogers v. Hill*, 3 Ind. T. 562, 64 S. W. 536, one taking possession under a void Indian lease was held to be a tenant at will. In *Rogers v. Hill*, 3 Ind. T. 562, 64 S. W. 536, one taking possession under a void Indian lease was held to be a tenant at will.

³⁷⁹ See post, § 25 g (1).

³⁸⁰ *Coggan v. Warwicker*, 3 Car. & K. 40; *Lennox v. Westney*, 17 Ont. 472; *Fall v. Moore*, 45 Minn. 515, 48 N. W. 404; *Carteri v. Roberts*, 140 Cal. 164, 73 Pac. 818.

³⁸¹ *Doe d. Tomes v. Chamberlain*, 5 Mees. & W. 14; *Swart v. Western Union Tel. Co.*, 142 Mich. 21, 12 Det. Leg. N. 609, 105 N. W. 74.

³⁸² See post, § 65.

³⁸³ *Murray v. Cherrington*, 99 Mass. 229; *Gardner v. Hazleton*, 121 Mass. 494; *Amick v. Brubaker*, 101 Mo. 473, 14 S. W. 627. So it has been held that a lease of land, to be held until it is sold, creates a tenancy at will only. *Lea v. Hernandez*, 10 Tex. 137. It might have been regarded as

creating a life interest subject to termination by sale, if the lease were executed in the manner necessary for the conveyance of a life interest.

The Massachusetts cases above cited do not seem to accord with earlier cases in the same state. In *Hurd v. Cushing*, 24 Mass. (7 Pick.) 169, it was decided that a grant and demise of land for an indefinite time, and so long as the salt works intended to be erected thereon should continue to be used, created an estate for life, determinable on the lessee ceasing to occupy the salt works. And in *Cook v. Bisbee*, 35 Mass. (18 Pick.) 527, a lease by which the lessee covenanted to pay a yearly rent so long as he should keep furnaces upon the premises, without naming any period, was held not to be determinable at the will of the lessor.

livery of seisin, created an estate for life,³⁸⁴ and the abolition of the latter requirement cannot cause it to have a lesser effect. The fact that the old authorities turn upon the question whether livery had been made is occasionally lost sight of.³⁸⁵ In jurisdictions where the common-law requirement of words of inheritance for the creation of a fee simple is no longer in force, such a conveyance might be regarded as passing an estate in fee simple, except as the use of words of demise and lease only might exclude any inference of an intention to transfer the lessor's entire interest, that is, a fee simple estate.³⁸⁶ This view, that such a lease creates a freehold estate rather than a mere tenancy at will, is in accord with the well recognized rule that a conveyance which is of doubtful meaning will be construed in favor of the grantee rather than the grantor. There are occasional decisions in this country which seem to recognize in somewhat obscure terms that such a lease may be effective to create a freehold estate.³⁸⁷

³⁸⁴ See ante, note 9. So in Bro. Bac. Abr., Estates (H 1). But that Abr., Leases, pl. 67, it is said: "If I lease land to W. M., to hold till 100 pounds be paid, and without livery, it is only a lease at will, for the uncertainty, but if he makes livery the lessee will have it for life on condition, implied to cease if the 100 pounds be levied." And see *Blanford v. Blanford*, 3 Bulst. 100, citing the *Bishop of Bath's Case*, 6 Coke, 35, to the effect that if "one doth lease his land to one, being of a certain yearly value, until his debts are paid, this is but a lease at will without livery made, but if he makes livery, he hath a freehold."

³⁸⁵ See e. g., *Murray v. Cherrington*, 99 Mass. 229. So in *Woodfall, Landl. & Ten.* (16th Ed.) 239, the author (or editor) says that "where a person lets land to another without limiting any certain or determinate estate, a tenancy at will is thereby created," citing *Com. Dig., Estates* (H 1), as he might also have cited

such passages in these earlier works do not refer to a case where the conveyance is otherwise sufficient to create a freehold plainly appears from the quotations in note 9, supra.

³⁸⁶ In *Wright v. Hardy*, 76 Miss. 524, 24 So. 697, it was decided, or rather assumed, that an indenture not naming any term was a conveyance in fee, although the words "demise and let" were used.

³⁸⁷ In *Reed v. Lewis*, 74 Ind. 433, 39 Am. Rep. 88, where a lease was made to continue until a certain contingency, the court questioned whether it did not create a fee.

In *Sweetser v. McKenney*, 65 Me. 225, and *Holley v. Young*, 66 Me. 520, leases for a term named and also giving the lessee the right to retain possession as much longer as he desired were upheld, apparently, as giving the lessees possession for an indefinite period. In the first case the court says that the lessor was "es-

(5) **Tacit acquiescence in another's possession.** There are a number of cases which suggest the view that the mere failure of the owner of land to object to the unauthorized holding of possession by another constitutes the latter a tenant at will of the owner, as showing what we have before referred to as a "permissive possession,"³⁸⁸ but it is difficult to see how this can

topped" to bring dispossessory proceedings, but, it is submitted, the doctrine of estoppel was not applicable. If it was a lease for an indefinite time, equivalent to a lease in fee or for life, this was sufficient reason for his inability to dispossess the lessee. If, on the other hand, the lease created only a tenancy at will, the lessor would not have been estopped to dispossess the tenant. In neither of these cases does the court undertake to name the lessee's estate, and as before stated, it does not seem that the lessee could continue to hold at his option unless he had a freehold estate.

In *Thurber v. Dwyer*, 10 R. I. 355, where a lease was in terms "to hold for so long a time as a certain building on the lessor's land next adjoining should remain in the same location," the court said that were the lease valid, though it must terminate upon the removal of the building without notice, no notice to quit would avail to put an end to it. This seems to be equivalent to saying that it conveys a fee simple, determinable only upon the removal of the building. The court held that the lease was invalid, because not recorded as required by statute, in the case of leases creating estates greater than a year.

In *Warner v. Tanner*, 38 Ohio St. 118, it was held that a lease to B. for the erection of a "cheese house" on the premises, the land to revert to the lessor on the cessation of the

manufacture of cheese thereon, was a lease for life, terminable upon the cessation of such use of the land. The court refers to the fact that the lease required the lessee to make improvements on the land, and that he did so, as showing that it was not a lease at will or from year to year. It may, however, be questioned whether the presence of these elements could affect the nature of the tenancy. If the lease was sufficient to convey a freehold, the absence of a provision for improvements could not cut it down, and if the lease was such as to create a tenancy at will or from year to year only, no covenant for the erection of the buildings could turn it into an estate for life.

³⁸⁸ See *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658; *Shean v. Withers*, 51 Ky. (12 B. Mon.) 441; *Hoffman v. Clark*, 63 Mich. 175, 29 N. W. 695, 4 Am. St. Rep. 836; *Doe d. Mann v. Keith*, 4 U. C. Q. B. (O. S.) 86.

In *Stamper v. Griffin*, 20 Ga. 312, 65 Am. Dec. 628, it is said that one who enters as a "squatter," disclaiming title, with the knowledge of the owner, holds as tenant at will. There, however, the question was merely whether such a person could claim adversely without the owner's knowledge. In *Zilch v. Young*, 184 Ill. 333, 56 N. E. 318, it was decided that if one enters as licensee merely to pile lumber on land, and thereafter builds a house on the land, and the owner, on discovering this,

be. Such a view appears to be opposed to the almost numberless cases in which a claim to recover land has been held to be barred by the statute of limitations. If the plaintiff's failure, during the period named in the statute or a less period, to object to the defendant's wrongful possession, renders the latter the plaintiff's tenant, the statute of limitations becomes inapplicable, since the existence of the relation of tenancy deprives the possession of the element of hostility necessary for the application of the statute.³⁸⁹ The effect would be that the statute could apply only when the rightful owner had objected to the other's wrongful possession, and he could always exclude the operation of the statute to his disadvantage by failing so to object. Another consideration in this respect is that the cases asserting this doctrine of the creation of a tenancy by silent acquiescence make no suggestions as to the period which must elapse after the commencement of the wrongful holding before the tenancy can be regarded as arising, and from the nature of the case no definite period can be named. It has been said in this connection by a distinguished judge that "mere silence on the part of the plaintiff did not constitute or make evidence of a tenancy at will. If it did, when did the silence have that effect. At the end of a day—a week—a month—a year—or when. When there is no duty to do anything, mere lapse of time and nothing done, is no evidence of anything."³⁹⁰ In view of these considerations and of the well

makes no objection, the former becomes tenant at will. A like view was taken where an employe, after the end of his employment, remained some time in possession with the tacit acquiescence of the owner. *Jennings v. McCarthy*, 40 N. Y. St. Rep. 678, 16 N. Y. Supp. 161; *Kerrains v. People*, 60 N. Y. 221, 19 Am. St. Rep. 158. In *Bedford v. McElherron*, 2 Serg. & R. (Pa.) 49, it was held that where a tenant for years held over seventeen years, there was a presumption of consent by the owner creating a tenancy at will or from year to year.

In *Munson v. Plummer*, 59 Iowa, 120, 12 N. W. 806, and *Kane v. Mink*,

64 Iowa, 84, 19 N. W. 852, a tenant remaining in possession, with the knowledge of the purchaser of the premises under a judgment against the lessor prior to the lease, was regarded as a tenant at will, though apparently there had been merely a tacit acquiescence in his possession by such purchaser. In *Dobbins v. Lusch*, 53 Iowa, 304, 5 N. W. 205, an execution defendant so retaining possession was so regarded.

³⁸⁹ See ante, § 4.

³⁹⁰ *Bramwell, B.*, in *Ley v. Peter*, 3 Hurl. & N. 101, *Watson and Channel, B. B.*, were of the same opinion. *Martin B.*, apparently was not.

recognized distinction between a tenant and a trespasser,³⁹¹ and in spite of the cases before referred to apparently to the contrary, a tenancy at will, like any other tenancy, can, it is submitted, be created only by a legal act constituting a lease or demise, and not by a mere forbearance to act. There are *dicta* at least to this effect.³⁹²

(6) **Statutory provisions.** Occasionally a statute provides that a person in possession of land with the consent of the owner shall be presumed to be a tenant at will unless the contrary is shown.³⁹³ This would seem to be the law apart from any statute. On the other hand, in one state at least, it is expressly provided that a tenancy at will shall arise only by express agreement to that effect,³⁹⁴ and this seems to be the effect of the statutes before referred to,³⁹⁵ providing that a tenancy of undefined duration shall extend for a certain period or until a certain time of the year.

b. **Termination of the tenancy**—(1) **By the landlord.** A tenancy at will may, at common law, be terminated immediately by the landlord by giving a notice to that effect, that is by making a demand for possession.³⁹⁶ Likewise, at common law, with-

³⁹¹ See ante, § 6.

³⁹² In *Doe d. Stanway v. Rock*, 4 Man. & G. 30 it was said, by Tindal, C. J., that to create a tenancy at will "something must be done by the lessor." In *Blum v. Robertson*, 24 Cal. 127, it is said that an express grant or contract is necessary. See, also, *Godfrey v. Walker*, 42 Ga. 562; *Moore v. Smith*, 56 N. J. Law, 446, 29 Atl. 159; *Bodwell Granite Co. v. Lane*, 83 Me. 168, 21 Atl. 829; *Martin v. Knapp*, 57 Iowa, 336, 10 N. W. 721; *Ley v. Peter*, 3 Hurl. & N. 101.

³⁹³ Iowa Code 1897, § 2991; Kan. Gen. St. 1905, § 4051. N. H. Pub. St. 1901, c. 246, § 1, provides that every tenancy shall be deemed to be at will, and the rent payable upon demand, unless a different contract is shown. In this state the expression "tenancy at will" apparently includes what is generally known as a "ten-

ancy from year to year." See post, § 14 a.

³⁹⁴ In *Indiana* (Burns' Ann. St. 1901, § 7089, it is provided that a tenancy at will cannot arise but by express contract, and that all general tenancies in which the premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year. "General tenancies" within this provision are held to be those the duration of which is not fixed by agreement, and consequently a mere permissive holding does not there create a tenancy at will. See cases cited post, § 14 b (2) (c).

³⁹⁵ See ante, § 12 c (3) (c).

³⁹⁶ Co. Litt. 55 b; 2 Blackst. Comm. 146; *Locke v. Matthews*, 13 C. B. (N. S.) 753; *Pollen v. Brewer*, 7 C. B. (N. S.) 371; *Blackley v. Colles*,

out any express notice on the landlord's part as to his desire or intention in this respect, acts of ownership by him on the premises inconsistent with the continued existence of the tenancy, such as entering and cutting down trees or carrying away stone without the tenant's consent, are ordinarily regarded as indicating the owner's will to terminate the tenancy and have that effect.³⁹⁷ In a number of states, however, by force either of an express statute or of judicial decisions, the landlord cannot of his own volition terminate the tenancy without a notice of some length of time, that is the tenant is not bound to relinquish possession to the landlord immediately upon the latter's expression of a desire to take possession. The existence and effect of these requirements will be considered in another place.³⁹⁸

The express demand for possession which at common law entitles the landlord to immediate possession need not be made upon the land.³⁹⁹ There is a decision in this country that the demand must be brought home to the tenant, and that the act of the landlord in going on the land and declaring the tenancy at an end, if not done within the hearing of the tenant, is nugatory.⁴⁰⁰ The common-law rule, however, was apparently otherwise,⁴⁰¹ and even mere acts on the part of the landlord, if done on the land, inconsistent with the continuance of the tenancy, have been decided to be sufficient, although the tenant is unaware of the doing of such acts.⁴⁰²

6 Colo. 349; *Den d. Howell v. Howell*, 29 N. C. (7 Ired. Law) 496, 47 Am. Dec. 335; *Curl v. Lowell*, 36 Mass. (19 Pick.) 25; *Whitney v. Swett*, 22 N. H. 10, 53 Am. Dec. 228. New York Real Prop. Law, § 202, fixing the duration of tenancies in New York city when the duration is not specified. *Jennings v. McCarthy*, 40 N. Y. St. Rep. 678, 16 N. Y. Supp. 161.

The institution of an action of ejectment is a sufficient demand or notice. *Chamberlain v. Donahue*, 45 Vt. 50; *Locke v. Matthews*, 13 C. B. (N. S.) 753.

³⁹⁷ Co. Litt. 55 b; *Doe d. Bennett v. Turner*, 7 Mees. & W. 226; *Rising v. Stannard*, 17 Mass. 282; *Den d. Howell v. Howell*, 29 N. C. (7 Ired. Law) 496, 47 Am. Dec. 335.

³⁹⁸ See post, § 196 b.

A tenancy expressed to be at the will of either party is not within

³⁹⁹ Co. Litt. 55 b.

⁴⁰⁰ *Cook v. Cook*, 28 Ala. 660.

⁴⁰¹ "The lessor may by actual entry into the ground determine his will in the absence of the lessee, but by words spoken (away) from the ground the will is not determined until the lessee hath notice." Co. Litt. 55 b. And to the same effect see *Doe d. Davies v. Thomas*, 6 Exch. 854.

⁴⁰² *Ball v. Cullimore*, 2 Crompt. M.

Although the landlord may at common law terminate the tenancy by a mere demand for possession or by acts of a certain character as above set forth, he cannot, until he has in some way terminated the tenancy, bring ejectment against the tenant to recover the land,⁴⁰³ or summary proceedings under the statute,⁴⁰⁴ or trespass to try title.⁴⁰⁵

There seems at common law to be no restriction as to the time at which a tenancy at will may be terminated by the lessor, except to this extent, that if he terminates it between rent days he loses the rent.⁴⁰⁶

(2) **By the tenant.** The tenant may terminate the tenancy by relinquishing possession.⁴⁰⁷ A mere notice by him, however, that the tenancy is to be regarded as at an end, without relin-

& R. 120; *Pinhorn v. Souster*, 8 Exch. 763. a previous one which failed on a technicality.

In *Doe d. Price v. Price*, 9 Bing. 404 *Wheeler v. Wood*, 25 Me. 287.

356, it was held sufficient to terminate the tenancy that the owner notified the tenant that unless he paid what he owed measures would be immediately taken to recover possession, the implied offer to allow the retention of possession not appearing to have been accepted. So when the owner entered and required the tenant's employes to stop all work on the premises. *Moore v. Boyd*, 24 Me. 242. 405 *Jones v. Jones*, 2 Rich. Law (S. C.) 542.

406 See post, § 176 a, at note 373.

In *Vin. Abr.*, Estates (B c), published about 1750, there is a long statement to the general effect that the lessor cannot, in the case of arable pasture land, terminate the tenancy in the spring, and that the tenant cannot terminate it in the spring if he has failed to sow, or in the fall. This may have been the law as enforced by the courts before the time at which, it is conceived, the doctrine of periodic tenancies inferred from the reservation or payment of a periodic rent became established (post, § 14 b (2)), but the authorities cited do not support the statement, and the present writer has discovered no other mention of such restrictions upon the termination of tenancies at will.

In *Chamberlain v. Donahue*, 45 Vt. 50, it is stated that the bringing of an action of ejectment by the owner of the land terminated the tenancy. But it will be noticed that the action referred to was not that in which the opinion in question was rendered, but 407 *Say v. Stoddard*, 27 Ohio St. 478; *Chandler v. Thurston*, 27 Mass. (10 Pick.) 205; *Shaw v. Hill*, 79 Mich. 86, 44 N. W. 422; *Dolan v. Scott*, 25 Wash. 214, 65 Pac. 190;

quishment of possession, will have no effect.⁴⁰⁸ Furthermore, the tenancy may be terminated at the landlord's option by any acts on the part of the tenant of a character inconsistent with his holding as such. So it is terminated if by words or acts he disclaims holding under his landlord, as when he asserts a fee simple title to the land.⁴⁰⁹ And, likewise, the commission of voluntary waste by the tenant is regarded as being so inconsistent with his obligations as tenant at will as to terminate the tenancy at the landlord's option,⁴¹⁰ and within this principle has been held to fall the act of the tenant in authorizing the use of the premises as a smallpox hospital to the diminution of the value of the property.⁴¹¹

If the tenant at will is required by statute to give notice in order to terminate the tenancy,⁴¹² he cannot terminate it by a mere relinquishment of possession. But even though notice is required by statute the requirement may be waived by the landlord's acceptance of possession or otherwise.⁴¹³

The entrance by the parties to an existing tenancy at will into an agreement that the tenant shall give up possession at a future

Warner v. Page, 4 Vt. 291, 24 Am. Dec. 604.

⁴⁰⁸ Co. Litt. 55 b, Hargrave's note.

It was held to be no defense to an action for rent against a tenant at will that he was prevented from relinquishing possession by the issue of an injunction in a proceeding to which the plaintiff was not a party. Bartlett v. Robinson, 52 Neb. 715, 72 N. W. 1053.

⁴⁰⁹ Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237; McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14, 35 L. R. A. 267; Appleton v. Ames, 150 Mass. 34, 22 N. E. 69, 5 L. R. A. 206; Isaacs v. Gearhart, 51 Ky. (12 B. Mon.) 231; Currier v. Earl, 13 Me. 216; Russell v. Fabyan, 34 N. H. 218; Den d. Love v. Edmonston, 23 N. C. (1 Ired. Law) 152; Ramsey v. Henderson, 91 Mo. 560, 4 S. W. 408. So where the tenant allowed the levy of execution on the land under a judg-

ment against him under such circumstances that he led the officer to believe that the land belonged to him in fee. Campbell v. Proctor, 6 Me. (6 Greenl.) 12, and where he accepted and recorded a conveyance of the premises in fee. Benneck v. Whipple, 12 Me. (3 Fairf.) 346, 28 Am. Dec. 186.

⁴¹⁰ Co. Litt. 56 a; Esty v. Baker, 50 Me. 325, 79 Am. Dec. 616; Phillips v. Covert, 7 Johns (N. Y.) 1; Pettengill v. Evans, 5 N. H. 54; Perry v. Carr, 44 N. H. 118; Daniels v. Pond, 38 Mass. (21 Pick.) 367, 32 Am. Dec. 269; Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769.

⁴¹¹ Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442.

⁴¹² See post, § 196 b.

⁴¹³ See Farson v. Goodale, 90 Mass. (8 Allen) 202, and post, § 197.

day named will, it has been held, terminate the tenancy at will, the tenancy being thereby changed into one for a fixed term, a tenancy for years,⁴¹⁴ though this could not be the case unless the agreement were executed with the formalities necessary in the case of a lease for that length of time.

(3) **By death of party.** The relation between the owner and the tenant at will is regarded as personal in its nature, and consequently the tenancy is terminated by the death of either the landlord or the tenant.^{414a} But this is not the case when one of two joint lessors or joint lessees dies.⁴¹⁵ The dissolution of a corporation party to the relation will likewise, it has been decided, terminate the tenancy.⁴¹⁶

(4) **By transfer—(a) By the landlord.** A conveyance by the landlord will terminate the tenancy as soon as the making of the conveyance is known to the tenant,⁴¹⁷ and a conveyance of merely part of the premises will have the same effect.⁴¹⁸ Nor need the conveyance be of the whole interest of the landlord, but a written lease by him, retaining a reversion, is equally effective for this purpose,⁴¹⁹ as is the conveyance of an undivided

⁴¹⁴ *Engels v. Mitchell*, 30 Minn. 122, 14 N. W. 510.

^{414a} Co. Litt. 57 b, 62 b; 2 Blackst. Comm. 146; *Turner v. Barnes*, 2 Best. & S. 435; *Reed v. Reed*, 48 Me. 388; *Rising v. Stannard*, 17 Mass. 282; *Say v. Stoddard*, 27 Ohio St. 478; *Manchester v. Doddridge*, 3 Ind. 360. And this even in the case of a lease to one "and his heirs," to hold at the will of the lessor. Litt. § 82; Co. Litt. 62 b.

⁴¹⁵ Co. Litt. 55 b; *Henstead's Case*, 5 Coke, 10 a.

⁴¹⁶ *Lea v. Hernandez*, 10 Tex. 137.

⁴¹⁷ *Doe d. Davis v. Thomas*, 6 Exch. 854; *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616; *Curtis v. Galvin*, 83 Mass. (1 Allen) 215; *Lash v. Ames*, 171 Mass. 487, 50 N. E. 996; *Davis v. Brocklebank*, 9 N. H. 73; *Den d. Howell v. Howell*, 29 N. C. (7 Iréd Law) 496.

⁴¹⁸ *Emmes v. Feeley*, 132 Mass. 346.

⁴¹⁹ *Disdale v. Iles*, 2 Lev. 88; *Hinchman v. Iles*, 1 Vent. 247; *Hildreth v. Conant*, 51 Mass. (10 Metc.) 298; *Wardell v. Etter*, 143 Mass. 19, 8 N. E. 420; *Cofran v. Shepard*, 148 Mass. 582, 20 N. E. 181; *Mentzer v. Hudson Sav. Bank*, 197 Mass. 328, 83 N. E. 1102; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Seavey v. Cloudman*, 90 Me. 536, 38 Atl. 540.

A lease by a husband of premises held by him and his wife by the entirety was held to terminate a tenancy at will, since the control of such an estate during their joint lives is, at the common law, vested in the husband. *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462.

That the person who made the lease at will makes a subsequent written lease will not terminate the tenancy at will if the lessor himself

interest.⁴²⁰

A mortgage by the landlord has also been held to terminate the tenancy,⁴²¹ but this could, it seems, be the case only where the mortgage transfers the legal title to the mortgagee.

A transfer of the landlord's interest by operation of law, as by sale under a judgment,⁴²² or the vesting of the property in a trustee in bankruptcy,⁴²³ has the same effect as a voluntary conveyance in terminating the tenancy. The taking of a mere easement, however, in the exercise of the right of eminent domain, not followed by actual eviction, is without any such result.⁴²⁴

While it is recognized that a conveyance or lease by the landlord does not terminate the tenancy till the tenant receives notice thereof in one way or the other,⁴²⁵ the notice to the tenant need not be in any particular form.⁴²⁶ There are suggestions in the decisions of one state to the effect that such a notice does not give the landlord a right to proceed against the tenant as wrongfully holding over until the lapse of a day or two after it is given, but no clear rule has been stated in this regard.⁴²⁷

had no estate which he could lease, as where he was a tenant at will of the rightful owner; and the subtenant at will is not estopped to show the character of his landlord's holding for this purpose. *Hilbourn v. Fogg*, 99 Mass. 11.

⁴²⁰ *McFarland v. Chase*, 73 Mass. (7 Gray) 462, where all the members of a firm owning the property conveyed to another firm consisting of themselves and one other, thus in effect transferring an undivided interest to such other.

So the tenancy is terminated by a conveyance of his interest by one cotenant of the reversion (*Cofran v. Shepard*, 148 Mass. 582, 20 N. E. 181) as it is in the case of a partition by exchange of conveyances by part owners. *Rising v. Stannard*, 17 Mass. 282.

⁴²¹ *Jarman v. Hale* [1899] 1 Q. B. 994.

⁴²² *Marsters v. Cling*, 163 Mass. 477, 40 N. E. 763.

⁴²³ *Doe d. Davies v. Thomas*, 6 Exch. 854.

⁴²⁴ *Emmes v. Feeley*, 132 Mass. 346.

⁴²⁵ *Doe d. Davies v. Thomas*, 6 Exch. 854; *Pratt v. Farrar*, 92 Mass. (10 Allen) 519; *Furlong v. Leary*, 62 Mass. (8 Cush.) 409.

It was different in the case of a conveyance by livery of seisin, this being a notorious act done on land, of which the tenant was presumed to have notice. *Ball v. Cullimore*, 2 Crompt. M. & R. 120.

⁴²⁶ *Mizner v. Munroe*, 76 Mass. (10 Gray) 290; *Pratt v. Farrar*, 92 Mass. (10 Allen) 519.

⁴²⁷ See *Pratt v. Farrar*, 92 Mass. (10 Allen) 519; *Arnold v. Nash*, 126 Mass. 397; *Hooton v. Holt*, 139 Mass. 54, 29 N. E. 221.

The tenant cannot complain, after his interest has come to an end by reason of a transfer by the landlord, that the latter induced the transferee to eject him.⁴²⁸

(b) **By the tenant.** The tenant has no interest which he can transfer, and an attempted assignment or sublease by him is regarded as inconsistent with the continued existence of the tenancy and terminates it.⁴²⁹ Such termination does not, however, become effective until the owner acquires knowledge of the transfer.⁴³⁰ But though the tenant cannot transfer his interest as against the owner, a transfer by him is effective as against himself, making the transferee a tenant at will to that extent,⁴³¹ and the owner may recognize the transferee as tenant and so create a new tenancy at will.⁴³²

(5) **By special limitation.** We have previously spoken of the cases in which a tenancy for life or years may by force of an express limitation come to an end upon the happening of some contingency before the expiration of the life or term named, such a limitation being known as a "special" or "conditional" limitation.⁴³³ Under the common-law doctrine that a tenancy at will is terminable immediately at the will of the landlord, a special limitation in connection with such a tenancy would have

⁴²⁸ *Groustra v. Bourges*, 141 Mass. 7, 4 N. E. 623.

⁴²⁹ *Co. Litt.* 57 a, and *Hargrave's* note; *Birch v. Wright*, 1 Term R. 378; *Pinhorn v. Souster*, 8 Exch. 763; *Reckhow v. Schanck*, 43 N. Y. 448; *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 81; *Dean v. Comstock*, 32 Ill. 173; *Cooper v. Adams*, 60 Mass. (6 Cush.) 87; *Cunningham v. Holton*, 55 Me. 33; *Doak v. Donelson's Lessee*, 10 Tenn. (2 Yerg.) 249, 24 Am. Dec. 485; *Austin v. Thomson*, 45 N. H. 117.

⁴³⁰ *Carpenter v. Colins*, Yel. 73; *Pinhorn v. Souster*, 8 Exch. 763.

⁴³¹ *Holbrook v. Young*, 108 Mass. 85; *Meier v. Thiemann*, 15 Mo. App. 307. In the former of these cases the tenant at will was held liable as

lessor on the covenant for quiet enjoyment in a lease made by him to another.

⁴³² *Landon v. Townsend*, 129 N. Y. 166, 29 N. E. 71. Where the owner brought suit for use and occupation against the tenant's transferee, it was held that it was a question for the jury whether this made the latter his tenant. *Cunningham v. Holton*, 55 Me. 33; *Austin v. Thomson*, 45 N. H. 117. So it was held to be a question for the jury on the evidence whether the owner recognized the original tenant's assignee as tenant by sending to the original tenant a notice of increase of rent addressed by name to him "or the present occupant." *King v. Lawson*, 98 Mass. 309.

⁴³³ See ante, § 12 d.

been almost useless, and the possibility of its presence in that connection appears never to have been suggested. Such a provision, however, may become of importance when the statute requires a notice to terminate the tenancy, and it has been held to be effective for this purpose, although the statutory notice is not given.⁴³⁴ The fact that the rent under a tenancy at will is payable in advance does not create a special limitation terminating the tenancy on nonpayment.⁴³⁵

(6) **Tenant's rights on termination.** Not only has the tenant at will, upon the termination of the tenancy otherwise than by his own act, the right to emblements,⁴³⁶ but he also has the right for a reasonable time to enter to remove his goods from the premises.⁴³⁷ If he fails to remove his goods within a reasonable time, the landlord may, it has been held, remove the goods and store them subject to the tenant's order, in which case they are at the latter's risk.⁴³⁸

c. **Nature of the tenant's interest.** Though a tenant at will has no interest which he can transfer to another, and though in some jurisdictions he holds entirely at the will of the landlord, he nevertheless has, it seems, what may be called an "estate," since he has not only the possession, but as against third persons the right of possession, which he may assert by an action of trespass, or, it seems, an action of ejectment.⁴³⁹ That he has an estate is assumed by the standard writers.^{440, 441}

⁴³⁴ Ashley v. Warner, 77 Mass. (11 Gray) 43 (tenancy at will "so long as the tenant keeps a good school").

In McGee v. Gibson, 40 Ky. (1 B. Mon.) 105, an employe was held to be a tenant at will of the house occupied by him; the tenancy to expire with his employment. In Goodenow v. Allen, 68 Mé. 308, the question is not decided whether the statute requiring notice precludes the termination of the tenancy by such a clause.

⁴³⁵ Sprague v. Quinn, 108 Mass. 553, following Elliott v. Stone, 66 Mass. (12 Cush.) 174, and distinguishing Elliott v. Stone, 67 Mass. (1 Gray) 571.

⁴³⁶ See post, § 251.

⁴³⁷ Litt. § 69; Cornish v. Stubbs, L. R. 5 C. P. 334; Moore v. Boyd, 24 Me. 242; Ellis v. Paige, 18 Mass. (1 Pick.) 43; Clark v. Wheelock, 99 Mass. 14; Leavitt v. Leavitt, 47 N. H. 329; Payton v. Sherburne, 15 R. I. 213, 2 Atl. 300; Amsden v. Blaisdell, 60 Vt. 386, 15 Atl. 332.

⁴³⁸ Lash v. Ames, 171 Mass. 487, 50 N. E. 996. See post, § 255 b.

⁴³⁹ See post, chapter XXXIII.

^{440, 441} See e. g., 2 Blackst. Comm. 145; 1 Cruise's Dig. tit. 9, c. 1, § 2; Williams, Real Prop. (18th Ed.) 434. So Coke, in speaking of tenancy at will, refers to "the estate of the lessee." Co. Litt. 55 a.

§ 14. Periodic tenancies.

a. **General considerations.** The expression "periodic tenancy" is a convenient designation for all tenancies which are in their nature such as will endure for a certain period, and will continue for subsequent successive periods of the same length, unless terminated by due notice, at the end either of the first period or of one of the succeeding periods. The typical tenancy of this character is that from "year to year," but the essential qualities of a tenancy from "quarter to quarter," "from month to month," or "from week to week," are the same.

Such a tenancy is occasionally spoken of as a "yearly," "quarterly," "monthly," or "weekly" tenancy, or as a tenancy "by the" year, quarter, month or week. These expressions can, however, not be regarded as technically accurate, and are to be avoided as tending to confuse such a tenancy with a tenancy for years, which will continue for the period named, whether one or more years, a quarter, a month, or a week. In New York, for instance, the expression "monthly tenancy" has been applied by the courts sometimes to a periodic tenancy measured by the month, and sometimes to a tenancy for the term of a month.⁴⁴² The use of this ambiguous expression "monthly tenancy" has contributed to confuse the law in that state with reference to periodic tenancies measured by the month.⁴⁴³

In some states a tenancy apparently such as is ordinarily referred to as a tenancy from year to year is referred to as a "tenancy at will from year to year," or less frequently as a

⁴⁴² See, for instance, *Douglass v. month* was held to constitute a hiring "for the month" in *Fash v. Kav-Suppl. 289*; *Olson v. Schevlovitz*, 91 App. Div. 405, 86 N. Y. Supp. 834; *Judge McAdam*, who has written with especial reference to the law of that state, uses the expressions "yearly" and "monthly" to cover tenancies for a year and for a month, as well as tenancies from year to year and from month to month. See *McAdam, Landl. & Ten.* (3d Ed.) §§ 38-40.

(semble); *Bent v. Renken*, 86 N. Y. Supp. 110. And so a hiring "by the" ⁴⁴³ See post, § 14 c (1), at notes 506, 507.

"tenancy at will,"^{443a} in recognition, it would seem, of the fact that either party may terminate it at his will at the end of any year by giving the previous legal notice. The expression "tenancy at will from month to month" is also to be found.^{443b} Occasionally, a periodic tenancy has been regarded as within a provision of a statute referring in terms to a "tenancy at will."⁴⁴⁴ Occasionally, while applying the term tenancy at will to both classes of tenancies, that is, what we have previously discussed under the name of tenancy at will and also what we are now discussing under the name of tenancy from year to year, courts or text writers have undertaken to distinguish between the two by calling the first "strict" tenancy at will and the second "general" tenancy at will.⁴⁴⁵ While the first appellation is not inappropriate, it emphasizing the fact that this tenancy is "strictly" in accordance with the common-law conception of a tenancy at will, the term "general" as applied to a periodic tenancy seems in no way suggestive of the peculiar characteristics of such a tenancy. It was probably adopted from the expressions of the courts that such a tenancy arose in the case of a "general letting," that is when there was no specification of the duration of the tenancy.⁴⁴⁶

As stated elsewhere, it has been recognized from an early period that a tenant at will has the right, after the termination of

^{443a} *Currier v. Perley*, 24 N. H. 219; *Perry v. Carr*, 44 N. H. 118; *Leavitt v. Leavitt*, 47 N. H. 329; *Holmes v. Wood*, 88 Mich. 435, 50 N. W. 323; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146; *Blanchard v. Bowers*, 67 Vt. 403, 31 Atl. 848. See *Prouty v. Prouty*, 5 How. Pr. (N. Y.) 81, 3 Code R. 161; *Park v. Castle*, 19 How. Pr. (N. Y.) 29.

^{443b} *Prendergast v. Searle*, 74 Minn. 333, 77 N. W. 231; *Blair v. Mason*, 64 N. H. 487, 13 Atl. 871. See *Haines v. Beach*, 90 Mich. 563, 51 N. W. 644.

⁴⁴⁴ So it has been held that where the statute divides estates into those of inheritance, for life, for years, at will, and by sufferance, an estate from year to year or from month to month is to be regarded as included in "estate at will." *Hunter v. Frost*, 47 Minn. 1, 49 N. W. 327; *Hilsendegen v. Scheich*, 55 Mich. 468, 21 N. W. 894. And a tenancy from year to year was held to be terminable by the notice prescribed for a tenancy at will, no notice for a tenancy from year to year being named in the statute. *Rosenblatt v. Perkins*, 18 Or. 156, 22 Pac. 598, 6 L. R. A. 257.

⁴⁴⁵ See e. g., *Taylor, Landl. & Ten.* § 60; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146.

⁴⁴⁶ See post, § 14 b (2).

⁴⁴⁴ So it has been held that where the statute divides estates into those of inheritance, for life, for years, at

the tenancy, to crops planted by him, and that he may enter freely for the purpose of their cultivation and removal. This privilege, in the case of land covered with crops, in effect gave the use of the land to the tenant until the maturity of the crop, although the tenancy had been terminated by the landlord at a time considerably previous, and during this period the tenant, though thus enjoying the use of the land, was not, it seems, liable to rent. On the other hand, the liability of the tenant to be deprived of all rights of occupancy other than the growing of his crops, and presumably the difficulties attending the cultivation of crops on land the nominal possession of which was in another, rendered a tenancy terminable at the landlord's will an unsatisfactory class of holding. It was, perhaps, considerations such as these which first induced the recognition by the courts of tenancies from year to year, terminable at the will of the landlord or tenant at the end of any year. The earlier authorities bearing upon the subject of such tenancies are scanty and somewhat obscure.⁴⁴⁷

The other classes of periodic tenancies are, no doubt, of later origin than the tenancies from year to year, and are merely a development therefrom as a result of the application of the prin-

⁴⁴⁷ Bracton (f 168) speaks of "a tenant at will from day to day or from year to year," without stating the character of such a tenancy.

As late as the reign of Henry the eighth, the meaning of the expression "from year to year, as the parties please," was the subject of question. Fitzherbert and Brooke, JJ., apparently regarding it as creating merely a lease at will, and Brudenell, J., and Pollard, C. J., regarding it as creating a tenancy for each year if the land was occupied for any part of such year. Potkin's Case, Y. B. 14 Hen. 8, 10 (A. D. 1523). In Anonymous, Keilw. 65, pl. 6 (20 Hen. 7, A. D. 1505), the question was whether a lessee under a lease "from year to year at the will of the lessor" could terminate the tenancy at his own will, and Frowike, C. J., ex-

pressed the view that the lessor alone could terminate it, but that "the will of the lessor" should have a reasonable construction. In Anonymous, Keilw. 163, pl. 5 (3 Hen. 8, A. D. 1512), it was said that under such a lease, if the lessor permitted the lessee to enter upon the second year without notifying him "of his will," the tenant could occupy for that year. In Bro. Abr., Lease, pl. 53, it is said: "A man leases for a year and so from year to year at the will of the parties, or so long as both parties please; then when one year is passed and another year commenced, the lessor shall not oust the lessee until the second year be finished, and the lessee shall have notice to quit for half a year before the end of the year; and the same notice upon a lease at will, it seems."

ciples governing the latter tenancy to closely analagous circumstances.

A tenancy from year to year does not come to an end and recommence with each year, but the tenant has an interest for one year certain with a growing interest during every year thereafter springing out of the original demise.⁴⁴⁸ In other words, after the beginning of any subsequent year, or indeed after the expiration of that part of the current year in which notice to terminate must be given, the subsequent year or years are to be considered a part of the original term, though in the beginning it was uncertain whether the tenancy would so long continue.⁴⁴⁹ The same principle applies to any other periodic tenancy, such as one from month to month or week to week.⁴⁵⁰ This principle has consequences of considerable importance. For instance, if the tenancy were to be regarded as commencing anew at the beginning of each subsequent period, the landlord would, under a rule hereafter referred to,⁴⁵¹ be liable for injuries caused by

⁴⁴⁸ *Cattley v. Arnold*, 1 Johns & H. 651; *Gandy v. Jubber*, 9 Best & S. 15; *Pugley v. Aiken*, 11 N. Y. (1 Kern.) 494. ated at the end of the first year. (See *Doe d. Clarke v. Smaridge*, 7 Q. B. 957; *Fox v. Nathans*, 32 Conn. 351; *Walley v. Radcliff*, 11 Wend. [N. Y.] 22). The oversight in this respect is noticed in *Wright v. Tracey*, 8 Ir. R. C. L. 478, where the nature of the tenancy in question is elaborately discussed.

⁴⁴⁹ *Preston, Conveyancing*, 76, 77.

"The true nature of such a tenancy is that it is a lease for two (sic) years certain, and that every year after it is a springing interest arising upon the first contract and parcel of it, so that if the lessee occupies for a number of years, these years by computation from the time past, make an entire lease for so many years, and that after the commencement of each new year it becomes an entire lease certain for the years past, and also for the year so entered on, and that it is not a reletting at the commencement of the third (sic) and subsequent years." *Gandy v. Jubber*, 9 Best & S. 15. This statement is, however, erroneous in the use of the word "two," since a tenancy from year to year can unquestionably be termin-

⁴⁵⁰ *Bowen v. Anderson* [1894] 1 Q. B. 164, overruling *Sandford v. Clarke*, 21 Q. B. Div. 398; *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956. The decisions to the contrary in *Borman v. Sandgren*, 37 Ill. App. 160; *Griffith v. Lewis*, 17 Mo. App. 605, are based on *Gandy v. Jubber*, 5 Best & S. 78, and make no reference to the opinion on appeal in that case (9 Best & S. 15), in which a contrary view is taken. The above Illinois case is followed in *Donk Bros. Coal Co. v. Leavitt*, 109 Ill. App. 385. See post, § 106.

⁴⁵¹ See post, § 101.

defects in the premises existing at the beginning of such new period.⁴⁵² Furthermore, the landlord has in any year a right to distrain for the rent of a previous year, since the tenant still holds under the same demise.⁴⁵³ And either the landlord or the tenant may declare on the demise as having been made for the number of years which have elapsed since it was made.⁴⁵⁴ On the same principle it was decided that where one who had made a demise from year to year died, leaving the premises to a person for life with remainder over, the leasehold interest, during such life estate, was to be regarded as created by the testator and not by the life tenant, and consequently did not terminate on his death.⁴⁵⁵

b. **When a periodic tenancy arises—(1) Under express limitation.** As above remarked, the typical form of periodic tenancy is a tenancy from year to year, and the principles which govern in the creation of such a tenancy control also in the creation of the other classes of periodic tenancies. In view of this consideration and for the sake of convenience, we will here discuss the mode of creation of a tenancy from year to year, such discussion being applicable in substance as well to the other classes of periodic tenancies, and we will subsequently state briefly the law as to the creation of quarterly, monthly, and weekly tenancies.

A tenancy from year to year, like any other tenancy, may be created by a lease or demise expressly limiting an estate of that duration.⁴⁵⁶

A lease may be made for a fixed term, to be followed by a

⁴⁵² *Bowen v. Anderson* [1894] 1 Q. B. 164; *Gandy v. Jubber*, 9 Best & S. 15. In *Morris v. Healy Lumber Co.*, 46 Wash. 686, 91 Pac. 186, a lease for a period of one year, and so on

⁴⁵³ *Legg v. Strudwick*, 2 Salk. 414. from year to year until terminated

⁴⁵⁴ *Birch v. Wright*, 1 Term R. 380; *Cattley v. Arnold*, 1 Johns. & H. 651. by notice from the lessee at the end of the first or any subsequent year.

⁴⁵⁵ *Cattley v. Arnold*, 1 Johns. & H. 651. appears not to have been regarded as creating a tenancy from year to

⁴⁵⁶ *Jones v. Nixon*, 1 Hurl. & C. 48; *Fox v. Nathans*, 32 Conn. 351; *Dix v. Atkins*, 130 Mass. 171; *Brady v. Flint*, 23 Neb. 785; *Finkelstein v. Herson*, 55 N. J. Law, 217, 26 Atl. 688. year. What character of tenancy it did create is not stated. The lessee having an interest to endure so long as he desired, he had, it would seem, at least an estate for life, provided the instrument was properly execut-

periodic tenancy. For instance, there may be a demise for one year certain, and so on from year to year, and this will create a tenancy for two years at the least.⁴⁵⁷ And a tenancy "for six months and so on for six months to six months, until" determined by either party, has been held to be one for twelve months at least.⁴⁵⁸ A lease for several years, with a provision that if notice be not given at the end of that time it should be considered a lease from year to year until terminated by notice, was regarded as valid.⁴⁵⁹ But a mere provision that after the term of one year created by the lease had expired the lessee was to "have the preference each succeeding year thereafter" did not create a tenancy from year to year.⁴⁶⁰

Occasionally a demise has been construed as creating not a tenancy for a year, continuing from year to year, the ordinary form of tenancy from year to year, but rather a tenancy for two years at least, to be followed by a tenancy from year to year if not terminated by notice at the end of such two years. This construction has been placed upon a lease of land to hold "not for one year only, but from year to year,"⁴⁶¹ and likewise on one for one year and so on from year to year.⁴⁶² In regard to a lease in the latter form, however, some of the older English authorities take a different view, regarding it as creating an ordinary tenancy from year to year,⁴⁶³ and this latter view has

ed for the creation of a freehold estate.

⁴⁵⁷ Doe d. Chadborn v. Green, 9 Adol. & E. 658; Doe d. Monk v. Gec-
kie, 5 Q. B. 841. So there may a lease
for one year "with the privilege of
continuing the same from year to
year." Hetfield v. Lawton, 108 App.
Div. 113, 95 N. Y. Supp. 451.

That a lease for a term contains a
clause providing that if the lessee
continues in possession thereafter
he shall hold as tenant from year
to year does not give him the option
to hold as such during the term.
MacGregor v. Rawle, 57 Pa. 184.

⁴⁵⁸ Reg. v. Inhabitants of Chawton,
1 Q. B. 247.

⁴⁵⁹ Brown v. Trumper, 26 Beav. 11.

And see Jones v. Nixon, 1 Hurl. & C.
48; B. Roth Tool Co. v. Champ
Spring Co., 93 Mo. App. 530, 67 S.
W. 967.

⁴⁶⁰ Crawford v. Morris, 5 Grat.
(Va.) 90.

⁴⁶¹ Denn d. Jacklin v. Cartright, 4
East, 29.

⁴⁶² Doe d. Chadbourn v. Green, 9
Adol. & E. 658; Reg. v. Inhabitants
of Chawton, 1 Q. B. 247. See Cannon
Brewery Co. v. Nash, 77 Law T. (N.
S.) 648.

⁴⁶³ Some of the old cases favor the
idea that a lease in such form con-
fers a term for three years. Potkin's
Case, Y. B. 14 Hen. 8, 10, pl. 6;
Bishop of Bath's Case, 6 Coke, 35 b
(dictum); Anonymous, Winch, 32;

been adopted in at least one state in this country.⁴⁶⁴ A lease from year to year "so long as both parties agree" does not create a tenancy necessarily lasting more than a year,⁴⁶⁵ nor is an intention to that effect shown by references in the lease to "the last year," or "the last half year," these merely showing a recognition by the parties of the possibility of the continuance of the tenancy beyond a year.⁴⁶⁶

There is a decision in this country, rendered without discussion and without any characterization of the tenancy, that a demise for one year with a provision that the lessees "is to have the said farm from year to year as long as the said farm is to be let" created a tenancy terminable by the lessor at the end of the first year, provided he no longer desired to lease, though he could not then terminate it for the purpose of leasing to another.⁴⁶⁷

(2) **By inference on general letting—(a) From payment of periodic rent.** A tenancy from year to year, though it may be created by express language, more frequently arises upon a letting with no limitation as to the duration of the tenancy, that is, a mere grant of permission to take possession followed by the payment and acceptance of a yearly rent. What would otherwise be a tenancy at will thus takes effect as a tenancy from

Costrike v. Mason, 2 Keb. 543; *Panton v. Isham*, 3 Lev. 359. On the other hand, Chief Justice Holt, in a number of decisions, expressed the opinion that such a lease was a demise for one year only if terminated at that time by either party, that is, that it was an ordinary demise from year to year. *Stonfil v. Hicks*, 2 Salk. 413, Holt, 414; *Leighton v. Theed*, 1 Ld. Raym. 707; *Dod v. Monger*, 6 Mod. 215, Holt, 416. And the same opinion is apparently expressed by Lord Kenyon in *Goodright v. Richardson*, 3 Term R. 462. The authorities, other than those above cited, upholding the view that such a lease creates an estate for two years certain and then from year to year, are *Agard v. King*, Cro.

Eliz. 775; *Lutterel v. Weston*, Cro. Jac. 308; *Belasyse v. Burbridge*, 1 Lutw. 74 (folio 213), 1 Ld. Raym. 170; *Stanfill v. Hickes*, 1 Ld. Raym. 280, 2 Salk. 413; *Denn d. Jacklin v. Cartright*, 4 East, 31 (dictum). The cases are reviewed and discussed at length in 1 Platt, Leases, 658. And see the references in Bac. Abr., Leases (L) 3.

⁴⁶⁴ *Lesley v. Randolph*, 4 Rawle (Pa.) 123, where Kennedy, J., reviews the authorities.

⁴⁶⁵ *Doe d. Clarke v. Smaridge*, 7 Q. B. 957; *Fox v. Nathans*, 32 Conn. 348; Bac. Abr., Leases (L) 3.

⁴⁶⁶ *Doe d. Plumer v. Mainby*, 10 Q. B. 472.

⁴⁶⁷ *Walley v. Radcliff*, 11 Wend. (N. Y.) 22.

year to year if the tenant pays a yearly rent, the theory being that such a payment by him and its acceptance by the owner shows an intention to create a tenancy of the latter character.⁴⁶⁸ The payment of rent must, in order to give rise to an inference of an intention to create a tenancy from year to year, be "with reference to a yearly holding," as it is expressed, by which is meant that it must be paid as rent for a year or as a part of rent computed by the year, and if paid not with reference to a yearly holding, or to a holding for some other period, the tenancy is at will.⁴⁶⁹

As above stated, the theory of the creation of a periodic tenancy by the payment and receipt of rent is that it shows an intention to create such a tenancy. But it is evidence merely of intention, and though stated to be conclusive in that regard

⁴⁶⁸ *Doe d. Martin v. Watts*, 7 Term R. 85; *Chapman v. Towner*, 6 Mees. & Supp. 973.

W. 100; *Arden v. Sullivan*, 14 Q. B. 832; *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289; *Judd v. Fairs*, 53 Mich. 518, 19 N. W. 266; *Tiernan v. Johnson*, 7 Mo. 43; *Lesley v. Randolph*, 4 Rawle (Pa.) 123; *Hey v. McGrath*, 81* Pa. 310; *Woelpper v. City of Philadelphia*, 38 Pa. 203; *Silsby v. Allen*, 43 Vt. 172; *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615; *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; *Beloit Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501, 34 N. W. 514.

So a tenancy from year to year may be created by an occupancy under an agreement for a lease, accompanied by payment of rent. *Hamerton v. Stead*, 3 Barn. & C. 478, 483; *Cox v. Bent*, 5 Bing. 185; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597.

When, after a surrender by the tenant, the landlord collected rent from the subtenant through another person, a new tenancy of a periodic character was regarded as

arising. *Simmons v. Pope*, 84 N. Y. Supp. 973.

⁴⁶⁹ *Braythwaite v. Hitchcock*, 10 Mees. & W. 494; *Richardson v. Langridge*, 4 Taunt. 128, *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615; *Sheldon v. Davey*, 42 Vt. 637; *Johnson v. Johnson*, 13 R. I. 467; *Lyons v. Philadelphia & R. R. Co.*, 209 Pa. 550, 58 Atl. 924. So it was held that there was no tenancy from year to year when the tenant merely paid a certain amount on the square foot of slate extracted, without reference to a year or any other period. *Sheldon v. Davey*, 42 Vt. 637.

In *Amsden v. Floyd*, 60 Vt. 386, 15 Atl. 332, it is said that "it is clear that in order to convert a tenancy at will into one from year to year an occupation for the second year must at least be entered upon." No authorities are cited for this statement, and though it accords with occasional suggestions made with reference to a holding under a lease invalid because not in writing (post, § 25 g (1) note 417), it finds no support in the authorities generally. The tenancy in this par-

in the absence of evidence to the contrary,⁴⁷⁰ the tenancy remains at will if it is shown that the parties did not intend thereby to create a tenancy from year to year or other periodic holding.⁴⁷¹ Evidence of a gross disparity between the rent actually paid and the annual value of the property has been regarded as sufficient to rebut the presumption of a tenancy from year to year.⁴⁷²

In order that the existence of a tenancy from year to year or other periodic tenancy be inferred from the payment and receipt of a yearly or other periodic rent, the rent need not be paid in money, but may be paid in services or supplies,⁴⁷³ and there need not even be any actual payment of rent, it being sufficient that the tenant is by his consent charged with a certain amount as being a portion of a year's rent.⁴⁷⁴

Attention has previously been called to decisions that a formal demise not naming the duration of the tenancy creates a tenancy at will,⁴⁷⁵ and, conceding this to be the case, a holding under

titular case would seem to have been from month to month, a monthly rent having been paid.

⁴⁷⁰ *Bishop v. Howard*, 2 Barn. & C. 100. It is a question for the jury. *Finlay v. Bristol & E. R. Co.*, 7 Exch. 409; *Jones v. Shears*, 4 Adol. & E. 832; *Johnson v. Foreman*, 40 Ill. App. 456; *Lyons v. Philadelphia & R. R. Co.*, 209 Pa. 550, 58 Atl. 924.

⁴⁷¹ *Doe d. Dixie v. Davies*, 7 Exch. 89; *Doe d. Bastow v. Cox*, 11 Q. B. 122; *Doe d. Lord v. Crago*, 6 C. B. 90; *Prisley v. Presbyterian Hospital*, 70 Neb. 353, 97 N. W. 475, 113 Am. St. Rep. 788; *Waring v. Louisville & N. R. Co.*, 19 Fed. 863; *Johnson v. Foreman*, 40 Ill. App. 456; *Say v. Stoddard*, 27 Ohio St. 478.

In New York it was held that where a tenant remained in possession eleven years, paying rent monthly, receipts for rent given to her by previous owners of the premises, which receipts stated that she was tenant for a month only, and

conversations with former agents, were admissible in her favor to show that the tenancy was originally by the month, and so continued. *Schloss v. Huber*, 21 Misc. 28, 46 N. Y. Supp. 921. And to show that the tenant did not hold merely from month to month, evidence was admitted in his behalf to the effect that the landlord required him to make repairs and to pay taxes, which it was not the duty of such a tenant to do. *Cohen v. Green*, 21 Misc. 334, 47 N. Y. Supp. 136. See, however, post, notes 506, 507, as to the New York decisions.

⁴⁷² *Roe d. Brune v. Prideaux*, 10 East, 158; *Denn d. Brune v. Rawlins*, 10 East, 261; *Smith v. Widlake*, 3 C. P. Div. 10.

⁴⁷³ *Doe d. Tucker v. Morse*, 1 Barn. & Adol. 365; *Thomas v. Wright*, 9 Serg. & R. (Pa.) 87.

⁴⁷⁴ *Cox v. Bent*, 5 Bing. 185.

⁴⁷⁵ See ante, § 13 a (4).

such a demise, if accompanied by the payment of annual (or other periodic) rent, would become a tenancy from year to year (or from other period to period).⁴⁷⁶ But, as before remarked, it is most doubtful whether a tenancy at will is properly created by such a demise for an indefinite time, if it is sufficient in point of execution to convey a life or greater estate, and the same may be said as regards the inference of a tenancy from year to year from the payment of rent in such a case.⁴⁷⁷

The most frequent case of a tenancy from year to year is that of a holding under a lease which fails to comply with the statute of frauds, the tenancy at will, which would otherwise exist in such case, becoming a tenancy from year to year by reason of the payment of an annual rent.⁴⁷⁸ It may also occur when one enters and pays an annual rent under a lease which is invalid on other grounds.⁴⁷⁹

In Maine and Massachusetts, by the construction of the statutes there in force providing that a lease not in writing shall have the effect of a lease at will only, a tenancy from year to year or other periodic tenancy does not arise from the payment and acceptance of a yearly or other periodic rent, but the tenancy remains one at will.⁴⁸⁰ But even in those jurisdictions

⁴⁷⁶ *Ridgeley v. Stillwell*, 25 Mo. Grath, 81* Pa. 310, it was clearly decided, without any discussion how-
570; *Lesley v. Randolph*, 4 Rawle ever, that a sealed lease not nam-
(Pa.) 123; *Garrett v. Clark*, 5 Or. ing any particular period, reserving
464; *Holmes v. Wood*, 88 Mich. 435, an annual rent, created a tenancy
50 N. W. 323. from year to year, and not for life.

⁴⁷⁷ See *Kusel v. Watson*, 11 Ch. Div. 129; *Doe d. Warner v. Browne*,
8 East, 165. In the latter case, the
lease being sufficient in point of ex-
ecution to convey a freehold estate,
and not specifying any estate, but
stating that the tenancy should not
be terminated so long as the lessee
paid rent, it was apparently regard-
ed as creating a life estate. See,
also, *Holmes v. Day*, 8 Ir. R. C. L.
235, where the court divided equal-
ly on the question whether a life
estate or an estate from year to
year was created. In *Hey v. Mc-*

⁴⁷⁸ See post, § 25 g (1).

⁴⁷⁹ *Lockwood v. Lockwood*, 22
Conn. 425; *Tiernan v. Johnson*, 7 Mo.
43; *Farley v. McKeegan*, 48 Neb. 237,
67 N. W. 161; *Kernochan v. Wilkens*,
3 App. Div. 596, 38 N. Y. Supp. 236.

⁴⁸⁰ *Ellis v. Paige*, 18 Mass. (1
Pick.) 43; *Davis v. Thompson*, 13
Me. 209, 214; *Wheeler v. Wood*, 25
Me. 287; *Withers v. Larrabee*, 48 Me.
570; *Thomas v. Sanford S. S. Co.*,
71 Me. 548; *Sprague v. Quinn*, 108
Mass. 553; *Lyon v. Cunningham*, 136
Mass. 532, 540. See post, § 25 g (1).

a periodic tenancy may be created by express provision to that effect.⁴⁸¹

(b) **From reservation of periodic rent.** The reservation of a periodic rent may be as effective as the actual payment of such a rent to create a periodic tenancy,⁴⁸² though ordinarily the reservation is accompanied by one or more payments. The presumption of a periodic tenancy, in case of the reservation of a periodic rent, may be rebutted by other language in the instrument of demise showing a contrary intention,⁴⁸³ and such effect has been given to a provision that the tenancy should continue so long as both parties agree thereto.⁴⁸⁴ Obviously, the reservation of such a rent has no effect if the duration of the tenancy is validly specified, as when there is a written lease for years.

Occasionally a state statute provides expressly that the reservation of a periodic rent shall create a periodic tenancy.⁴⁸⁵

(c) **Not from general letting alone.** There are statements to be found to the effect that a general holding, that is, a holding for no specified time, creates a tenancy from year to year with-

⁴⁸¹ *Dix v. Atkins*, 130 Mass. 171.

was in effect a lease at a yearly rent for this purpose.

⁴⁸² 1 Platt, Leases, 653; *Roe d.*

⁴⁸³ *Doe d. King v. Grafton*, 18 Q. B. 496.

Bree v. Lees, 2 W. Bl. 1173; *Richardson v. Langridge*, 4 Taunt. 128; *Doe*

d. Hull v. Wood, 14 Mees. & W. 682;

⁴⁸⁴ *Say v. Stoddard*, 27 Ohio St. 478.

Doe d. Patton v. Axley, 50 N. C. (5

Jones Law) 440; *Williams v. Apothecaries Hall Co.*, 80 Conn. 503, 69

Atl. 12; *Hey v. McGrath*, 81* Pa.

310; *Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501, 34 N. W. 514;

Ridgely v. Stillwell, 25 Mo. 570;

Jackson v. Bradt, 2 Caines (N. Y.)

169; *Lesley v. Randolph*, 4 Rawle

(Pa.) 123; *Rich v. Bolton*, 46 Vt. 84,

14 Am. Rep. 615. But in *Benfey v.*

Congdon, 40 Mich. 283, it is said

that a lease not naming a term, at

a stipulated annual rent, makes a

lease for no more than one year.

In *Davis v. McKinnon*, 31 U. C.

Q. B. 564, it was held that a lease

made in consideration of the lessee's

agreement to pay the yearly taxes

⁴⁸⁵ 1 Kan. Gen. St. 1905, § 4053, provides that when rent is reserved, payable at intervals of three months or less, the tenant shall be deemed to hold from one period to another equal to the interval between the days of payment, unless there is an express notice to the contrary.

Ball Ann. Codes & St. Wash. 1897, § 4569, provides that when premises are rented for an indefinite time, with monthly or other periodic rent reserved, the tenancy shall be construed to be from month to month or from period to period. But section 4568 purports to abolish tenancy from year to year except when

out reference to whether there is the reservation of an annual rent or whether there are circumstances to show a tenancy from year to year, in other words, that tenancy from year to year has entirely superseded tenancy at will.⁴⁸⁶ This may be the law in some few jurisdictions, but ordinarily, as we have seen, tenancies at will are still fully recognized.⁴⁸⁷

The view above referred to, that a tenancy from year to year arises upon a general letting without more, seems to have first obtained currency in England in the latter half of the eighteenth century, when the general doctrine of tenancies from year to year arising otherwise than by express limitation apparently first originated.⁴⁸⁸ Blackstone, however, writing in 1765, says merely that "courts of law have of late years learned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please,

created by express written contract. It does not appear what class of tenancy would be created by a lease for an indefinite time, reserving a yearly rent.

⁴⁸⁶ *Parker v. Constable*, 3 Wils. 25; *Timmins v. Rowlinson*, 3 Burrow, 1609; *Jackson v. Bryan*, 1 Johns. (N. Y.) 322; *Phillips v. Covert*, 7 Johns. (N. Y.) 1; *Sullivan v. Enders*, 33 Ky. (3 Dana) 66; *Den d. McEowen v. Drake*, 14 N. J. Law (2 J. S. Green) 523; *Clark v. Smith*, 25 Pa. 137; *Larkin v. Avery*, 23 Conn. 304 (semble).

⁴⁸⁷ See ante, § 13. And see *Den d. Stedman v. McIntosh*, 27 N. C. (5 Ired. Law) 571; *Williams v. Deriar*, 31 Mo. 13; *Johnson v. Johnson*, 13 R. I. 467; *Rich v. Bolton*, 46 Vt. 84, 16 Am. Rep. 615.

In *Richardson v. Langridge*, 4 Taunt. 128, it is said: Surely the distinction has been a thousand times taken. A mere general letting is a letting at will. If the lessor accepts yearly rent, * * *

that is evidence of a taking for a year.

In *Leavitt v. Leavitt*, 47 N. H. 329, it was held that an agreement for a holding without the payment of a periodical rent created, in the particular case, a tenancy "at will from year to year," and not a "strict" tenancy at will. The court, however, fully recognized that "strict" tenancies at will still exist. It does not clearly appear why the tenancy in this case was regarded as from year to year. In this state, under a statute providing that every occupancy creates a tenancy at will unless the contrary is shown (ante, § 13 a (6)), there is a presumption against the existence of a tenancy from year to year in any particular case. *Currier v. Perley*, 24 N. H. 2193; *Hazeltine v. Colburn*, 61 N. H. 466, 471.

⁴⁸⁸ *Parker v. Constable*, 3 Wils. 25 (1769); *Timmins v. Rowlinson*, 3 Burrow, 1603 (1765); *Clayton v. Blakey*, 8 Term R. 3 (1798). See 2 *Preston, Abstracts of Title*, 25.

especially where an annual rent is reserved."⁴⁸⁹ Some thirty years later it was said by a judge of high reputation that "so long ago as the time of the year books it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out of possession without reasonable notice to quit,"⁴⁹⁰ and a statement similar in effect has been made by other distinguished judges.⁴⁹¹ As appears from what we have said above, this does not state the law as it exists at the present day, a general occupation in itself without more not giving rise to a tenancy from year to year, and the year book case cited in support of the statement seems insufficient to justify the view that such was the law at the time referred to.⁴⁹² If any such doctrine was recognized in the time of the year books, it is most singular that it is not mentioned by Coke, and that there is no reference thereto till towards the end of the eighteenth century, that is, during an interval of over two hundred years. It was fully recognized, as before stated, that a "general letting," if not accompanied by formalities sufficient to create a freehold estate, created a tenancy at will,⁴⁹³ and there is during that long period no suggestion that a tenancy

⁴⁸⁹ 2 Blackst. Comm. 147. To the same effect see Co. Litt. 55 a, Hargraves note (anno. 1785).

⁴⁹⁰ Lord Kenyon in *Doe d. Martin v. Watts*, 7 Term R. 85. The year book case referred to is stated in the note to the report to be 13 Hen. 8, 15 b.

⁴⁹¹ Buller, J., in *Right v. Darby*, 1 Term R. 163, and Willes, J., in *Jones v. Mills*, 10 C. B. (N. S.) 788, referring to the same case. See *Larkin v. Avery*, 23 Conn. 304.

⁴⁹² In 2 Smith's Leading Cases (11th Ed.) p. 127, notes to *Clayton v. Blakey* (8 Term R. 3), it is said that the passage in the year book case referred to is the following statement by Willoughby (Wilby): "If the lessor does not give to him notice before the half year, he will justify for another year, and so from year to year." There is no

other passage at the page referred to (13 Hen. 8, 15 b) on which the statement of Lord Kenyon can be based. The printed year book shows the statement to have been made with reference to a lease "for years." This is probably an error of the reporter or of the printer, but there is nothing to suggest that the statement was made with reference to a "general" letting. It is said by Shelly, J., in the same case, that the lease there in question "is not properly a lease at will, but is a lease for a year at will, for after a year, to wit, at the end of a year, he can oust him if he wishes." It may perhaps have been a lease for a year and then from year to year.

⁴⁹³ Litt. § 70; *Blamford v. Blamford*, 3 Bulst. 98; Com. Dig., Estates (H. 1); Bac. Abr., Estates (H 1).

at will so created differed from the other tenancies at will in being terminable only by notice.

There are perhaps two early decisions in this country to the effect that a tenancy at will may by mere lapse of time be converted into a tenancy from year to year,⁴⁹⁴ but these can hardly be regarded as authoritative at the present day, and they are not in harmony with the decisions generally.

In Indiana the statute expressly provides that all "general tenancies," where occupancy is by consent, shall be deemed tenancies from year to year, and requires an express provision to create a tenancy at will.⁴⁹⁵ A Rhode Island statute,⁴⁹⁶ providing that "the time agreed upon in a definite letting shall be the time of the termination thereof for all purposes; and if there be no time of termination agreed upon, it shall be deemed a letting from year to year," was held to apply only when there was a lease which was definite except as regards duration, and not to a mere permissive occupation without any agreement as to terms, a tenancy at will arising in such case.⁴⁹⁷

c. Quarterly, monthly, and weekly tenancies—(1) Apart from statute. A tenancy analogous to that from year to year, and differing therefrom merely in the length of the recurring periods with reference to which it is measured, and consequently in the character of the notice necessary to terminate it may,

⁴⁹⁴ In *Hanchett v. Whitney*, 2 McQuat, 40 Ind. 521; *Swan v. Clark*, Aiken (Vt.) 240, it was decided that one who entered into possession as tenant at will and remained in possession for five years became tenant from year to year, and could not be ousted without notice to quit. And a like view is taken by two judges out of the five in *Jackson v. Bryan*, 1 Johns. (N. Y.) 322, where there had been a possession for twenty years. *Den d. Mackey v. Mackey*, 2 N. J. Law (1 Penning.) 207, is sometimes cited to the same effect, but it is not in point.

⁴⁹⁵ Burns' Ann. St. 1901, § 7089.

By "general tenancies" in the statute is meant those tenancies which are for an indefinite time. *Bright v.*

80 Ind. 57; *Rothschild v. Williamson*, 83 Ind. 387; *Coomler v. Hefner*, 86 Ind. 108. Under the statute, in the absence of any showing of an agreement as to the payment of rent or duration of the term, rent is presumably payable only at the end of each year. *Indianapolis, D. & W. R. Co. v. First Nat. Bank*, 134 Ind. 127, 33 N. E. 679. The tenancy is from year to year, although the rent is reserved at a fixed rate per month. *Elliott v. Stone City Bank*, 4 Ind. App. 155, 30 N. E. 537; *Rothschild v. Williamson*, 83 Ind. 387.

⁴⁹⁶ Gen. Laws 1896, c. 269, § 6.

⁴⁹⁷ *Johnson v. Johnson*, 13 R. I.

467.

as before stated, be created either expressly or as a result of conditions similar to those giving rise to tenancy from year to year. That is, a tenancy from quarter to quarter, from month to month, or from week to week, or indeed from any period to like period, is created *prima facie* by the reservation or payment of rent with reference to such a period, when no period for the duration of the tenancy is named.⁴⁹⁸

The mere fact that rent is paid under a tenancy of undefined duration at intervals of a quarter of a year, of a month, or of a week, does not cause a tenancy measured by corresponding periods to arise, if such payments are merely on account of a yearly rent, that is, it is the character of the rent rather than the time of payment that determines the character of the periodic holding, and such payments of aliquot parts of an annual rent at equal intervals during the year will raise an inference of a tenancy from year to year.⁴⁹⁹ But where there is no evidence as to the terms of the letting, it would seem that the monthly payment of rent should show a letting at a monthly rent, thereby

⁴⁹⁸ *Wilkinson v. Hall*, 3 Bing. N. C. 508; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616; *Sebastian v. Hill*, 51 Ill. App. 272; *Hollis v. Burns*, 100 Pa. 206, 45 Am. Rep. 379; *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289; *Finch v. Moore*, 50 Minn. 116, 52 N. W. 384; *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642; *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 214; *Hoover v. Pacific Oil Co.*, 41 Mo. App. 317; *Hungerford v. Wagoner*, 5 App. Div. 590, 36 N. Y. Supp. 369; *Branton v. O'Briant*, 93 N. C. 99; *Bent v. Renken*, 86 N. Y. Supp. 110; *Klingenstein v. Goldwasser*, 27 Misc. 536, 58 N. Y. Supp. 342.

rule prevailing in most jurisdictions, nor perhaps with the cases of *Finch v. Moore*, 50 Minn. 16, 52 N. W. 384, and *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642.

⁴⁹⁹ *Ridgeley v. Stillwell*, 25 Mo. 570; *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289; *Patton v. Axley*, 50 N. C. (5 Jones Law) 440; *Lesley v. Randolph*, 4 Rawle (Pa.) 123; *Hey v. McGrath*, 81 *Pa. 310; *McKinney v. Peck*, 28 Ill. 174 (semble); *King v. Eversfield* [1897] 2 Q. B. 475.

In *Schloss v. Huber*, 21 Misc. 28, 46 N. Y. Supp. 921, it was decided that the fact that receipts for rent, paid monthly, stated that the letting was by the month, is sufficient evidence to sustain a finding to the effect that such a holding had continued, in the absence of contrary evidence, though later receipts omitted this statement.

In Minnesota it is said that the payment of one month's rent by a tenant "with nothing further said nor done," does not create a tenancy from month to month, but a tenancy for a month. *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454. This is not in accord with the

creating a tenancy from month to month rather than one from year to year.⁵⁰⁰

A tenancy from month to month does not become one from year to year because the tenant remains in possession for one or more years,⁵⁰¹ and the fact that for the convenience of a tenant from month to month the landlord accepts rent quarterly in advance does not in itself change the tenancy into one from quarter to quarter terminable only at the end of a quarter.⁵⁰²

There are occasional decisions to the effect that if one enters during a calendar period, a month or a quarter for instance, and pays rent proportioned to the interval between the day of entry and the end of the period, and thereafter pays rent for each period, his tenancy will, for the purpose of ascertaining the time for termination by notice, be regarded as commencing at the commencement of such period.⁵⁰³

The law in New York state in reference to tenancies from month to month is in considerable confusion. The view which prevails in other jurisdictions, that a tenancy from month to month is *prima facie* created by a letting at a monthly rent for no definite period,⁵⁰⁴ and that it can be terminated only by a month's notice,⁵⁰⁵ is supported by a number of cases.⁵⁰⁶ There

⁵⁰⁰ See *Anderson v. Prindle*, 23 Jones Law) 430; *Hollis v. Burns*, Wend. (N. Y.) 616; *Decker v. Harts-* 100 Pa. 206, 45 Am. Rep. 379.

Steffens v. Earle, 40 N. J. Law, 128, 137, 29 Am. Rep. 214; *Finch v.* ⁵⁰² *London & San Francisco Bank* v. *Curtis*, 27 Wash. 656, 68 Pac. 329.

Moore, 50 Minn. 116, 52 N. W. 384; *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642; *Edmundson v. Pre-* ⁵⁰³ *Doe d. Holcomb v. Johnson*, 6 ville, 12 Colo. App. 73, 54 Pac. 394. *Esp.* 10; *Doe d. Savage v. Stapleton*, 3 Car. & P. 275; *Ver Steeg v. Becker* Moore Paint Co., 106 Mo. App. 257, 80 S. W. 346.

But in Ridgeley v. Stillwell, 25 Mo. ⁵⁰⁴ See ante, at note 498.

570, a contrary view is apparently ⁵⁰⁵ See post, § 196 c.

adopted, and *Waters v. Williamson*, 59 N. J. Law, 337, 36 Atl. 665, seems ⁵⁰⁶ *Anderson v. Prindle*, 23 Wend. (N. Y.) 619; *People v. Darling*, 47 N. Y. 666; *Geiger v. Braun*, 6 Daly (N. Y.) 506; *Wilson v. Taylor*, 8 Daly (N. Y.) 256; *Hoffman v. Van Allen*, 3 Misc. 99, 22 N. Y. Supp. 369; *Klingenstein v. Goldwasser*, 27 Misc. 536, 58 N. Y. Supp. 342; *Hungerford v. Wagoner*, 5 App. Div. 590, 39 N. Y. Supp. 369; *Rybicki v. Kalish*, 58

⁵⁰¹ *Jones v. Willis*, 53 N. C. (8 Misc. 219, 108 N. Y. Supp. 1001.

are other cases, however, which appear irreconcilable with these.⁵⁰⁷

(2) **Under statutes.** In some states there are statutory provisions to the effect that under certain circumstances named a tenancy from month to month shall be regarded as arising,⁵⁰⁸ while in at least two states there are provisions changing the common-law rule by which such a tenancy may arise as a result

⁵⁰⁷ In *People v. Goelet*, 14 Abb. Pr. (N. S.) 130, 64 Barb. (N. Y.) 476, it was decided that a renting of premises "by the month, and from month to month," created a tenancy that, "to be continued, must be renewed monthly," and did not require a month's notice to terminate it. The court speaks of this, nevertheless, as a tenancy "from month to month." In most jurisdictions such a letting would be construed as a tenancy from month to month, which would continue till terminated by notice, presumably of a month. In *Gibbons v. Dayton*, 4 Hun (N. Y.) 453, the court says of a letting for one month only, to expire on the first day of the following month, that "it is very clear that the tenancy was from month to month," and that "neither party was bound to give any notice to terminate the tenancy at the expiration of any month." That no notice was necessary to terminate such a tenancy at the end of the first month is evident, and the tenancy created by holding over this first month would possibly be terminable at the end of any month without notice (see post, § 210 b, note 96), but to call such a tenancy for a term of one month a tenancy "from month to month" is a clear misnomer. As a matter of fact, in this case, there seems to have been a new demise at the beginning of each month by the form of the receipt for rent in advance given and accepted.

In *Ludington v. Garlock*, 29 N. Y. St. Rep. 607, 9 N. Y. Supp. 24, it was thought that, in view of the fact that the monthly rent was paid in advance, so that the landlord was thereby protected, and that the tenant said that he could not move till he got another house, an agreement might be implied that the tenant might move without giving any previous notice, and that at most a reasonable notice could be required, and that what was such a notice was a question of fact. This case, so far as it calls for a "reasonable" notice, is approved in *Thompson v. Chick*, 92 Hun, 510, 72 N. Y. St. Rep. 212, 37 N. Y. Supp. 59. It has also been decided in that state that where the tenant paid one year's rent in advance, and at a subsequent time paid six month's rent in advance, though the rent was fixed at a certain amount per month, the holding was not a "monthly," but a "yearly," one. *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289. See, also, for New York decisions, ante note 442, and post, notes 516, 517. The notice necessary to terminate a tenancy from month to month is now, it seems, fixed by statute, in New York. See post, § 196 c.

⁵⁰⁸ Mo. Rev. St. 1899, § 4110, provides that all contracts for leasing stores, shops, houses, tenements, or other buildings in cities and towns, not in writing, shall be taken to be tenancies from month to month.

of the reservation or payment of a monthly rent.⁵⁰⁹ In Maine and Massachusetts, it would seem, a tenancy from quarter to

This statute was held to apply to the lease of a park of nine acres on which were buildings used for saloons, restaurants, booths and dance halls (Withnell v. Petzold, 104 Mo. 409, 16 S. W. 205), and also to a lease of vacant ground for the erection of a real estate office. Edmonston v. Webb, 119 Mo. App. 679, 94 S. W. 314. It does not apply in the case of a lease of land in a city for agricultural purposes, though it contains a dwelling house, stable and out houses. Kroeger v. Bohrer, 116 Mo. App. 208, 91 S. W. 159. Whether the lessee had taken possession so as to be within the operation of the statute was held to be for the jury, where his servants had made alterations and had cleared the premises, and his name had been placed on the building, but he had not moved in. Pacific Exp. Co. v. Tyler Office Fixture Co., 72 Mo. App. 151. One who took possession under a deed of trust from the lessee, and orally promised the lessor to pay the rent so long as he remained in possession, was held to be within the statute. Koken Iron Works v. Kinealy, 86 Mo. App. 199. And likewise where it was verbally agreed between the parties to a written lease that the lessee should retain possession two weeks after the termination thereof. Smith v. Smith, 62 Mo. App. 596.

In Rhode Island it is provided (Gen. Laws 1896, c. 269, § 6) that in case of a letting at a certain rate per month, without any other reference as to time, the letting shall be deemed from month to month. The rule would be the same apart from statute, it seems. In Washington

Real Estate Co. v. Roger Williams Silver Co., 25 R. I. 483, 56 Atl. 686, a corporation tenant for a year, holding over at a certain monthly rent, sold its personal property to another, who took possession of the premises and paid the same rent monthly on demand of the landlord, and it was held that, not being shown to be an assignee of the former tenant's lease, he held as a tenant from month to month under this statute. The opinion ignores the fact that the original lease for a year had expired long before any change of possession occurred. It appears to have been a simple case of one in permissive possession, paying a monthly rent, thereby becoming a tenant from month to month, and it does not seem that the fact that he originally obtained possession from a former tenant could have affected the character of his tenancy. In J. B. Barnaby Co. v. Johnston, 28 R. I. 105, 65 Atl. 613, it is decided that a statement by the lessor, on making that lease, that the lessee could stay until the lessor wanted the premises, is not a "reference to time," such as to prevent the application of the statute.

In Washington, also, the statute (Ball. Ann. Codes & St. § 4569) provides that a tenancy for an indefinite time, with monthly rent reserved, is a tenancy from month to month. See Schreiner v. Stanton, 26 Wash. 563, 67 Pac. 219.

⁵⁰⁹ In Connecticut the statute (Gen. St. 1902, § 4043) provides that "parol leases of lands or tenements reserving a monthly rent, and in which the time of their termination is not agreed upon, shall be construed to

quarter, from month to month, or from week to week, can exist only when it is expressly so provided.⁵¹⁰

The question whether a statute of the character before referred to,⁵¹¹ by which a certain day in the year is named as the day for the termination of any tenancy the duration of which is not named in the lease, has any application to a tenancy under which a monthly rent is reserved or paid, so as to change the common-law rule by which such a tenancy is one from month to month, is one on which the decisions are somewhat at variance. In Georgia it has been decided that the statute⁵¹² declaring that, where no time is specified for the termination of the tenancy, it shall be regarded as extending to the end of the calendar year, applies to the case of a lease at so much per month so as to end it at the end of the year, even without notice such as would ordinarily be necessary to terminate a leasing from month to month. On the other hand, the statute of New Jersey,⁵¹³ providing that, where no term is agreed upon and the rent is payable monthly, it shall be unlawful to displace the tenant so long as he pays the rent before the first day of April, without giving three months' notice to quit, was held not to apply where

be leases for one month only." At fact, merely until the execution of common law such a lease would be the lease, which would supersede the from month to month. This statute, agreement. See post, § 65. The it was held, did not apply when one statement that there was an "agreed entered under an oral agreement for the making of a lease for several years, since in such case there was an "agreed time of termination," and the tenancy was one at will, which "by implication is held to be a tenancy from year to year." *Corbett v. Cochrane*, 67 Conn. 570, 35 Atl. 509. In view of the reservation of a monthly rent, such a tenancy would, in most jurisdictions, have been regarded as a tenancy from month to month, and not a tenancy from year to year. Furthermore, it is most questionable whether a holding under a mere executory agreement to make a lease for a certain period should be regarded as a holding for an ascertained period, it being in

the lease, which would supersede the agreement. See post, § 65. The statement that there was an "agreed time of termination" is hardly reconcilable with the statement that the tenancy was one at will, becoming a tenancy from year to year. A tenancy having an agreed time of termination is a tenancy for years.

In Indiana, by the construction placed on the statute of that state, the tenancy is from year to year, though rent is reserved at a monthly rate. *Elliott v. Stone City Bank*, 4 Ind. App. 155, 30 N. E. 537; *Rothschild v. Williamson*, 83 Ind. 387. See ante, note 495.

⁵¹⁰ See ante, at notes 480, 481.

⁵¹¹ See ante, 12 c (3) (c).

⁵¹² Code 1895, § 2182.

⁵¹³ 2 N. J. Gen. St. p. 1924.

there was a letting for the "term of one month and month to month thereafter" from a day named.⁵¹⁴ The New York statute,⁵¹⁵ providing that an agreement for the occupation of real property in the city of New York, which shall not particularly specify the duration of the occupation, shall be deemed to continue until the first day of May, has in some cases, apparently, been regarded as inapplicable to a tenancy from month to month.⁵¹⁶ But in others a different view⁵¹⁷ has been asserted.

In several of the Western states a statutory provision is found,⁵¹⁸ authorizing the landlord, in the case of a tenancy from month to month, to change the terms of the tenancy by merely serving on the tenant, fifteen days before the end of any month, a notice to that effect, to take effect at the end of the month. Such a provision does not empower the landlord by notice to change the tenancy into one for a year.⁵¹⁹

⁵¹⁴ *Finkelstein v. Herson*, 55 N. J. Law, 217, 26 Atl. 688.

⁵¹⁵ Real Prop. Law 1896, § 202.

⁵¹⁶ It has been held that this statute does not apply where the tenant enters without any agreement as to terms and pays rent monthly, this creating a tenancy from month to month. *Wilson v. Taylor*, 8 Daly (N. Y.) 253. And the same view was taken where the lease was void, under the statute of frauds, as regards the duration of the tenancy, but a monthly rent was reserved which the lessee paid. *Gilfoyle v. Cahill*, 18 Misc. 68, 41 N. Y. Supp. 29, and so where the leasing was expressly "by the month," *Olson v. Schevlovitz*, 91 App. Div. 405, 86 N. Y. Supp. 834. In *Vernon v. Gilbert*, 30 Misc. 112, 61 N. Y. Supp. 896, it was held that a memorandum for a "monthly" lease from a certain date created a "tenancy by the month," and therefore, as being "for a definite term," it was not within the statute.

⁵¹⁷ In *Spies v. Voss*, 30 N. Y. St. Rep. 548, 9 N. Y. Supp. 532, the holding was regarded as within the stat-

ute, though a monthly rent was agreed on, since there was no duration fixed for the letting. In *Cohen v. Green*, 21 Misc. 334, 47 N. Y. Supp. 136, it is said that the fact that the rent is payable monthly does not conclusively show that the tenancy is from month to month, in view of the statute, but that it is a question of fact whether it is such a tenancy. To apparently the same effect is *Bernstein v. Lightstone*, 36 Misc. 193, 73 N. Y. Supp. 151. *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289, seems to be to the effect that a "monthly" holding is within the statute and that an indefinite holding at a yearly rent is not within the statute. This does not, however, clearly appear. See, also, ante, notes 506, 507.

⁵¹⁸ Cal. Civ. Code, § 827; Idaho Civ. Code, § 2384; Mont. Civ. Code, § 1279; Nev. Comp. Laws 1900, § 3827. See *Dawson v. Cerf*, 4 Cal. App. 272, 87 Pac. 559; *Vatuone v. Cannobio*, 4 Cal. App. 422, 88 Pac. 374.

⁵¹⁹ *Hurd v. Whitsett*, 4 Colo. 77,

d. **Transfer of interest.** A tenancy from year to year, though resembling in some degree a tenancy at will, in that the continuance of the holding beyond the end of any year is dependent on the will of the parties, nevertheless resembles a tenancy for years rather than a tenancy at will, in that it is a tenancy for one year at least. Accordingly, the interest of either the landlord^{519a} or of the tenant⁵²⁰ may be assigned without affecting the existence of the tenancy, and on the death of the tenant his interest passes to his personal representative.⁵²¹ Nor does the death of the landlord terminate the tenancy.⁵²²

Though a tenant from year to year has originally a certain term of one year only, the possibility of its indefinite extension has been held to give him a reversion in case he makes a lease for several years, and one holding under such a sublease is, it seems, to be regarded as a tenant for years, subject only to the possible ending of his term by the termination of his lessor's tenancy from year to year.^{523, 524} And so a tenant from year to year may make a lease from year to year, he having thereafter an estate from year to year in reversion.⁵²⁵

e. **Mode of termination.** While the nature of a periodic tenancy is ordinarily such that it can be terminated only at the end of one of the periods,⁵²⁶ it is possible, it seems, expressly to provide

where the purpose of such a statute is considered.

^{519a} *Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. 510; *Swope v. Hopkins*, 119 Ind. 125, 21 N. E. 462. In *Hemphill v. Giles*, 66 N. C. 512, it seems to be held that a tenant from year to year, attorning to and holding under the assignee of the lessor, is merely a tenant at will to the latter.

⁵²⁰ *Pleasant v. Benson*, 14 East, 234; *Braythwayte v. Hitchcock*, 10 Mees. & W. 494; *Cody v. Quarterman*, 12 Ga. 386 (semble); *Jackson v. Hughes*, 1 Blackf. (Ind.) 421; *Austin v. Thomson*, 45 N. H. 113.

⁵²¹ *Doe d. Shore v. Porter*, 3 Term. R. 13; *Doe d. Hull v. Wood*, 14 Mees. & W. 682; *Mackay v. Mackreth*, 4 Doug. 213; *In re Ring's Estate*, 132 Iowa, 216, 109 N. W. 710; *Pugsley v.*

Aikin, 11 N. Y. (1 Kern.) 494; *Kitchen v. Pridgen*, 48 N. C. (3 Jones Law) 49, 64 Am. Dec. 593. But in *Cody v. Quarterman*, 12 Ga. 386; *Decker v. Hartshorne*, 65 N. J. Law, 87, 46 Atl. 775, it was held, without any citation of authority, that the death of a tenant from year to year terminated the tenancy at the end of the current year.

⁵²² *Cattley v. Arnold*, 1 Johns. & H. 651; *Maddon d. Baker v. White*, 2 Term R. 159; *Botheroyd v. Woolley*, 5 Tyrw. 522.

^{523, 524} *Oxley v. James*, 13 Mees. & W. 209.

⁵²⁵ *Curtis v. Wheeler*, *Moody & M.* 493; *Pike v. Eyre*, 9 Barn. & C. 909.

⁵²⁶ *Lockwood v. Lockwood*, 22 Conn. 425; *Gunn v. Sinclair*, 52 Mo. 327; *Usher v. Moss*, 50 Miss. 208;

for its termination at some other time,⁵²⁷ and it has even been decided that a tenancy from year to year may be made terminable at the will of the landlord.⁵²⁸ In one jurisdiction the rule has been adopted that a tenancy from year to year is terminable, not at the end of one of the periods by which it is measured, but only at the end of a calendar year.⁵²⁹ In another the statute provides that a tenancy from year to year shall terminate at the end of each year without notice.⁵³⁰

The ordinary mode in which such a tenancy comes to an end is by reason of a notice given by one party to the other to the effect that he desires to terminate the tenancy. The essentials of such a notice will be elsewhere considered.⁵³¹

The tenancy is terminated without notice by the expiration of the estate of the person who created the tenancy, so far as the person subsequently entitled is concerned, as where a life tenant after demise from year to year dies.⁵³² It may also be terminated by the making of another demise between the same parties to terminate at a fixed term, that is, a lease for years,⁵³³ this effecting a surrender of the periodic tenancy.⁵³⁴ Or it may be terminated by an express surrender.⁵³⁵ Likewise it may be terminated upon the happening of a particular contingency by reason of a special limitation.⁵³⁶ The tenancy is not terminated by the death of either party,⁵³⁷ nor by his insanity.^{537a}

Brown v. Vanhorn, 1 Bin. (Pa.) 334; longer until a specified period. This
Lesley v. Randolph, 4 Rawle (Pa.) seems to make every tenancy from
123; *Barlow v. Wainwright*, 22 Vt. year to year a tenancy for years, that
88, 52 Am. Dec. 79. is, for one year, which expires unless

⁵²⁷ *Bridges v. Potts*, 17 C. B. (N. renewed.
S.) 314; *Soames v. Nicholson* [1902]
1 K. B. 157; *Doe d. King v. Grafton*,
18 Q. B. 496; *King v. Eversfield*
[1897] 2 Q. B. 475. Compare *Lewis*
v. Baker [1906] 2 K. B. 599.

⁵²⁸ *In re Threlfall*, 16 Ch. Div. 274.

⁵²⁹ *Floyd v. Floyd*, 4 Rich. Law
(S. C.) 23; *Wilson v. Rodeman*, 30
S. C. 210.

⁵³⁰ *Ariz. Rev. St.* 1901, § 2694, pro-
vides that a tenancy from year to
year shall terminate at the end of
each year, unless written permission
be given for the tenant to remain

⁵³¹ See post, chapter XX.

⁵³² *Doe d. Thomas v. Roberts*, 16
Mees & W. 778.

⁵³³ *Den d. Williams v. Bennett*, 26
N. C. (4 Ired. Law) 122.

⁵³⁴ See post, § 190 b.

⁵³⁵ *Doe d. Watt v. Stagg*, 5 Bing.
N. C. 564; *Harding v. Crethorn*, 1
Esp. 57; *Currier v. Perley*, 24 N. H.
219.

⁵³⁶ *Clark v. Rhoads*, 79 Ind. 342.

⁵³⁷ See ante, notes 521, 522.

^{537a} *McFall v. McFall*, 35 S. C. 559,
14 S. E. 985, where the conclusion of

It does not clearly appear, so far as the writer has observed, whether, in jurisdictions where a periodic tenancy is still regarded as one form of tenancy at will, the tenancy would be terminated by operation of law in the same manner as an ordinary tenancy at will, as, for instance, upon a transfer by the owner of the land or by the tenant, or upon the death of either.⁵³⁸

§ 15. Tenancy at sufferance.

a. **The common-law conception.** The expression "tenant at (or by) sufferance" is quite frequently used, sometimes, it is submitted, under a misconception as to its proper significance. The use of this, as of any common-law expression, in other than its common-law sense, can result only in perplexity and confusion, and it seems desirable to consider at length the conception of a tenant at sufferance as it presented itself to the builders of the common law.

The only statement of the nature of a tenancy at sufferance which is in any way adequate, to be found either in the older or the later books, is that of Coke,⁵³⁹ and what has been said since his day in reference thereto, so far as it can be said to be based on any authority whatever, is based directly or indirectly on his statement.⁵⁴⁰ This we will accordingly insert at

the lower court that "the fact that the lessor had become *non compos mentis*, without a proceeding to have the fact declared, would not terminate the tenancy," was approved.

⁵³⁸ In *Currier v. Perley*, 24 N. H. 219, 227, it is said that an estate from year to year may be ended by any act of the lessor or lessee which would at common law terminate a lease at will strictly, provided the other party choose to take advantage of it. The cases cited in support of the proposition, are, however, cases involving a "strict" tenancy at will, or in which there was a disclaimer of the landlord's title, operating by way of forfeiture. In *Perry v. Carr*, 44 N. H. 118, it is said that a tenant at will holding from year to year

determines his estate by voluntary waste. Citing *Phillips v. Covert*, 7 Johns. (N. Y.) 1, where it was decided that one in possession at will, paying an annual rent, even though a tenant from year to year for the purpose of notice, was merely a tenant at will for the purpose of an action of trespass against him on account of voluntary waste. But in *Austin v. Thomson*, 45 N. H. 113, it was in effect decided that a tenant from year to year may transfer his interest, which could not be done in the case of a "strict" tenancy at will.

⁵³⁹ Co. Litt. 57 b.

⁵⁴⁰ See e. g., 2 Blackst. Comm. 150; 1 Cruise's Dig., tit. 9 c. 2.

length and we will then make some comments thereon. The statement of Coke is as follows:—"There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is always by right, and tenant at sufferance entreth by a lawful lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawful demise and after his estate ended continueth in possession and wrongfully holdeth over. As tenant *pur terme d' autre vie* continueth in possession after the decease of *ce' que vie* or tenant for years holdeth over his term; the lessor cannot have an action of trespass before entry. Now that a writ of entry *ad terminum qui praeterit* lyeth against such a tenant as holdeth over is rather by admission of the demandant than for any estate of freehold that is in him, for in judgment of law he hath but a bare possession. But against the king there is no tenant at sufferance, but he that holdeth over in the cases above said is an intruder upon the king, because there is no laches imputed to the king for not entering. If tenant in tail of a rent grant the same in fee and dieth, yet the issue in tail may bring a *formedon*, and admit himself out of possession. The like law is it, if a man maketh a lease at will and dieth, now is the will determined; and if the lessee continueth in possession, he is tenant at sufferance, and yet the heir by admission may have an assise of Mordancestor against him. But there is a diversity between particular estates made by the *terre tenant*, as above is said, and particular estates created by act in law; as if a guardian after the full age of the heir continueth in possession, he is no tenant at sufferance, but an abator."

The statement by Coke that tenant at sufferance has no estate of freehold, and that consequently a writ of entry lies against him in favor of the person entitled, the "demandant" only "by admission of the demandant,"⁵⁴¹ has reference to the rule that a real action could in theory be brought only against one seised of a freehold estate in the land,⁵⁴² and so, as Coke says, though a tenant at will became a tenant at sufferance upon the landlord's death, the heir of the latter could, for the purpose of bringing an assise of mort d' ancestor⁵⁴³ against him, admit him to be

⁵⁴¹ See, also, 3 Blackst. Comm. 175. or *mortancestor*, see 3 Blackst.

⁵⁴² Stearns, Real Actions (2d Ed.) Comm. 185; 2 Pollock & Maitland, 86, 175.

Hist. Eng. Law, p. 56.

⁵⁴³ As to assise of *mort d'ancestor*,

seised of a freehold estate, and he refers to the somewhat analogous case of a writ of *formedon* by issue in tail against one who is not seised of the rent.

The view incidentally stated by this writer, that a tenant at sufferance has no freehold estate, is deserving of attention. It might have been contended that one so tortiously holding over became seised in fee simple by wrong, as was,⁵⁴⁴ and indeed is,⁵⁴⁵ a person who disseises another, and this view of a tenant wrongfully holding over was taken in early cases⁵⁴⁶ but was afterwards repudiated.⁵⁴⁷ And the view that he has no estate in fee simple by wrong is necessarily involved in the statement elsewhere made by Coke that a release to him is void,⁵⁴⁸ since if he had a fee simple the release would be good as passing a right.⁵⁴⁹

The statement of Coke that there is no tenant at sufferance against the king, because there is no laches imputed to the king for not entering, is, it would seem, based on a *dictum*,⁵⁵⁰ in a case in which Coke was counsel. So far as it involves an assertion that a tenancy at sufferance is the result of laches, it gives an erroneous impression as to the nature of the tenancy. There are many cases to the effect that one holding over his tenancy is a tenant at sufferance,⁵⁵¹ but if he were such a tenant only in case of laches on the part of the person rightfully entitled he could not be so called until the lapse of a considerable period after the end of the original holding, yet in no cases, except in a few in this country,⁵⁵² where the courts were reduced to ex-

⁵⁴⁴ Co. Litt. 296 b, Butler's note; Williams, Seisin, 7; 2 Preston, Abstracts of Title, 284; Stearns, Real Actions (2d Ed.) 5.

⁵⁴⁵ See article by Prof. Ames in 3 Harv. Law Rev., at pp. 23, 27.

⁵⁴⁶ Y. B. 18 Edw. 4, f. 25, pl. 16; Y. B. 22 Edw. 4, f. 38 b, pl. 23.

⁵⁴⁷ Allen v. Hill, Cro. Eliz. 238, 3 Leon. 152; Rouse's Case, Owen, 27; Tudor's Leading Cases in Real Prop. 1; s. c., sub. nom., Rous v. Artois, 2 Leon. 45; Doe d. Burrell v. Perkins, 3 Maule & S. 271.

⁵⁴⁸ Co. Litt. 270 b.

⁵⁴⁹ See Co. Litt. 265 b, 217 a; 2 Blackst. Comm. 325, and Chitty's note.

⁵⁵⁰ Per Manwood, C. B., in Sir Moil Finch's Case, 2 Leon. 143. There is a similar dictum in Attorney General v. Andrew, Hardres, 25. That there is no tenant at sufferance against the King seems to be decided in a nisi prius case. Tailor's Case, Clayt. 55.

⁵⁵¹ See post, at note 585.

⁵⁵² See post, at notes 595, 596.

tremities to avoid the operation of ill conceived statutes requiring a notice to terminate a tenancy at sufferance, has it ever been suggested that the tenancy at sufferance did not commence with the commencement of the wrongful holding. A tenancy at sufferance arises from laches only if by laches we understand a failure to eject a wrongful holder immediately upon the commencement of the wrongful holding.

The diversity, mentioned by Coke, between one holding over after a particular estate made by the *terre tenant*, that is a tenant at sufferance, and one holding over after a particular estate created "by act in the law," is no doubt based upon the familiar rule that one who enters by permission and abuses his right of entry does not thereby become a trespasser *ab initio*, while if "entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*."⁵⁵³ So it is said by an early judge that if a lessee for years holds over he is not a trespasser because his entry was authorized by the lessor.⁵⁵⁴ His entry thus not being made wrongful *ab initio* by his subsequent tortious holding over, it cannot support a claim that it involved a disseisin.⁵⁵⁵ On the other hand, since one who enters by authority of law becomes by wrongfully holding over a trespasser *ab initio*, his original entry to the exclusion of all others is, in the eye of the law, a disseisin.⁵⁵⁶

⁵⁵³ Six Carpenters' Case, 8 Coke, 146 a, 1 Smiths' Leading Cases (11th Ed.) 132.

⁵⁵⁴ Nele, J., in Y. B. 21 Edw. 4, 76 b, pl. 9, cited Pollock, Torts (6th Ed.) 379.

⁵⁵⁵ See 1 Rolle, Abr. 659, to the effect that it involves no disseisin. Also Com., Dig., Seisin (F 2); Doe d. Burrell v. Perkins, 3 Maule & S. 271; Doe d. Souter v. Hull, 2 Dowl. & R. 38. That he is not a disseisor is involved in the decisions supra, note 547, that he is not tenant in fee simple by wrong.

⁵⁵⁶ That he is a disseisor, see 1 Rolle, Abr. 659, l. 50, where it is said: "If guardian in Chivalry continues possession of the land in

ward after the full age of the ward, without title, this is a disseisin to the heir, because he came in by the law, and therefore the continuance is beyond the time which the law limited him and against the trust reposed in him by the heir, and the law makes this a disseisin to the heir, who was not ever out of possession, but the guardian was seised in his right." Citing dictum of Culpepper in Y. B. 7 Hen. 4, 42. That he is a disseisor is also stated, on the authority of Rolle, in Com. Dig., Seisin (F 1). Coke says that the guardian thus holding over is an abator." Co. Litt. 57 b, 271 b. The incorrectness of this statement is suggested in the note to the latter citation in Har-

It is stated by Coke that the lessor cannot have trespass against the tenant at sufferance before entry, and this statement is adopted in several modern cases.⁵⁵⁷ This, it is submitted, is not for the reason given by Blackstone, that "the tenant, being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act, such as entry is, will declare his continuance to be tortious."⁵⁵⁸ The correct reason, as indeed is suggested elsewhere by Blackstone himself,⁵⁵⁹ is that the action of trespass is possessory in its nature, being founded upon an injury to the plaintiff's possession, and proof of an actual or constructive possession in the plaintiff is indispensable. For this reason, at common law, while a man actually disseised could maintain an action of trespass on account of the disseisin itself, he could not, until he entered (provided the right of entry still existed), recover in such action for the subsequent withholding of possession, since, after the disseisin, the possession was no longer in him. After he had entered, or rather re-entered, however, he was regarded as having had possession "by relation" from the commencement of the wrong, so as to be able to recover mesne profits.⁵⁶⁰ So in the case of tenant at sufferance, there was no possible

grave and Butler's edition. "Abatement," as Coke says (Co. Litt. 277 a), "is when a man died seised of an estate of an inheritance, and between the death and the entry of the heir an estranger doth interpose himself and abate." See to the same effect 3 Blackst. Comm. 168; Challis, Real Prop. 207.

⁵⁵⁷ Trevillian v. Andrew, 5 Mod. 384; Dorrell v. Johnson, 34 Mass. (17 Pick.) 263; Russell v. Fabyan, 34 N. H. 218; Rising v. Stannard, 17 Mass. 282. See Toles v. Meddaugh, 106 Mich. 398, 64 N. W. 329.

⁵⁵⁸ 2 Blackst. Comm. 150.

⁵⁵⁹ In 3 Blackst. Comm. 210, it is said, referring to the action of trespass, that "neither, by the common law, in case of an intrusion or de-

forcement, could the party kept out of possession sue the wrongdoer by a mode of redress which was calculated merely for injuries committed against the land while in the possession of the owner." A "deforcement," as stated by the same author (3 Comm. 173), occurs when a tenant for years or for life holds over. That is, a "tenant at sufferance" is a "deforcor."

⁵⁶⁰ Y. B. 19 Hen. 6, 28; 2 Rolle, Abr., f. 550, l. 7; f. 553, ll. 50, 52; Com. Dig., Trespass (B 2) (B 3); Stearns, Real Actions (2d Ed.) 362; 3 Blackst. Comm. 210; Bigelow, Torts (7th Ed.) §§ 469, 470; Newell, Ejectment, 623; Sedgwick & Wait, Trial of Title to Land (2d Ed.) § 657. See Leland v. Tousey, 6 Hill

right of action in trespass on account of his taking of possession, since this was by permission, and there was no right of action for the subsequent wrongful withholding of possession, because the possession was in him and not in the person rightfully entitled. Consequently, the right to bring trespass for mesne profits accruing during the period of the wrongful retention of possession by the tenant at sufferance can, even after entry by the person entitled to possession, be based only upon the doctrine of relation. There is some ground for question whether that doctrine was applicable, at common law, to any case other than that of a disseisin.⁵⁶¹ The authorities before referred to, however, asserting that the lessee has no right of action in trespass against the tenant holding over until entry, assert by implication that he has such right after entry, and presumably at the present day the doctrine of relation would be applied in the case of a wrongful continuance in possession as well as in that of a wrongful taking of possession.⁵⁶² It may further be remarked that under the system of fictions in ejectment which once prevailed, a judgment in ejectment against the tenant at sufferance was conclusive as to the fact of entry before the time of the demise laid in the declaration,⁵⁶³ and it seems that profits even anterior to that time could be recovered on the theory that the actual entry under the judgment in ejectment or the execution of the writ of possession thereunder related back to the original inception of the plaintiff's title as against the wrongdoer.⁵⁶⁴ On such a theory, in spite of the abolition of the fictions of an entry and demise, one who has obtained a judgment in ejectment against one wrongfully holding over and has acquired possession in accordance therewith could, at the present day, recover mesne profits for the full time of the wrongful holding, except in so far as the statute of limitations may be applicable.

(N. Y.) 328; *Reid v. Stanley*, 6 Watts & S. (Pa.) 369; *Cutting v. Cox*, 19 Vt. 517, and cases cited 28 Am. & Eng. Enc. Law (2d Ed.) 577.

⁵⁶¹ See the discussion by Parke, B. in *Barnett v. Guildford*, 11 Exch 19.

⁵⁶² See the case last cited, and *Leland v. Tousey*, 6 Hill (N. Y.) 328.

⁵⁶³ *Adams, Ejectment*, 388. See *Stearns, Real Actions*, 364, 367.

⁵⁶⁴ See *Barnett v. Guildford*, 11 Exch. 19; *Adams, Ejectment*, 392; *Sergeant Manning's note to Butcher v. Butcher*, 1 Man. & R. 221. As to the conclusiveness of a judgment in ejectment in the action for mesne profits, see the notes to *Aslin v. Parkin*, 1

Not only is the person entitled to possession unable, until after entry, to maintain trespass for mesne profits against the tenant at sufferance, but he is also unable to maintain trespass for acts by such tenant involving injury to the land.⁵⁶⁵ He may, however, even before entry, maintain an action on the case on account of such acts,⁵⁶⁶ and after entry his possession relates back, it seems, so as to enable him to maintain trespass on account of such acts as well as for the recovery of mesne profits.⁵⁶⁷

Not infrequently in modern cases the courts assume that a tenant at sufferance is a tenant *of* or *under* the person entitled to possession. The common-law authorities give not the slightest countenance to such a view. Coke speaks of tenant at sufferance as tenant "against" not "of" the reversioner,⁵⁶⁸ and it is expressly stated that there is no privity between the tenant at sufferance and the reversioner,⁵⁶⁹ and that for this reason a release to the latter is not good. So it is the rule, except as changed by statute, that distress cannot be made after the end of the term⁵⁷⁰ for the reason, it seems, that upon the ending of the term the relation of privity ceases.⁵⁷¹ A tenant *pur auter vie* who holds over after the death of the *cestui que vie*, though well recognized to be a tenant at sufferance, cannot, with any show of reason, be regarded as tenant of the remainderman under whom he did not enter, with whom he has no contractual relations, and who has never consented to his continued possession. So it is said by Lord Mansfield that the possession of a tenant *pur auter vie* holding over is adverse to the remainderman or

Smith's Leading Cases (8th Am. Ed.) 1397.

⁵⁶⁵ Russell v. Fabyan, 34 N. H. 218. And see authorities cited ante, note 557.

In Dorrell v. Johnson, 34 Mass. (17 Pick.) 263, it was held that the entry upon the premises by the agent of the lessor, by the latter's direction, and the cutting of trees by him, was a sufficient entry to support trespass against the tenant at sufferance for injuries to the soil.

⁵⁶⁶ West v. Treude, Cro. Car. 187, W. Jones, 234; Russell v. Fabyan, 34 N. H. 218.

⁵⁶⁷ See authorities cited ante, notes 561, 562.

⁵⁶⁸ Co. Litt. 57 b, where it is said that "against the king there is no tenant at sufferance."

⁵⁶⁹ Co. Litt. 270 b; Butler v. Duckmanton, Cro. Jac. 169.

⁵⁷⁰ Bro. Abr., Distress, pl. 19, pl. 74; Co. Litt. 47 b; Doctor & Student, Bk. 2, c. 9; Y. B. 14 Hen. 4, 31; note (2) to Poole v. Longueville, 2 Wms. Saund. 284 a.

⁵⁷¹ 1 Rolle, Abr. 672, pl. 10; Bradby, Distresses, 89.

reversioner, which could not be the case were he to be regarded as holding of the latter,⁵⁷² and in accordance with this *dictum* is the weight of modern authority to the effect that the statute of limitations runs in favor of such tenant holding over.⁵⁷³

This single case of a life tenant holding over is sufficient to demonstrate that the expression "tenant at sufferance" has no reference to any idea that a relation of tenancy exists between such tenant and the person rightfully entitled. And the fact that a tenant for years wrongfully holding over is not, as is a life tenant so holding over, regarded as holding adversely to the person rightfully entitled,^{573a} does not show that he is such person's tenant, but merely that the circumstance of his entry under a lease excludes the inference that his wrongful possession is under claim of right. At the present day, it is true, a tenant under a lease holding over his term is quite frequently regarded as a tenant of the person entitled, the reversioner, for the purpose of supporting an action against him for use and occupation. How one so holding over can, at the election of the reversioner, be liable either in an action of trespass for mesne profits or in an action based on the theory of a rightful possession and a contractual liability is somewhat difficult to say, but conceding that a termor so holding over *is*, under these decisions, to be regarded as a tenant of the reversioner, it is not because the early judges chose to call him a tenant at sufferance, but because the later judges have chosen to regard one who becomes tenant under a lease as continuing in privity to the reversioner, at the election of the latter, so long as he chooses to stay in possession, for the purpose of an action for use and occupation.

While, as just stated, a tenant at sufferance is not as such properly the tenant of the person entitled to possession, neither is he the tenant of the lord paramount, since this could be only on the theory that he has an estate in fee simple by wrong, which, as we have seen, he has not.⁵⁷⁴ He is consequently tenant of nobody, and the expression "tenant" as applied to him may be regarded as used merely in the sense of one holding posses-

⁵⁷² Doe d. Fishar v. Prosser, Cowp. & Eng. Enc. Law (2d Ed.) 809; 2 Tif-
218. fany, Real Prop. § 443, notes 60, 65.

⁵⁷³ See Doe d. Parker v. Gregory, 2
Adol. & E. 14, and cases cited 1 Am. ^{573a} See ante, § 4, at note 74.

⁵⁷⁴ See ante, at note 547.

sion,⁵⁷⁵ and in confirmation of this view is the fact that none of the common-law authorities speak of any legal results as flowing from the existence of such a "tenancy." In other words, "tenant at sufferance" was merely a convenient name employed to designate this person, who was not a trespasser and not a disseisor, who was in possession and yet held of nobody. As said by Chief Justice Rolle, one holding over his term "is called" tenant at sufferance.⁵⁷⁶ He might be called a "deforceor," which he is, technically speaking,⁵⁷⁷ but so are certain other persons wrongfully in possession. The convenience of an expression specifically applicable to a tenant for a limited period who holds over after the termination of his rightful holding is unquestionable, though the selection of an expression other than that actually adopted might have avoided considerable misunderstanding.

It has been suggested by writers of high reputation that this so-called tenancy had its origin in the desire of the judges to prevent adverse possession from arising upon the termination of a particular estate without the knowledge of the reversioner or remainderman.⁵⁷⁸ Apart from the fact that this statement involves the apparent misconception that such a holding cannot be adverse in character,⁵⁷⁹ it involves also, it is submitted, a chronological impossibility. Previous to the adoption of the statute of 21 James I.,⁵⁸⁰ prescribing in effect a limitation of twenty years after the accrual of the "right or title" for actions of ejectment,⁵⁸¹ the only statute in force limiting the period within which actions concerning land could be brought was that of 32 Hen. 8, c. 2 (A. D. 1540), which provided that no person could bring any possessory action upon the seisin or possession of his ancestor unless such seisin or possession existed within fifty years before the bringing of the action, and that no action should be brought on the demandant's seisin unless such seisin existed within thirty years.⁵⁸² Previous to this statute the only

⁵⁷⁵ See ante, § 2.

⁵⁷⁶ 1 Rolle, Abr. 659, pl. 15.

⁵⁷⁷ See ante, note 559.

⁵⁷⁸ Smith, Landl. & Ten. (3d Ed.) 34; 2 Smith's Leading Cases (11th Ed.) 558, notes to *Nepean v. Doe d. Knight*; Tudor's Leading Cases in Real Prop., notes to *Rouse's Case*; Lightwood, Possession of Land, 161.

⁵⁷⁹ See ante, at notes 568-573.

⁵⁸⁰ 21 Jac. 1, c. 16 (A. D. 1623).

⁵⁸¹ See Lightwood, Possession of Land, 160; Angell, Limitations, §§ 342, 369.

⁵⁸² See Angell, Limitations, appendix, for the terms of this statute.

limitations as to the time of bringing real actions were those fixed by the statute of Merton, 20 Hen. 3, c. 8, and that of Westminster 1, 3 Edw. 1, c. 39, and these statutes, as merely requiring the seisin not to be alleged previous to a certain date named in the first part of the thirteenth century, or, in some cases, in the latter part of the twelfth century, were practically inoperative for any purposes,⁵⁸³ and especially so to preclude a recovery of possession against a particular tenant holding over. Under such a statute, it is evident, there was no room for the modern doctrine that the limitation period begins to run only upon the commencement of adverse possession, that is, upon a disseisin, and not before. Consequently, in order to support the view that tenancy at sufferance arose from the desire of the courts to avoid the application of the doctrine of adverse possession in favor of a tenant holding over, it would be necessary to show that the expression "tenant at sufferance" was not applied to a tenant holding over until the year 1546, at which time the statute of Henry 8, by its terms, first became operative, but as a matter of fact the expression "tenant at sufferance" was applied in this sense before the date named.⁵⁸⁴ Moreover, the fact that one is tenant at sufferance does not necessarily exclude the application of the doctrine of adverse possession, as appears from the case of a tenant *pur auter vie* holding over after the death of the *cestui que vie*.^{584a} And while a tenant

⁵⁸³ See 2 Co. Inst. 238; 3 Blackst. Comm. 188; Angell, Limitations, § 13; 3 Harv. Law Rev., at p. 102, article by Prof. Maitland.

⁵⁸⁴ In Y. B. 12 Edw. 4, 12 (A. D. 1473), we find reference to one who "occupies by sufferance at will" without, however, any statement of what is meant thereby. In Y. B. 21 Hen. 7, 38 (A. D. 1506), Brooke, as counsel, remarks that a tenant at will holding over is "tenant at sufferance." In Lord Zouche's Case (35 Hen. 8, A. D. 1543), reported Dyer, 57 b, pl. 1, one to whom a lease was made for another's life, holding over after the death of *cestui que vie*, is stated to be "tenant by sufferance."

We find the expression in several cases, in 17 Hen. 7 (A. D. 1502), applied to a feoffor to his own use remaining in possession. See Keilw. 41 b, pl. 2, 42 b, pl. 7, 46 b, pl. 2. Likewise in Keilw. 160 b, pl. 1 (2 Hen. 8), in the same sense.

In the argument in Rouse's Case, Owen, 27, it is said that Littleton (circa A. D. 1470) mentions tenant at sufferance in his chapter on Releases, 108, and in Bro. Abr., Tenant per Copie, pl. 4, also, it is intimated that Littleton uses the expression. The present writer is unable to find it in Littleton.

^{584a} See ante, at note 573.

who enters under a lease for years and wrongfully holds over is not regarded as holding adversely to his landlord, this does not appear to have been decided until the nineteenth century, generations after the introduction of the expression "tenancy at sufferance."

b. **Modern conceptions.** The expression "tenant (or tenancy) at sufferance" is frequently applied in modern decisions, as by the earlier authorities, to the case of one entering under a lease for years, who "holds over," that is, wrongfully retains possession, beyond his term.⁵⁸⁵ Likewise, a tenant at will who holds over after the termination of the tenancy becomes, it is generally recognized, a tenant at sufferance,⁵⁸⁶ but if a tenancy at will is terminated by the act of the tenant in attempting to transfer his interest and putting the transferee in possession, the latter is not a tenant at sufferance but is a mere disseisor or

⁵⁸⁵ *Butler v. Duckmanton*, Cro. Jac. hold. *Edwards v. Hale*, 91 Mass. (9 169; *Sutton v. Hiram Lodge*, 83 Ga. Allen) 462.
⁵⁸⁶ *Bro. Abr., Tenant per Copy*, pl. 770, 10 S. E. 585, 6 L. R. A. 703; 4; *Co. Litt.* 57 b; *McLeran v. Benton*, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814; *Creech v. Crockett*, 59 Mass. (5 Cush.) 133; *Emmes v. Feeley*, 132 Mass. 346; *Lash v. Ames*, 171 Mass. 487, 50 N. E. 996; *Wardell v. Etter*, 143 Mass. 19, 8 N. E. 420; *Marsters v. Cling*, 163 Mass. 477, 40 N. E. 763; *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616; *Reed v. Reed*, 48 Me. 388; *Meier v. Thieman*, 15 Mo. App. 307; *Doe d. Bennett v. Turner*, 7 Mees. & W. 226; 9 Mees. & W. 643; *Doe d. Goody v. Carter*, 9 Q. B. 863.

One having a contract for the sale of land to him, who takes a lease from the vendor for a fixed term, is a tenant at sufferance if he holds over the term. *Moore v. Smith*, 56 N. J. Law, 446, 29 Atl. 159.

He becomes tenant at sufferance as to the whole land upon a conveyance by the landlord of part of the land. *Emmes v. Feeley*, 132 Mass. 346.

Presumably it is on this theory that a *cestui que trust* remaining in possession after a sale and conveyance by the trustee was regarded as a tenant at sufferance (*Work v. Brayton*, 5 Ind. 396), he being a tenant at will before the conveyance. See post, § 42.

A tenant so holding over the term named was regarded as tenant at sufferance, although the lease provided that the lessee would pay the agreed rent for the term named and for such further term as he may

trespasser, since he did not enter by right as is necessary to make one a tenant at sufferance.⁵⁸⁷

One to whom a life tenant has conveyed the premises or has leased them, and who holds over after the death of the tenant for life, is also a tenant at sufferance,⁵⁸⁸ this being in effect the case mentioned by Coke of a tenant *pur auter vie* continuing in possession after the death of the *cestui que vie*.

A sublessee of a tenant for years, holding over after the expiration of the lessor's term, is properly regarded as a tenant at sufferance.⁵⁸⁹

A tenant for life or years whose estate is subject to a special limitation, by which his estate is to terminate upon the happening of a contingency named,⁵⁹⁰ no doubt becomes a tenant at sufferance if he continues in possession after the happening of such contingency.⁵⁹¹ The fact that a tenant for years has violated a condition subsequent cannot, it seems, render him or one holding under him a tenant at sufferance, since such violation does not in any way change the nature of his holding until the reversioner enforces his right of forfeiture.⁵⁹²

⁵⁸⁷ Co. Litt. 57a; Reckhow v. Schank, 43 N. Y. 448; Cunningham v. Holton, 55 Me. 33. And see Cooper v. Adams, 60 Mass. (6 Cush.) 87. But in McLeran v. Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 81, and Meier v. Thiemann, 15 Mo. App. 307, the transferee of a tenant at will was regarded as a tenant at sufferance.

⁵⁸⁸ Zouche's Case, 1 Dyer, 57; Rouse's Case, Owen, 27; Allen v. Hill, Cro. Eliz. 238, pl. 5; Doe d. Thomas v. Roberts, 16 Mees. & W. 780; Wright v. Graves, 80 Ala. 416; Manning v. Brown, 47 Md. 506; Guthmann v. Vallery, 51 Neb. 824, 71 N. W. 734, 66 Am. St. Rep. 475; Day v. Cochran, 24 Miss. 261; Lyebrook v. Hall, 73 Miss. 509, 19 So. 348; Griffin v. Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Kenney v. Sweeney, 14 R. I. 581. In Peters v. Balke, 170 Ill. 304, 48 N. E. 1012, it is said that the lessee of the life tenant holding over is "either a tenant at sufferance or a tenant at will." But he cannot be a tenant at will so long as his holding is without the permission of the person entitled to possession.

⁵⁸⁹ Wheeler v. Wood, 25 Me. 287; Evans v. Reed, 71 Mass. (5 Gray) 308; Magee v. Gilmour, 18 Can. Sup. Ct. 579; Simpkin v. Ashurst, 4 Tyrw. 781, 1 Cromp. M. & R. 261. But in Pearce v. Ferris, 10 N. Y. (6 Seld.) 280, such an undertenant holding over was regarded as a trespasser.

⁵⁹⁰ See ante, § 12 d.

⁵⁹¹ So it has been decided that a lessee for a term becomes a tenant at sufferance if he holds over after the lessor has terminated the tenancy under a clause giving him the option so to do. Abeel v. Hubbell, 52 Mich. 37, 17 N. W. 231.

⁵⁹² In Allen v. Hill, Cro. Eliz. 238, it was apparently assumed that a

While, as above shown, there are many modern cases in which the expression tenant at sufferance has been applied in accordance with the common-law authorities to one who holds over after the expiration of his estate, there are some cases in which the courts have asserted views in this regard not supported by the older authorities, and the framers of legislation have occasionally used the expression without apparently the slightest knowledge of its true meaning. Thus, the fact that, as Coke says, "there is a great diversity between a tenant at will and a tenant at sufferance," in that one holds rightfully and the other wrongfully,⁵⁹³ has not infrequently been ignored in statutory enactments which, under the mistaken idea, it seems, that "sufferance" means "permission" and that, accordingly, a tenant at sufferance is a tenant by permission, have provided that a tenancy at sufferance can be terminated by a notice of a certain

life tenant, whose estate was subject to a "proviso" that it should end if she should dwell out of London, became tenant at sufferance after she did so dwell. There, it seems, the court must have regarded the "proviso" as a special limitation, since they considered her estate at an end though she continued in possession, and there was no re-entry, which was always necessary at common law to terminate a freehold estate for breach of a condition. leasing was a tenant at sufferance. As to these two cases it may be said that one to whom an under lease is made is a tenant in accordance with the terms of the lease, even though the making of the lease involves a breach of covenant on the part of the lessor. Even a condition providing for re-entry in case of an underlease does not affect the status of the under tenant until it is enforced. Post, §§ 152 j (2), 194 d.

In *Cross v. Upson*, 17 Wis. 638, 86 Am. Dec. 730, it was said that one who entered as undertenant at will might, by reason of a covenant contained in the original lease, against underleasing without consent in writing, and of the condition for forfeiture in case of violation, have been regarded as a *quasi* tenant at sufferance. This case is cited in *Washington Real Estate Co. v. Roger Williams Silver Co.*, 25 R. I. 483, 56 Atl. 686, as authority for a statement that one entering as licensee or sublessee under a tenant who was *not* prohibited from sub-⁵⁹³ Co. Litt. 57 b. "There can be no such thing as tenant by sufferance when the tenancy is the result of agreement." *Stayton, J.*, in *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284. "One cannot, while he is rightfully occupying under the authority of the owner, be a tenant at sufferance." *Field, J.*, in *Lyon v. Cunningham*, 136 Mass. 532.

In *Clark v. Tukey Land Co.*, 75 Neb. 326, 106 N. W. 328, the opinion says that "when a tenancy from month to month is terminated for default in the payment of the rent reserved, the tenant may still occupy

number of days.⁵⁹⁴ To avoid the absurdity involved in such a requirement, that one wrongfully in possession should be entitled to notice to quit, the courts have occasionally seized upon the statement made by Coke, and adopted by Blackstone and other writers, that there is no tenant at sufferance against the king because he cannot be guilty of laches, and have accordingly decided that a tenant holding over is not a tenant at sufferance, so as to be entitled to notice, until the person entitled has been guilty of laches.⁵⁹⁵ And occasionally they have gone so far as to hold that the one so holding over was not a tenant at sufferance unless the holding was so long continued as to authorize the implication of an assent to the holding,⁵⁹⁶ thus in effect regarding one as a tenant at sufferance only when he is a tenant at will or perhaps a periodic tenant.

In one state it is provided by statute⁵⁹⁷ that one obtaining possession without the consent of the owner or person entitled to possession shall be a tenant at sufferance and shall be liable for a reasonable rent. This evidently involves a misuse of the expression.

In several cases, without reference to any statute bearing on the subject, the courts have referred to one holding by permission as a tenant at sufferance, thus ignoring the distinction between a tenant at sufferance and one at will.⁵⁹⁸

the premises by permission of the landlord as a tenant by sufferance until the formal statutory notice" necessary to support a summary proceeding has been given, and that consequently the statute of limitations does not begin to run till such notice is given. The error of the opinion lies in regarding a tenant at sufferance as a tenant by permission whose tenancy must be terminated by notice.

⁵⁹⁴ See post, § 196 d.

⁵⁹⁵ *Moore v. Morrow*, 28 Cal. 551; *Rowan v. Lytle*, 11 Wend. (N. Y.) 616.

⁵⁹⁶ *Smith v. Littlefield*, 51 N. Y. 539; *Meno v. Hoeffel*, 46 Wis. 282, 1 N. W. 31; *Eldred v. Sherman*, 81 Wis. 182,

51 N. W. 441. In the latter case it is said, somewhat singularly, that the abolition of the distinction between tenant at will and tenant at sufferance involves "the abolition of a mere technicality of the old law, for the retention of which no good reason can be given." This remark would presumably not have been made had it been understood that the distinction referred to is that between a rightful and a wrongful holding.

⁵⁹⁷ Ball. Ann. Codes & St. Wash. § 4571.

⁵⁹⁸ In *Kaufman v. Cook*, 114 Ill. 11, 28 N. E. 378, it is decided that if one "rents" property for a female relative, that she may live thereon,

If a husband who has, by the common law or by statute, an estate in his wife's land during her life holds over after her death without right, he is not, it seems, a tenant at sufferance, since his estate was created by act of the law.⁵⁹⁹ And it has been held that if after a divorce the wife remains in possession of her husband's property without permission, she is not such a tenant.⁶⁰⁰ A decision which has been made that a wife retaining possession without permission after a conveyance of the premises by her husband to a third person is a tenant at sufferance⁶⁰¹ is, it seems questionable.

with a promise to her that if he can buy it he will deed it to her, she is, until he buys, a tenant at sufferance. But, being in possession by permission of the person otherwise entitled, she is, it is submitted, at least a tenant at will, if a tenant at all. She might be merely a licensee. So in *Proctor v. Tows*, 115 Ill. 138, 3 N. E. 569, it is said that one permitted to occupy with no agreement as to time is a tenant at sufferance.

In *Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93, it is said that the mere permission to use land, without any provision for rent, could at most amount to tenant at sufferance, if indeed it could amount to that." If possession is not intended to be given, it would be a license. But it could not, in any case, be a tenancy at sufferance, it being permissive and not wrongful. It is not perceived how the absence of a stipulation for compensation can affect the character of the holding. In *Howard v. Carpenter*, 22 Md. 10, a person going into possession by permission, with the expectation of obtaining a lease, is referred to as a tenant at sufferance.

In *Washington Real Estate Co. v. Roger Williams Silver Co.*, 25 R. I. 483, 56 Atl. 686, a purchaser of the personal property of a tenant from

year to year went into possession in the latter's place, and it was held that, having entered under an "implied license" of the original lessee, he became a tenant at sufferance, and by subsequently paying monthly rent he became a tenant from month to month. If he entered rightfully, it is submitted, he could not be tenant at sufferance, and if he entered wrongfully, for lack of power in the original lessee to transfer the possession, he was a disseisor. Compare note 592, ante.

⁵⁹⁹ See *Pattison v. Dryer*, 98 Mich. 564, 57 N. W. 814; *Livingston v. Tanner*, 14 N. Y. (4 Kern.) 64. See ante, at notes 553-556.

⁶⁰⁰ *Brown v. Smith*, 83 Ill. 291. If she holds by permission she is at least a tenant at will. *Wilson v. Merrill*, 38 Mich. 707.

⁶⁰¹ *Taylor v. O'Brien*, 19 R. I. 429, 34 Atl. 739. It is here said that "to constitute a tenancy by sufferance, all that is necessary is that the tenant should have entered into possession lawfully and shall continue to hold after the termination of his right." This ignores entirely the distinction asserted by Coke and others between one who entered by act of the terre tenant and by act of the law.

c. Rights and liabilities of tenant. The rights and liabilities of a tenant under a lease who holds over after the expiration of his tenancy, and who is, as we have seen above, one of the class of persons called tenant at sufferance, we will consider in another place.⁶⁰² We will here briefly refer to such rights and liabilities of a tenant at sufferance as are independent of the consideration whether he entered under a lease or otherwise. These rights and liabilities are, it seems, the same as those of any other person in wrongful possession of land, except as these might in any case be based on the fact that the possessor has an estate in fee by wrong, which, as we have seen, a tenant at sufferance has not.⁶⁰³ A tenant at sufferance has the same right to the crops which he may have gathered during his possession as has any trespasser,⁶⁰⁴ and his possession will, it seems, support an action of trespass against a third person for any interference therewith.⁶⁰⁵ He cannot recover for damage to the freehold, since this belongs to another,⁶⁰⁶ and he has no interest in the land for which he can recover compensation in case the premises are taken for public use.⁶⁰⁷ He is, it has been decided, liable in damages for any injury to the premises which would not have occurred but for his wrongful retention of possession, as when fire catches from his use of a stove on the premises.⁶⁰⁸

⁶⁰² See post, chapter XXI.

⁶⁰³ See ante, at note 547.

⁶⁰⁴ *Wolcott v. Hamilton*, 61 Vt. 79, 17 Atl. 39.

⁶⁰⁵ Com. Dig., Trespass (B 1); 2 Rolle, Abr. 551, l. 40.

In *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616, it is said that a tenant at sufferance cannot sue in trespass on account of a peaceable entry. But there the entry was by one who,

as transferee of the lessor, had a right to the possession.

⁶⁰⁶ *Gulf, C. & S. F. R. Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. 43.

⁶⁰⁷ *Shaabber v. Reading*, 150 Pa. 402, 24 Atl. 692.

⁶⁰⁸ *Russell v. Fabyan*, 34 N. H. 218, citing *West v. Treude*, Cro. Car. 187, where an action on the case for waste by a tenant at sufferance was permitted, it being said that either case or trespass would lie.

CHAPTER III.

THE CREATION OF THE RELATION—THE LEASE OR DEMISE.

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§ 16. The nature of a lease or demise.

We have had occasion, in describing the various classes of tenancies, to refer to the "lease" or "demise" by which a tenancy is created. We will, in this chapter, undertake to consider the general characteristics and requisites of a lease or demise as the legal act by which a tenancy is created, with no reference, for the most part, to any particular class or classes of tenancy created thereby.

The word "lease" is unfortunately used in different senses. Its primary signification is well given by Blackstone¹ as "properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years, or at will, but always for a less time than the lessor hath in the premises." Other standard textbooks give substantially similar definitions,² and that a lease is a conveyance has been frequently stated judicially.³

The word "lease" is also used in a more extended sense to describe not only the legal act (the conveyance) by which a lesser estate is vested in another, but, in addition, the legal act

¹ 2 Blackst. Comm. 317.

² So in 1 Platt, Leases, 1, a lease is defined as "a grant or assurance of a present or future interest for life, for years, or at will, in lands or other property of a demisable nature, a reversion being left in the party from whom the grant or assurance proceeds." In Sheppard's Touchstone, 266, it is said that "a lease doth properly signify a demise or letting of lands, rent, common or any hereditament unto another for a lesser time than he that doth let it hath in it." And see, to the same effect, 2 Preston, Abstracts of Title, 124.

"A lease is a conveyance by way of demise of lands or tenants for life or lives, for years, or at will, but always for a less term than the party conveying himself has in the premises". Woodfall, Landl. & Ten. (16th Ed.) 132. "When the alienor

grants only a portion of his estate, reserving to himself a reversion, the conveyance is a lease." Comyn, Landl. & Ten. 51.

³ Jones v. Marks, 47 Cal. 242; Carlton v. Williams, 77 Cal. 89, 19 Pac. 185, 11 Am. St. Rep. 243; McKee v. Howe, 17 Colo. 538, 31 Pac. 115; New York, C. & St. L. R. Co. v. Randall, 102 Ind. 453, 26 N. E. 122; Craig v. Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; Crouse v. Mitchell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479; In re Tuohy's Estate, 23 Mont. 305, 58 Pac. 722; Averill v. Taylor, 8 N. Y. (4 Seld.) 44; Spielmann v. Kliet, 36 N. J. Eq. 203; Shimer v. Phillipsburg, 58 N. J. Law, 508, 33 Atl. 852; Clark v. Hyatt, 55 N. Y. Super. Ct. (23 Jones & S.) 98; Wien v. Simpson, 2 Phila. (Pa.) 158; Gray v. LaFayette County, 65 Wis. 567, 27 N. W. 311; State v. Morrison, 18 Wash. 664, 52 Pac. 228.

or acts by which various contractual obligations are created in connection with such conveyance, that is, it is applied to an aggregate of simultaneous legal acts, by one of which a lesser estate is transferred to another, and by another or others of which the transferor or transferee, or both, contract to do or leave undone certain things. In other words, it describes a lease in the sense first above referred to *plus* what are usually described as the "covenants of the lease."⁴

A third sense in which the word "lease" is frequently used is to describe the written instrument in which such a conveyance, and the covenants connected therewith, may be incorporated. When we speak of the "execution" of a lease, for instance, we evidently use the word "lease" in a sense different from that in which we use it when we say that a "lease" for less than three years need not be in writing. Not infrequently, in the course of this work, we will use the expression "instrument of lease" to avoid confusion in this respect.

The word "lease" is also, as we have before remarked,⁵ used, by a sort of metonymy, to describe the estate created by the lease.

In view of the fact that the entrance into contractual obligations by means of "covenants" ordinarily constitutes a most important part of a transaction involving the creation of the relation of landlord and tenant, it is not surprising that quite frequently the courts have lost sight of the fact that the really essential part of the transaction is a conveyance, and instead regard it as involving the creation of contractual obligations only, frequently speaking of the "contract of lease."⁶ The ex-

⁴ In Anson, Contracts (7th Ed., at p. 8), it is said: "It is no doubt possible that contractual obligations may arise incidentally to an agreement which has for its object the transfer of property. In the case of a conveyance of land with covenants annexed, or the sale of a chattel with a warranty, the obligation hangs loosely to the conveyance or sale, and is so easily distinguishable that one may deal with it as a contract.

⁵ See ante, § 12 a at note 17.

⁶ Compare Austin, Jurisprudence (3d Ed.) 387. "Rights *in rem* sometimes arise from an instrument which is called a contract, and are therefore said to arise from a contract. The instrument in these cases wears a double aspect, or has a two-fold effect. To one purpose it gives *jus in personam* and is a contract, to another purpose it gives *jus in rem* and is a conveyance. When a so-called contract passes an estate, or,

pression "contract of lease," if it is to be used at all, should be applied merely to the aggregate of the covenants into which the parties may have entered in connection with the making of the conveyance by way of lease. But such a conveyance may be made without any accompanying covenants, in which case the expression "contract of lease" would appear to be inapplicable.⁷ The word "contract," it is true, has occasionally been used in a sense broad enough to include a conveyance, on the theory that a conveyance is the result of agreement,⁸ a theory which, it may be remarked, is not in harmony with the common-law conception of a conveyance by deed.⁹ Giving the word "contract" this broader signification, a conveyance by way of lease is a contract, but the same may be said of a conveyance in fee simple. The modern scientific writers on the law of contract do not use the term in this extended sense, but restrict it to the voluntary creation of rights *in personam* as distinguished from rights *in*

in the language of the modern civilians, a right *in rem*, to the obligor, it is to that extent not a contract but a conveyance, although it may be a contract to some other extent and considered from some other aspect. A contract is not distinguished from a conveyance by the mere consent of parties."

Statements in the old books, as in Bro. Abr., Contracts, pl. 43; Co. Litt. 47 b, that a lease is a contract, have reference to the fact that an action of debt might be maintained for the rent reserved. See post, § 157 a, note 294. Compare the statement in Co. Litt. 45 b, that "whatsoever word amounteth to a grant may serve to make a lease," showing clearly that author's conception of a lease as a conveyance.

⁷ Occasionally the expression "breach of lease" or "breach of lease contract" is made use of by the courts, meaning thereby the breach of some particular contractual stipulation contained in the instrument of lease.

In some of the Southern states the expression "rental contract" is much in vogue. It is unfortunate that such expressions should be used, with the necessary result of obscuring fundamental legal principles. We do not refer, of course, to states which have avowedly accepted the civil law view of the subject.

⁸ See Holland, Jurisprudence (9th Ed.) 242. In Professor Salmond's able work on Jurisprudence (2d Ed.) 307, note, it is said: "Contract is sometimes used in the wide sense of any bilateral act in the law (citing Holland, Jurisprudence, supra). This, however, is very unusual, and it is certainly better to use agreement in this sense. Contract, being derived from *contrahere*, involves the idea of binding two persons together by the *vinculum juris* of an obligation. An assignment is not a contract, and a release is the very reverse of a contract."

⁹ That at common law a conveyance by deed is perfectly valid with-

rem.¹⁰ And to speak of a legal act as a contract when it involves the transfer of an interest is at best misleading, even if not erroneous.

Taking the most ordinary case of a lease, one for a term of years, it would generally be conceded that its effect is to create in the lessee an estate for years, a class of estate as well recognized at the present day, though not formerly,¹¹ as an estate in fee simple or for life. So a lease for life undoubtedly creates an estate for life in the lessee, a fact which was fully recognized at common law in the requirement of *livery of seisin* to validate such a lease.¹² And a lease from year to year, or other periodic lease, creating as it does a term for at least one year or other period named, must also be regarded as creating an estate in the lessee. Even a tenant at will has been recognized as having an estate in the land.¹³ In all these cases the tenant of the particular estate named may assert his rights of possession and enjoyment as against any person whomsoever, that is, he has that proprietary interest in land which goes by the name of estate. And to create such a proprietary interest a conveyance, as distinguished from a contract, is necessary.

The not infrequent failure to recognize that a lease is something more than a mere contract is, it is conceived, to a consid-

out any consent, or even knowledge thereof, on the part of the grantee, see Harriman, Contracts, §§ 82, 83; 2 Tiffany, Real Prop. § 407.

¹⁰ See Anson, Contracts (7th Ed.) 3; Pollock, Contracts (6th Ed.) Appendix A; Hammon, Contracts, §§ 6, 7, note (17); Clark, Contracts, 11. So Pothier, Obligations, 3, says: "That kind of agreement, the object of which is to form some engagement, is that which is called a contract."

¹¹ See ante, § 12 a.

In Trustees of Wadsworthville Poor School v. Jennings, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 854, there is a dictum that "a lessee has no estate in the lands demised to him. His term, under the law, is but a chose in action or

chattel interest." That the term is a chattel interest is no doubt to be conceded, but that it is not an estate is certainly not the law generally, though it was the law in England, as has been before stated, five hundred years ago. So the statement in the recent case of *In re Hubbell Trust*, 135 Iowa, 637, 113 N. W. 512, that "the lease of land by which a tenant acquires the right of possession for a specified period vests in him no interest in the land itself," cannot be approved.

¹² Barwick's Case, 5 Coke, 93; 2 Preston Estates, 162.

¹³ Co. Litt. 55a; 2 Blackst. Comm. 145; 1 Preston, Estates, 28; Williams, Real Prop. (18th Ed.) 434. See ante, § 13 c.

erable extent due to the fact that a writer of recognized standing, two centuries ago,¹⁴ defined a lease as a contract * * * for the possession and profits of lands on the one side, and a recompense by rent, or other consideration, on the other." This definition, or one substantially identical therewith, in regarding a lease purely as a contract, has been accepted in a number of cases,¹⁵ frequently upon the express authority of the writer referred to. The fundamental objection to such a definition of a lease is that it entirely ignores the common-law theory of a particular and a reversionary estate in the lessee and lessor respectively, and substitutes therefor the civil law conception of a contract of hiring (*locatio conductio*), which passes no title or property in the thing hired, but merely binds the owner (*locator*) to secure the enjoyment of the thing to the hirer.¹⁶

One writer, usually regarded as of considerable accuracy, seeming to find difficulty in choosing between the definitions of a lease, states that a lease is "a contract for the possession of lands and tenements on the one side; and a recompense of rent

¹⁴ The author of *Bac. Abr. tit. Leases*, 433. This is usually attributed to Chief Baron Gilbert.

¹⁵ *United States v. Gratiot*, 14 Pet. (U. S.) 526, 10 Law Ed. 573; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 Law. Ed. 950; *Heywood v. Fulmer*, 158 Ind. 658, 32 N. E. 574, 18 L. R. A. 491; *Sawyer v. Hanson*, 24 Me. 542; *Pelton v. Minah Con. Min. Co.*, 11 Mont. 281, 28 Pac. 310; *Paul v. Crag-naz*, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540; *Edwards v. Noel*, 88 Mo. App. 434; *Jackson v. Harsen*, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517; *Dolittle v. Eddy*, 7 Barb. (N. Y.) 74; *Becker v. Becker*, 13 App. Div. 342, 43 N. Y. Supp. 17.

¹⁶ See, as to the civil law contract as distinguished from a modern lease, and its resemblance to the early English conception of a lease, *Hare, Contracts*, 90, 92. See, also, *Pothier, Contract de Louage*, § 3; *Sandars' Justinian*, 451. That the civil law *locatio conductio* did not create any rights *in rem* in the hirer is clearly shown in *Hunter's Roman Law* (3d Ed.) at p. 506. The civil law conception of a lease prevails in Louisiana and to some extent in Georgia. In the latter state a statute (Code 1895, § 3115) provides that "no estate passes out of the landlord, and the tenant has only a usufruct * * * ; and all renting or leasing of such real estate for a period of time less than five years shall be held to convey only the right to possess and enjoy such real estate, * * * and to give only the usufruct, unless the contrary be agreed upon." In *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013, however, it is said that "a tenant, though he has no estate in the land, is the owner of its use for the term of his rent contract, and he can recover damages for any injury to such use" occasioned by a public nuisance.

or other income on the other. Or it is a conveyance of lands and tenements to a person for life, for years, or at will, in consideration of a return of rent, or other recompense."¹⁷ And occasionally such an alternative definition has been asserted by the courts.¹⁸ As we have undertaken to show, a lease is always a conveyance, and such a definition is, it is conceived, not only ambiguous, but likewise erroneous.

One of the definitions which we have undertaken to criticise appears to assume that a consideration is necessary to the validity of a lease, and we occasionally find judicial suggestions to the same effect.^{19, 20} So far as by the term "lease" we refer to a conveyance by way of lease, that is, a conveyance leaving a reversion in the grantor, it is perfectly valid without any consideration moving to the lessor. Even though any of the contractual stipulations were invalid for lack of a consideration, this would not affect the lease so far as it is a conveyance creating a tenancy. A conveyance in fee simple is valid without any consideration,²¹ and so must be a conveyance for a less period. In other words, one having an estate in land may make to another a gift of either his whole interest or of a part of his interest. Ordinarily the lessor does receive what would be a sufficient consideration to support a contract in the shape of the lessee's contract to pay rent, but that a lease is valid without any provision for rent is well recognized.²²

¹⁷ 4 Cruise's Dig. tit. 32, c. 5, § 1. Real Prop. (6th Ed.) § 2272; Notes of

¹⁸ Milliken v. Faulk, 111 Ala. 658, Coleridge and Christian, at p. 296 of 20 So. 594; Lacey v. Newcomb, 95 Blackstone's Comm. criticizing the Iowa, 287, 63 N. W. 704; Branch v. Doane, 17 Conn. 402; Badger Lumber Co. v. Malone, 8 Kan. App. 121, 54 effect cited 2 Tiffany, Real Prop. § Pac. 692; Jackson v. Harsen, 7 Cow. 384, note 145. (N. Y.) 323, 17 Am. Dec. 517.

^{19, 20} Gilpin v. Adams, 14 Colo. 512; That a common-law conveyance was valid without consideration is White v. Walker, 31 Ill. 422; Mc- necessarily involved in the well rec- Farlane v. Williams, 107 Ill. 53; ognized rule that, on a feoffment Mitchell v. Com., 37 Pa. 187; Visalia without consideration, a use result- Gas. & Elec. L. Co. v. Sims, 104 Cal. ed in favor of the feoffor. See Sug- 326, 37 Pac. 1042, 43 Am. St. Rep. den's Gilbert on Uses, c. 1, §§ 5, 60; 105. 1 Sanders, Uses and Trusts, 60; Per-

²¹ See Preston, Abstracts of Title, § 533.
²² See post, § 165.
⁷¹; 1 Sanders, Uses & Trusts, 67;
⁴ Kent's Comm. 462; 3 Washburn,

The word "demise" is not infrequently, especially in England, applied to the legal act by which the relation of landlord and tenant is created, that is, the conveyance of an estate less than that of the grantor. The use of this word, not having any reference to the covenants entered into by the parties thereto, is free from the ambiguity which unfortunately attends the use of the word "lease."²³

§ 17. Tenancy "by implication."

Not infrequently reference is made to a tenancy "by implication," or it is said that the relation of landlord and tenant may be "implied." The courts and textbook writers, in using this language, are not entirely explicit, but they appear usually to mean that the relation may be created without the use of the language ordinarily regarded as most appropriate for the purpose. It is, for instance, said by an able writer that "an estate at will may, and frequently does, arise by implication,"²⁴ by which is meant, no doubt, that such an estate may be created by an entry under an informal oral permission, as before explained.²⁵ There is, however, no distinction in principle between such a case, and the case of a lease in express terms, using the words "lease" and "demise." Ordinarily a tenancy at will is created in this way, the owner of the premises merely giving permission to another to take possession, and the latter taking possession accordingly. But the words "you may take possession of this property" are quite as effective as the words "I, A. B. hereby lease to you C. D., the premises, (describing them) to have and to hold at will." In either case there is a lease, either oral or in writing, as the case may be. The only distinction between the forms of expression is that in the former case there is no state-

²³ Coke (2 Inst. 483) uses demise to denote a partial transfer by way of lease." In the sense of a conveyance in fee simple, fee tail or for life. Referring to this passage counsel in *Greenaway v. Adams*, 12 Ves. Jr. 397, said: "The strict technical import of the word demise, from the verb 'dimitto' is any transfer or conveyance, though by habit it is generally used to denote a partial transfer by way of lease."

In *Snedecor v. Pope*, 143 Ala. 275, 39 So. 318, it is decided that the word "demise" does not necessarily import a written instrument. That this is so seems unquestionable.

²⁴ Smith, Landl. & Ten. (3d Ed.)

21.

²⁵ See ante, § 13 a (3).

ment as to the nature of the tenancy, and this has to be supplied by the law, which determines that the taking of possession under such bare permission creates a tenancy at will. The relation of tenancy may even be created by a landowner's mere assent to the words used by another, as when he is asked if he is willing to lease on certain terms and he indicates his assent to the proposition, and possession is taken accordingly,²⁶ and he might indicate his assent for this purpose by acts instead of words. In such a case, however, there is a lease, and the use of the expression "implication" in this connection can but obscure the real nature of the transaction. So in the frequent case of what is known as an "attornment," that is, an acknowledgment by one in possession of land, by word or act, that he is tenant of another, there is in effect a lease to him by such other, though there may be, on the part of the latter, no word or act except the mere tacit acceptance of the acknowledgment.²⁷ And when it is said, in connection with actions for use and occupation, that the relation of landlord and tenant must exist by "implied or express contract,"²⁸ it cannot be intended thereby to say that the law creates the relation under certain circumstances without reference to the intention of the parties, but the meaning presumably is that a mere permissive possession, however the permission may be indicated, is ordinarily sufficient to justify recovery in such an action. If one takes possession "under a contract for a lease" or "under a contract of sale," as it is usually expressed,²⁹ his entry is actually by reason of a permission, stated in the contract, or otherwise indicated, and it seems improper to say that there is in such case a tenancy "by implication." And if one enters under a lease invalid for want of writing or of record, he becomes tenant because his entry is by permission, and he in reality enters under a lease, though not under the lease intended to be made.³⁰

²⁶ See e. g., *Schwarze v. Mahoney*, 97 Cal. 131, 31 Pac. 908, where one who asked the owner what rent she desired, and, on being told, expressed a readiness to "take" the property, and took possession, was held to be a tenant.

²⁷ See post, § 19 c.

²⁸ See e. g., *Dudding v. Hill*, 15 Ill. 61; *Greenup v. Vernor*, 16 Ill. 26; *Chamberlain v. Donahue*, 44 Vt. 57.

²⁹ See post, §§ 43 a, 65.

³⁰ See ante, § 13 a (3); post, § 25 g.

In no case, it is conceived, does the law "imply" a tenancy when there is in fact no lease, that is, no permission by the owner to another to take or retain possession, manifested either by words or acts,³¹ though it occasionally says that one who is in by permission shall, under certain circumstances, be regarded as one class of tenant rather than another.³² One who enters another's land without permission is a trespasser and not a tenant³³ and the law will not "imply" that he is rightfully in possession for the purpose of imposing liability upon him as a tenant,³⁴ even though he enters into negotiations for a lease.³⁵

Occasionally the expression "implication" or "implied" is used with regard to the evidence necessary or sufficient to justify a finding of the existence of the relation of tenancy. Thus it has been said that, if the facts are such, in the estimation of the jury, as to exclude every other reasonable hypothesis, the law will imply that the relation of landlord and tenant exists.³⁶ This seems to be merely the equivalent of a statement that the jury should find the existence of a tenancy if this is the only reasonable hypothesis on the evidence, and so when it is said that a

³¹ See *Bailey's Adm'r v. Campbell*, 82 Ala. 342, 2 So. 646; *Emerson v. Weeks*, 58 Cal. 439; *Littleton v. Wynn*, 31 Ga. 583; *Hill v. Coal Valley Min. Co.*, 103 Ill. App. 41; *Cummings v. Smith*, 114 Ill. App. 35; *Knowles v. Hull*, 99 Mass. 562; *Emmons v. Scudder*, 115 Mass. 367; *Twiss v. Boehmer*, 39 Or. 359, 65 Pac. 18; *Moore v. Harvey*, 50 Vt. 297; *Wilcher v. Robertson*, 78 Va. 602.

In *Pardee v. Gray*, 66 Cal. 524, 6 Pac. 389, it was held that one who, having refused to leave A's house, was moved by A, with the house, on land leased to A, was "put in possession" of a portion of such land, and was consequently liable to expulsion by summary proceedings commenced by A's lessor, as being an undertenant. It might, it seems be questioned whether the person in the house was "put in possession" of

part of the land by the removal of the house thereon. It would rather seem that by such removal of the house with him in it the lessee in effect licensed him to go on the land for the purpose of occupying the house, and that by remaining in the house he acted under the license. It was as if he had been transported by the lessee thereon in his vehicle. There was no intention on the part of the lessee to give possession of any part of the premises or to create a tenancy, and there was not, so far as appears, any intention on the part of the person in the house to take possession as tenant.

³² See ante, §§ 13 a (3), 14 b (2).

³³ See ante, § 6.

³⁴ See post, § 302.

³⁵ See post, § 19d, at notes 105-107, § 302, at note 32.

³⁶ *Rainey v. Capps*, 22 Ala. 288.

tenancy may be "implied" from the payment of rent,³⁷ it is usually meant that its existence may be inferred from such payment.

§ 18. Evidence of creation of the relation.

The question whether the relation of landlord and tenant has been created is one of fact for the jury subject to the instructions of the court,³⁸ and even though the construction of a written instrument as being a lease *vel non* is involved, a question which is plainly for the court,³⁹ and the court decides it to be a lease, the question whether the relation of tenancy actually exists is, it seems, still for the jury as being dependent on whether possession has been taken and held under the lease.⁴⁰

The only class of evidence bearing upon the existence, or which is the same thing, the creation, of the relation, particularly re-

³⁷ *Strahan v. Smith*, 4 Bing. 51; *Cunningham v. Holton*, 55 Me. 33; *Weinhauer v. Eastern Brew. Co.*, 85 N. Y. Supp. 354. See post, § 18.

³⁸ *Swanner v. Swanner*, 50 Ala. 66; *McDowell v. Hyman*, 117 Cal. 67, 48 Pac. 984; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480; *Duncan v. Beard*, 2 Nott & McC. (S. C.) 400; *Doe d. Hearn v. Gray*, 2 Houst. (Del.) 135; *Jackson v. Vosburgh*, 7 Johns (N. Y.) 186; *McKenzie v. Sykes*, 47 Mich. 294, 11 N. W. 164; *Chamberlin v. Donahue*, 44 Vt. 57. So the question whether a tenancy was for a year or from month to month was decided to be for the jury. *Pusheck v. Frances E. Willard N. T. H. Ass'n*, 94 Ill. App. 192.

In *Borough of Phoenixville v. Walters*, 147 Pa. 501, 23 Atl. 776, it was regarded as a question for the jury whether the possession of land by an association was that of a tenant from year to year, as having continued to pay rent after the expiration of its original lease, or was under a renewal thereof, in accordance with a resolution of the council

of the borough which owned the land, an officer of the association having been present when the resolution was passed. Where all the facts on which the allegation of a tenancy is based are admitted, the court may determine whether a tenancy exists. *Howard v. Carpenter*, 22 Md. 10.

³⁹ See *Ferris v. Hoglan*, 121 Ala. 240, 25 So. 834; *State v. Paige*, 1 Speer Law (S. C.) 408, 40 Am. Dec. 608; *McCutchen v. Crenshaw*, 40 S. C. 511, 19 S. E. 140; *Stadden v. Hazard*, 34 Mich. 76; *Nightingale v. Barends*, 47 Wis. 389, 2 N. W. 767. In *Lamson v. Moffat*, 61 Wis. 153, 21 N. W. 62, it was decided that though an instrument was on its face a lease, the jury could find on the evidence that it was intended merely as a mortgage on the crops, in accordance with the general rule that an absolute conveyance may be shown to be a mortgage.

⁴⁰ *Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131. As to the necessity of entry under the lease to create the relation of tenancy, see post, § 37.

ferred to by the cases, is that of the payment of rent, it being said that such payment by one in possession is evidence of the relation,⁴¹ and the same has been said of a promise to pay rent.⁴² It may happen, however, that the payment of rent does not show that the payor is a tenant of the payee,^{42a} as when he is paying it on account of another,⁴³ and even when the payment is by a person in possession, he may be a subtenant paying the rent on account of the original tenant,⁴⁴ or a person on the premises making the payment may be doing so as the agent or servant of the tenant.⁴⁵ Or he may even be doing so without the existence of any legal relation or privity between him and one claiming under the lease.⁴⁶ Likewise, the fact that the defendant in a summary proceeding pays the rental value of the premises in order to secure an appeal does not show him to be a tenant rightfully in possession.⁴⁷ And it has been held that the fact that one in possession made a single payment, as for rent, to an adverse claimant of the land, in order to obtain a temporary immunity from suit, did not preclude her from denying the existence of a

⁴¹ *Doe d. Hearn v. Gray*, 2 *Houst.* (Del.) 135; *Doe d. Barrett v. Jefferson*, 5 *Houst.* (Del.) 477; *Voigt v. Resor*, 80 *Ill.* 331; *Morris v. Niles*, 12 *Abb. Pr.* (N. Y.) 103; *Cressler v. Williams*, 80 *Ind.* 366; *Virginia Min. & Imp. Co. v. Hoover*, 82 *Va.* 449, 4 *S. E.* 689.

⁴² *Kelly v. Eyster*, 102 *Ala.* 325, 14 *So.* 657.

^{42a} See *Sanford v. Herron*, 161 *Mo.* 176, 61 *S. W.* 839, 84 *Am. St. Rep.* 703.

⁴³ "The rent must be paid in the capacity of tenant." *Strahan v. Smith*, 4 *Bing.* 91. In that case the pledgee of pictures took a lease of a room in which to place them, and the pledgor paid the rent in order to get them back.

A promise to pay an annual sum to the owner of land in order to induce him to make a lease to another does not make the promisor a tenant

of the owner. *Sanborn v. First Nat. Bank*, 9 *Colo. App.* 245, 47 *Pac.* 660.

⁴⁴ See post, § 177 e.

⁴⁵ In *Joslin v. Ervien*, 50 *N. J. Law*, 39, 12 *Atl.* 136, it was held that evidence that a person on the premises paid the first instalment of rent by his own check, that he demanded rents of sublessees, and gave receipts in his own name, was sufficient to support a finding that he was himself tenant and not merely the agent of another.

⁴⁶ *Doe d. Hull v. Wood*, 14 *Mees. & W.* 682. There the widow of the lessee paid the rent to the lessor, and this was held not to show that she was tenant under the lessee's administrator, or under the lessor, but that knowing that she had no title, she merely retained possession, avoiding expulsion by the administrator by such payment of the rent.

⁴⁷ *Hopkins v. Holland*, 84 *Md.* 84, 35 *Atl.* 11.

tenancy.⁴⁸ Furthermore, one in possession paying rent may be paying it, not as tenant of the payee, but as holding under a conveyance in fee reserving rent,⁴⁹ or under an assignment to him, as distinguished from a sublease, reserving rent.⁵⁰ Ordinarily, however, if one pays to another certain sums as and for rent of particular land, of which the payor is in possession, this is *prima facie* evidence of the existence of the relation of landlord and tenant, as showing an attornment by the person in possession, as will be explained in the next section.

The existence of the relation of landlord and tenant may be shown, as against one of the parties, by an admission by him, or by acts equivalent to an admission. So it has been decided that, by bringing an action for use and occupation, one admits the existence of a tenancy.⁵¹ But the service of a notice to quit has been held not to involve such an admission, when it was served simultaneously with a declaration and notice in ejectment.⁵²

A landlord is not precluded, it has been decided, from showing that a certain person is his tenant, as regards particular premises, by the fact that he has procured the issue of a liquor license to another person.⁵³

That an agent uses his own property to some extent for the

⁴⁸ Hudson v. White, 17 R. I. 519, 23 Atl. 57.

A payment made to secure immunity from suit, not as for rent, evidently does not show the existence of the relation of tenancy. See Myer v. Roberts, 50 Or. 81, 89 Pac. 1051.

⁴⁹ See ante, § 11 a.

The payment of rent to a certain man and his heirs or devisee for over twenty years by one having a fee simple estate in land has been held to show *prima facie* that the person to whom rent is so paid has title to the rent. Steward v. Bridger, 2 Vern. 516; McElroy v. Railroad, 7 Pa. 536. And the continuous occupation of land for eighty years, by one whose original entry thereon was permissive and by his descend-

ants, and the payment of rent by such persons throughout that time to the person under whom the entry was made and to his descendants, accompanied by the making of improvements, has been held to raise a presumption of a "lease in fee," or of an agreement for such a lease. Ham v. Schuyler, 4 Johns. Ch. (N. Y.) 1.

⁵⁰ See post, § 151.

⁵¹ Powers v. Ingraham, 3 Barb. (N. Y.) 576; Cunningham v. Holton, 55 Me. 33, 57 Me. 420.

⁵² Powers v. Ingraham, 3 Barb. (N. Y.) 576.

⁵³ S. Liebmann's Sons Brew. Co. v. De Nicolo, 46 Misc. 268, 91 N. Y. Supp. 791.

transaction of his principal's business does not show that the latter is his tenant as regards such property.⁵⁴

It is said that "a tenancy once created is presumed to continue so long as the tenant remains in possession."⁵⁵ This, however, is not, properly speaking, a matter of presumption or of evidence, but is, it seems, merely another mode of stating that one who enters as tenant is precluded, so long as he continues in possession, from asserting title in himself or in another.⁵⁶ There is not, it is conceived, any presumption of the continuance of the tenancy as against the landlord.

It has been said that the relation will not be inferred from occupation, if the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause.⁵⁷ This appears to mean merely that if one is shown to be in possession in another capacity, there is no room for an inference that he is in possession as tenant, and so, if one is in possession as trustee, he is not in possession as tenant;⁵⁸ and if he is in possession as agent, acts on his part within his authority will not be regarded as the acts of a tenant.⁵⁹

The fact that a written instrument contains the word "lease"⁶⁰ or "term,"⁶¹ does not conclusively show it to be a lease, but its construction in this respect is to be determined by a consideration of the whole instrument. In numerous decisions the courts

⁵⁴ Pittsburgh, C. & St. L. R. Co. v. Thornburgh, 98 Ind. 201.

⁵⁵ Wheelock v. Warschauer, 21 Cal. 309; Milsap v. Stone, 2 Colo. 137; Longfellow v. Longfellow, 54 Me. 240; Hill v. Goolsby, 41 Ga. 289.

⁵⁶ See post § 78.

⁵⁷ Hardin v. Pulley, 79 Ala. 381.

⁵⁸ Russell v. Erwin's Adm'r, 38 Ala. 44; Hardin v. Pulley, 79 Ala. 381.

⁵⁹ Paige v. Akins, 112 Cal. 401, 44 Pac. 666.

⁶⁰ Ferris v. Hoglan, 121 Ala. 240, 25 So. 834. In this case the word "lease" was used, but the agreement was that one party was to cultivate the land and gather and market the crop, and was to receive his compensation from the proceeds, the sur-

plus being paid to the other party, the owner, and no time was fixed for the termination of any possessory interest, no rent was named to be paid, and there was no provision for sharing in the crop. There was held to be a mere contract of employment.

⁶¹ State v. Page, 1 Speer Law (S. C.) 408, 40 Am. Dec. 608. Here there was an agreement with one to take charge of a hotel as manager for a term of years, compensation to him to be fixed by profits, and his books to be open to inspection by the owners. This was held not to be a lease. The court of appeals in equity, however, seems to have viewed the agreement differently in this respect. See Page v. Street, Speer Eq. (S. C.) 159.

have considered the question whether, in the particular case, the instrument in question involved a lease or merely a contract for the cultivation of land "on shares," and the use of the word "lease" has never been regarded as conclusive.⁶²

If an instrument in terms undertakes to create the relation of tenancy, it cannot be shown by oral evidence that the transaction was actually a sale.⁶³

§ 19. Attornment.

a. Double meaning of term. The expression "attornment" is used in two senses. At common law it was necessary, upon a transfer of a seignory, or of a reversion upon an estate for life or years, that the tenant should "attorn" to the transferee, before the latter could be regarded as the landlord and entitled to assert rights as such against the tenant.⁶⁴ The act of attorning, the "attornment," consisted merely of the tenant's recognition of such transferee as his landlord.⁶⁵ This requirement of attornment was dispensed with by St. 4 Anne, c. 16, § 9. And this statute, or the policy embodied therein, has been generally adopted in this country.⁶⁶ We have, therefore, at the present day, but little occasion to employ the word "attornment" as signifying the tenant's acknowledgment of the transferee of the reversion as his landlord.

The word "attornment" is also frequently used, in another sense, to describe the acknowledgment, by one previously in possession of land, that he is tenant to another, when there has been no transfer of any reversion to the latter, and the ex-

⁶² See post, § 20.

⁶³ *Smith v. Caldwell*, 78 Ark. 333, 95 S. W. 467.

⁶⁴ Litt. §§ 551-591, and Coke's Commentary thereon; Sheppard's Touchstone, c. 13.

⁶⁵ "Attornment is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, etc., or I am well content with the grant made to you; but the

most common attornment is to say, Sir, I attorn to you by force of the said grant, or I become your tenant, etc., or to deliver to the grantee a penny or a half-penny or a farthing by way of attornment." Litt. § 551. Lord Coke adds: "Any other words which import an agreement or assent to the grant do amount to an attornment." And payment of any part of the rent or service to the grantee was a sufficient attornment. Sheppard's Touchstone, p. 261.

⁶⁶ See post, § 146 f.

pression is thus used whether the person making the acknowledgment, or, which is the same thing, agreeing to hold under another, is himself the rightful owner of the land, or is a trespasser or disseisor, or is in possession as tenant of some person other than the one whom he thus accepts as landlord. Attornments of this character are the subject of our present discussion.

b. **Attornment by tenant to stranger**—(1) **Is usually invalid.** The expression "attornment" is perhaps most frequently used in reference to one already in possession as tenant of another, and it is generally recognized that one so in possession as another's tenant cannot voluntarily attorn, to the detriment of his landlord, to an adverse claimant of the land. Such an attornment was the subject of the statute 11 Geo. 2, c. 19, § 11, which, after reciting that "whereas the possession of estates in lands, tenements, and hereditaments is rendered very precarious by the frequent and fraudulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlord or landlords, lessor or lessors, who by that means are turned out of possession of their respective estates, and put to the difficulty and expense of recovering the possession thereof by actions or suits at law," prescribed that every such attornment of any tenant or tenants should be absolutely null and void, and that the possession of their respective landlords or lessors should not be deemed to be in any wise altered or affected thereby "provided always that nothing herein contained shall extend to vacate or affect any attornment made pursuant to and in consequence of some judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited." This provision has been substantially re-enacted in a number of the states of this country,⁶⁷ occasionally with changes of phraseology as to the exceptional cases in which an attornment to a stranger will be upheld.

⁶⁷ *California* Civ. Code, § 1948; *Jersey* Gen. St. p. 1921, § 26; *New Delaware* Rev. Code 1893, p. 867; *York* Real Prop. Law, § 194; *Okla-Burns'* Ann. St. *Indiana* 1901, § 7097; *Iowa* St. 1903, see 3333; *South Iowa* Code 1897, § 2990; *Kansas* Gen. *Carolina* Civ. Code, § 2413; *Virginia* St. 1905, § 4064; *Kentucky* St. 1903, Code 1904, § 2784; *West Virginia* § 2298; *Mississippi* Code 1906, § 2837; Code 1906, § 3397; *Wisconsin* St. *Missouri* Rev. St. 1899, § 4112; *Mon-* 1898, § 2182.
tana Rev. Codes 1907, § 5233; 2 *New*

The exact meaning and purpose of the provision above quoted is not entirely clear, and the same obscurity would seem to attend its American counterparts. From the recitals in the English act one might be led to infer that, by the law as it previously existed, a tenant could always, by attorning to a stranger, in effect disseise his landlord, but, as a matter of fact, the common-law rule is clearly stated by writers of authority to have been otherwise, the attornment to a stranger being effective as against the landlord in one case only, which could have occurred but seldom.⁶⁸

The doctrine, embodied in the English statute referred to, and in its American counterparts, that a tenant cannot make an attornment to an adverse claimant, to the prejudice of his own landlord, has been applied in a number of connections, usually without specific reference to any statute on the subject. For instance, the stranger to whom such an attornment is made acquires thereby no rights to the land as against the landlord,⁶⁹ nor as against third persons,⁷⁰ nor does the attornment give such stranger adverse possession as against the landlord, capable of ripening into title by lapse of the statutory period of limitation.⁷¹ So an attornment to a stranger does not affect the run-

⁶⁸ If a lord was disseised of the demesne lands of the manor, an attornment to the disseisor by the tenants of the other lands of the manor put the disseisor into possession of the rents and other services due by the tenants. But in other cases the attornment of a tenant to a stranger was simply nugatory. Litt. §§ 587, 589; Co. Litt. 323. So it is said in Gilbert on Tenures, p. 104: "Though my tenant should attorn to somebody else, that would not put me out of possession of my reversion, because, the right being in me, it could not be transferred to any body else, but by some act of my own; and the payment of my tenant is but a wrongful payment, and doth not give him my right."

⁶⁹ *United States v. Sliney*, 21 Fed. 894; *Chambers v. Pleak*, 36 Ky. (6

Dana) 426, 32 Am. Dec. 78; *Breeding's Heirs v. Taylor's Heirs*, 52 Ky. (13 B. Mon.) 477; *State v. Howell*, 107 N. C. 835, 12 S. E. 569; *Clampitt v. Kelley*, 62 Mo. 571. So where the tenant accepted a lease from a stranger, see *Parker v. Nanson*, 12 Neb. 419, 11 N. W. 865. A grantee is not ousted, so as to have a right of action on a covenant in his deed, by the attornment of his tenant to a third person who had no title. *Bailey v. Moore*, 21 Ill. 165.

⁷⁰ *Perkins v. Potts*, 52 Neb. 110, 71 N. W. 1017.

⁷¹ *Doe d. Hooper v. Clayton*, 8 Ala. 391, 2 So. 24; *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61; *Camden Orphan Soc. v. Lockhart*, 2 McMul. Law (S. C.) 84; *Fowler v. Simpson*, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370.

ning of the statute of limitations in favor of the landlord as against a third person claiming the property⁷² and it does not, it has been decided, give possession to the person to whom it is made for the purpose of avoiding the statute invalidating a conveyance by one out of possession.⁷³ Such an attornment does not affect the possession of the tenant as being that of his original landlord, so as to preclude an action by the latter to quiet title, under the statute authorizing such action by one in possession "by himself or tenant,"⁷⁴ though it has been held to give to the person to whom it is made possession sufficient for the purpose of such an action.⁷⁵ An attornment to a third person by one in possession under a lease from one having no title has, however, been regarded as giving to the latter the benefit of the attornor's labor for the purpose of procuring a title from the state.⁷⁶

(2) **Cases excepted in the statutes.** The statute 11 Geo. 2, c. 19, § 11, above referred to, as well as its American counterparts, names certain circumstances under which an attornment by the tenant to a stranger shall be valid. These exceptions to the general rule, as named in the statutes, have been the occasion of but little judicial discussion, and it is difficult to form clear opinions as to their exact scope and effect.

The case of an attornment made in pursuance of a judgment or decree is excepted in all the statutes, and the result is, that if the owner of a paramount title obtains a judgment or decree establishing his right as regards the land, the tenant may thereupon consent to hold under him and so retain possession. In a number of jurisdictions, even apart from any statutory provision, a tenant may attorn to one who has recovered a judgment for possession against him.^{77, 78}

⁷² Elliott v. Dycke, 78 Ala. 150; ble v. Lake Superior & Puget Sound Rankin v. Tenbrook, 5 Watts (Pa.) Co., 99 Minn. 11, 108 N. W. 867.

⁷³ State v. Hicks, 53 Ark. 238, 13

⁷⁴ Turner v. Thomas, 76 Ky. (13 S. W. 704.

Bush) 518.

^{77, 78} See post, § 78 p (2), at note

⁷⁴ Smith v. Cooper, 38 Kan. 446, 16 545.

Pac. 958; Blanchard v. Tyler, 12 In Doe d. Kennedy's Heirs v. Reynolds, 27 Ala. 364, it was decided Mich. 339, 86 Am. Dec. 57.

⁷⁵ State v. Griftner, 61 Ohio St. 201, that he cannot attorn to the judgment plaintiff after the judgment 55 N. E. 612; Sheaff v. Husted, 60 Kan. 770, 57 Pac. 976. But see Trim- has become void, as by the expiration

Another exception, named in various statutes, to the rule that a tenant cannot attorn to a third person, is when such attornment is with the consent of the landlord. Ordinarily, it is evident, a landlord will not give such consent, and we find but one case in which this exception was applied,⁷⁹ it being there held that if a landlord consented that his tenant attorn to one whom the landlord expected to purchase his reversion, he could not thereafter recover in ejectment against the tenant, or against the person to whom the tenant attorned.

Another exception, named in the English statute and in some of those enacted in this country,⁸⁰ is the attornment "to any mortgagee after the mortgage is become forfeited." This can refer, in jurisdictions where a mortgage passes the legal title, only to a mortgage prior to the lease, since a mortgage subsequent thereto constitutes merely a transfer of the reversion, and an attornment to the subsequent mortgagee is not to a stranger.⁸¹ As regards an attornment to a prior mortgagee, the rule in such jurisdictions, generally now recognized, is broader than the exception in the statute, and the tenant of the mortgagor is regarded as entitled to attorn to the mortgagee before as well as after a forfeiture under the mortgage, upon a demand by the mortgagee for rent or for possession.⁸² In jurisdictions, on the other hand, in which the legal title does not pass under a mortgage, an attornment to a mortgagee could, apart from the statute, be valid only when he has purchased at the sale under the mortgage and so procured the legal title.^{82a} The application, in such jurisdictions, of this exception in the statute, might have the effect, apparently, of enabling the mortgagee, by collusion with the mortgagor's tenant, to obtain the rent which would otherwise be paid to the mortgagor, although he has, as against the latter, no legal title to the land nor any right of possession.

In Missouri the English statute has been amended by adding to the excepted cases in which the tenant's attornment to a third person is lawful that of his attornment to one who pur-

of the fictitious demise laid in the 2 *New Jersey Gen. St.* p. 1920, § 26;
declaration. *New York Real Prop. Law*, § 194.

⁷⁹ *Jackson v. Brush*, 20 Johns. (N. Y.) 5.

⁸¹ See post, § 146 e.

⁸² See post, § 73 a (3).

⁸⁰ *Missouri Rev. St.* 1899, § 4112;

^{82a} See post, at note 85.

chases pursuant to a sale "under a deed of trust,"⁸³ and this has been regarded as justifying an attornment by a tenant to one who purchases a paramount title under such a deed, and as enabling him to set up such attornment as against his own landlord.⁸⁴

Even apart from statute, by some decisions, a tenant would have the right to attorn to a purchaser of a paramount title, upon the assertion of such title, irrespective of whether he purchased at voluntary or forced sale.⁸⁵ In two jurisdictions the statute forbidding an attornment by a tenant to a stranger excepts the case likewise of an attornment to a purchaser at judicial sale.⁸⁶ And in regard thereto the same may be said, that, even apart from statute, if the purchaser at such sale asserts his rights as against the tenant, the latter, by some decisions, might attorn to him instead of relinquishing possession, or driving him to an action of ejectment.⁸⁷

The statutes forbidding attornment to strangers do not, from their very terms, apply to an attornment to a transferee of the reversion,⁸⁸ though such an attornment is, as before stated, ordinarily, at the present day, unnecessary, and to that extent nugatory.

(3) **Attornment under compulsion.** While it has been asserted or decided in a considerable number of cases that an attornment to a stranger by a tenant under a lease is absolutely invalid as against the landlord, even though such stranger has title paramount to that of the landlord,⁸⁹ there are a number of

⁸³ Rev. St. 1899, § 4112.

⁸⁴ *Freeman v. Moffit*, 119 Mo. 280, 25 S. W. 87. And see *Holden Bldg. & Loan Ass'n v. Wann*, 43 Mo. App. 640.

⁸⁵ See post, §§ 73 a (3), 78 p. (2), 186 a (2).

⁸⁶ Iowa Code 1897, § 2990; Wis., St. 1898, § 2182 (Attornment permissible if made to a purchaser at judicial sale acquiring title by a conveyance after expiration of redemption period).

⁸⁷ See references ante, note 85.

⁸⁸ In *Teich v. Arms*, 5 Cal. App. 475, 90 Pac. 962, an attornment to a purchaser at a sale for taxes prior

to the lease is said not to be an attornment to a "stranger" within the statute, the court saying that it is in principle the same as an attornment to a transferee of the landlord. That it is not the same appears to be beyond question. See post, § 78 n (3).

⁸⁹ *Doe d. Kennedy v. Reynolds*, 27 Ala. 364; *Rogers v. Boynton*, 57 Ala. 501; *Simmons v. Robertson*, 27 Ark. 50; *Thompson v. Pioche*, 44 Cal. 508; *Broxton v. Ennis*, 96 Ga. 792, 22 S. E. 945 (semble); *Mason v. Bascom*, 42 Ky. (3 B. Mon.) 269; *Parker v. Nanson*, 12 Neb. 419, 11 N. W. 865;

decisions to the effect that such an attornment to the person having paramount title, if made under compulsion, in order to avoid eviction by the latter, is in legal effect an eviction, and consequently may be asserted by the tenant so attorning. These decisions will be hereafter referred to.⁹⁰

(4) **Validity as against tenant.** By some decisions, if one already in possession as tenant of one person accepts a lease from, or agrees to hold as tenant of, another person, he becomes liable to the latter as well as to his former landlord for rent or in use and occupation,⁹¹ and on the same theory, in an action against him by either to recover possession, he is precluded from denying the plaintiff's title.⁹² So in England it has been explicitly decided that one in possession of land can in succession attorn to two different persons, so as to give to each of them a right of distress.⁹³ By other decisions, however, one already in possession as tenant of another, who attorns to a third person, has been regarded as not bound by the attornment, so as to be precluded from asserting that he is not a tenant of the latter, the theory being that an attornment to a third person is void, not only for the purpose of affecting the former landlord injuriously, but also for the purpose of imposing liability on the part of the tenant towards such third person.⁹⁴

Mosher v. Colè, 50 Neb. 636, 70 N. W. 275; Jackson v. Harper, 5 Wend. (N. Y.) 246; Dem d. Belfour v. Davis, 20 N. C. (3 Dev. & B. Law) 443; Love v. Dennis, Harp. Law (S. C.) 70; McCardell v. Williams, 19 R. I. 701; Hammond v. Dean, 67 Tenn. (8 Baxt.) 193; Pence v. Williams, 14 Ind. App. 86; Stover v. Davis, 57 W. Va. 196, 49 S. E. 1023; Delaney v. Fox, 2 C. B. (N. S.) 768.

⁹⁰ See post, §§ 73 a, 78 p (2), 186 a (2).

⁹¹ Lyon v. Washburn, 3 Colo. 201; Den d. Freeman v. Heath, 35 N. C. (13 Ired. Law) 498; Bailey v. Moore, 21 Ill. 165; Hamilton v. Pittock, 158 Pa. 457, 27 Atl. 1079; Pomeroy v. Dennison, 13 U. C. Q. B. 283. But his liability by reason of his accep-

tance of a second lease ceases upon the termination of the tenancy thereby created. Hodges v. Waters, 124 Ga. 229, 52 S. E. 161, 1 L. R. A. (N. S.) 1181.

⁹² Voss v. King, 33 W. Va. 236, 10 S. E. 402; Petterson v. Sweet, 13 Ill. App. 255; Carter v. Marshall, 72 Ill. 609; Cox v. Cunningham, 77 Ill. 545.

If the second lessor should obtain possession by action against the tenant, such lessor as having obtained possession from the tenant would like him, be precluded from denying the title of the original landlord. Ballance v. Fortier, 8 Ill. (3 Gilm.) 291; Cox v. Cunningham, 77 Ill. 545.

⁹³ Ex parte Punnett, 16 Ch. Div. 226.

⁹⁴ Norton v. Sanders, 30 Ky. (7 J.

It is submitted that, of these two diverse views, the former is the sounder on principle. The statutes forbidding an attornment to a stranger, as appears from the recitals in the English statute on which the others are founded, were intended merely to protect the landlord, and, apart from the statutes, there is no reason whatever for protecting, from the consequences of his own folly or lack of good faith, a tenant who, having procured possession, or a right to continue in possession, by acknowledgment of one person as landlord, chooses thereafter to acknowledge another person as his landlord without having received satisfactory proof of the latter's title. That an attornment by a tenant to a stranger is not intrinsically invalid appears both from the exceptions in the statutes and also from the cases recognizing as valid an attornment to one having paramount title, and the only reason for holding it invalid in any case is, it would seem, that injury to the landlord may be prevented. So far as regards the tenant's double liability for rent in such case, it seems reasonably clear that one should not be relieved from his contract to pay rent to one person because he has made a like contract with another.

It has been decided that if a tenant under a lease attorns to a third person, and subsequently surrenders his leasehold and relinquishes possession to his lessor, who is ignorant of such attornment, the latter does not, by accepting such surrender, become a successor of his lessee as tenant under the person to whom the attornment was made.⁹⁵

c. **Attornment equivalent to acceptance of lease.** An attornment by one in possession to a person with whom he is otherwise in no privity is, it is conceived, in legal effect, merely the acceptance of a lease from the latter. As one who obtains legal exclusive possession of land by permission of another, for a

J. Marsh.) 12; *Payne v. Vandever*, it was decided that where a tenant
56 Ky. (17 B. Mon.) 14; *Cook v. Far-* of A took a lease from B and sur-
rah, 105 Mo. 492, 16 S. W. 692; *How-* rendered possession at the end of his
ard v. Terry, 36 Tenn. (4 Sneed) term to A, B could not claim that
419; *Byrne v. Beeson*, 1 Doug. A was his tenant and so liable to
(Mich.) 179; *Donnelly v. O'Day*, summary proceedings, since the sec-
1 Misc. 165, 20 N. Y. Supp. 688. ond lease was void as an attornment.

In *Freeman v. Ogden*, 40 N. Y. 105, ⁹⁵ *Freeman v. Ogden*, 40 N. Y. 105.

limited period only, becomes such other's tenant, so one already in possession who *retains* possession by permission of such other becomes his tenant. In either case there is a demise of the land if the one person thereafter holds the land "under" the other, that is, by force of his acknowledgment that he is tenant of the other, and it is entirely immaterial that words of leasing are not used, the demand for or acceptance of the acknowledgment being in effect a giving of permission to occupy, sufficient at least to create a tenancy at will. Even in the case of a formal lease to a person already in possession in his own right or under a person other than the lessor, the lessee may properly, it is conceived, be regarded, by his acceptance of the lease, as making an attornment to the lessor.

Such being the nature of an attornment to a stranger by one in possession, it seems obvious that an attornment, by one who is in possession as tenant of one person, to another person having paramount title, cannot properly be regarded as involving a continuance of the same holding with merely a change of landlord. The new landlord is, before the attornment, an absolute stranger to the old tenancy, and the attornment cannot make him in any way a party thereto. The terms of the old tenancy may no doubt be incorporated, expressly or by inference, in the new demise involved in the attornment, but even so there is a new demise and necessarily, therefore, a new tenancy. This has been clearly recognized in the later English cases with reference to an attornment to a mortgagee by a tenant holding under a lease subsequent to the mortgage, it being held that in such case there is a new tenancy, which may be or may not be upon the same terms as the tenancy under the lease from the mortgagor.⁹⁶ And in one case, apparently, the effect of an attornment to a paramount title other than that of a mortgagee, as creating a new tenancy, seems to have been fully recognized.⁹⁷ In some cases, however, in connection with the stamp acts, the English courts made some most refined distinctions between what they called an "attornment," consisting of a mere acknowledgment by the person in possession that he was holding as tenant of the paramount claimant, either upon terms similar to those on which he had been prev-

⁹⁶ See post, § 73 a (4).

⁹⁷ Doe d. Chawner v. Boulter, 6 Adol. & E. 675.

iously holding or without any statement of terms, and "an agreement" to hold on terms different, or possibly different, from those on which he had previously held.⁹⁸ These cases involved, however, merely the question whether the paper evidencing such an arrangement was an "agreement" within the meaning of the statute requiring stamps upon all "agreements," and they regarded an agreement to hold upon the same terms as before as merely an attornment, and so not within the requirement, apparently for the reason that such was the nature of an attornment at common law, ignoring the lack of analogy between such an acknowledgment of a holding under the transferee of the reversion, to which the term was formerly applied, and this modern use of the term as applied to an acknowledgment of a holding under a stranger.

In New York, on the authority of these English cases, it was decided that a tenant who attorned to the claimant of a paramount title continued, by reason of the attornment, to hold under the old tenancy, with merely a change of landlord, as if the reversion had been transferred to such claimant.⁹⁹ The English cases do not, it is submitted, assert any such a view.

There are decisions to the effect that an agreement by one in possession to hold under another who has no title and to pay rent to him is invalid for lack of consideration.¹⁰⁰ But this view

⁹⁸ *Cornish v. Searell*, 8 Barn. & C. 471; *Doe d. Linsey v. Edwards*, 5 Adol. & E. 95, 103; *Doe d. Wright v. Smith*, 8 Adol. & E. 255; *Doe d. Frankis v. Frankis*, 11 Adol. & E. 792.

⁹⁹ *Austin v. Ahearne*, 61 N. Y. 6.

In the case of *Winestine v. Ziglitzki-Marks Co.*, 77 Conn. 404, 59 Atl. 496, it is apparently considered that if one to whom an invalid lease is made pays the rent reserved, and so attorns, he thereupon becomes a tenant under that lease. It is submitted that an invalid lease cannot thus be validated. The tenancy is in such case created by the attornment, not by the lease. Perhaps the meaning is that the attornment will in

such case be presumed to be upon the same terms as those recited in the lease.

¹⁰⁰ *Crim v. Nelms*, 78 Ala. 604; *Fuller v. Sweet*, 30 Mich. 237, 18 Am. Rep. 122; *Compau v. Lafferty*, 43 Mich. 429, 5 N. W. 648; *Sage v. Halverson*, 72 Minn. 229, 75 N. W. 229; *Proprietors of Roxbury v. Huston*, 39 Me. 312. The latter case cites *Cornish v. Searell*, 8 Barn. & C. 471. The opinions in this case are singularly obscure, and but one out of the three judges mentions the subject of consideration.

Smith v. Coker, 110 Ga. 654, 36 S. E. 107, is also to the effect that such an agreement is invalid for want of consideration. In that state, how-

is not only contradicted by the decisions recognizing the validity of an attornment as against the tenant,^{100a} but seems also to involve a mistaken notion of the nature of a tenancy. A lease is not, as we have before stated, so far as it creates the relation of tenancy, a contract requiring a consideration to support it, and an agreement to hold under another, an attornment, is, as we have endeavored to show, merely the acceptance of a lease. If one asks another to hold under him, and the latter agrees to do so, a tenancy arises because an estate, at least at will, is vested in the latter. The liability for rent, moreover, is not primarily a contractual liability,^{100b} and even so regarding it, the grant of permission to continue in possession of the land would constitute a consideration, not to speak of the liability to which, in most jurisdictions, the person to whom the attornment is made becomes subject as landlord, by reason of the implied covenant for quiet enjoyment.¹⁰¹

d. Acts showing attornment. An attornment, that is, an acknowledgment by one in possession of land that thereafter he will hold as tenant of another, may be made, as just indicated, by means of the acceptance of a lease from such other, such acceptance being indicated either by joinder in the execution of the written instrument, or by language explicitly indicating the acceptance. Or, even though there is no lease in explicit language, the person in possession may state to the other that "I agree to hold of you," or "I attorn to you," or "I hereby acknowledge myself your tenant," or may use equivalent expressions.¹⁰² But frequently the acknowledgment is not so explicitly expressed, and, even when so expressed, evidence as to the language used may not be readily available, and consequently reference is frequently made to particular acts, rather than words, to show that the person in possession has recognized another as his landlord.¹⁰³ Ordinarily, the payment by him of rent to another is regarded

ever, the civil law view prevails to such an extent that common-law standards appear inapplicable.

^{100a} See ante, at notes 91-93.

^{100b} See post, § 171 a, at note 122.

¹⁰¹ See post, § 78 k (3), notes 404-407.

¹⁰² See *Baley v. Deakins*, 44 Ky.

(5 B. Mon.) 162; *Millay v. Millay*, 18 Me. 387; *Phipps v. Sculthorpe*, 1 Barn. & Ald. 50; *Goodman v. Jones*, 26 Conn. 264.

¹⁰³ For various classes of acts which have been regarded as showing an attornment, see post, § 73 a 6, § 78

k (1), at notes 377-380.

as at least *prima facie* evidence of such recognition. The payment of rent to another by one in possession does not, as we have seen,¹⁰⁴ always show a tenancy, since one may pay rent in behalf of his landlord, or may pay rent in his own behalf to one who is not his landlord, but such payment of rent by a person in possession is ordinarily made by him in the capacity of tenant, and is certainly *prima facie* evidence of an attornment to the person to whom it is paid, or, as it may be otherwise expressed, of the acceptance of a demise made by him. The case is as if the payee had expressly given to the payor permission to hold possession, and the payor had agreed that his possession should be regarded as under the payee.

An attornment is not shown by the fact that one in possession of land enters into negotiations as to the acceptance of a lease from a paramount claimant, these negotiations not resulting in an agreement.¹⁰⁵ It has also been decided that the fact that one who entered as another's tenant assented to arbitration of a demand for rent by such other's wife did not involve an attornment to the wife,¹⁰⁶ and that even an offer to pay rent to one contesting the landlord's title, who refused to receive it till the title was settled, did not show an attornment.¹⁰⁷

The attornment, to be effective as against the person to whom it is made, must no doubt be accepted by him,¹⁰⁸ but, ordinarily, there is no difficulty in this regard, the attornment being advantageous to such person. The acceptance of rent, paid by the person attorning, necessarily shows, it seems, an acceptance of the attornment, unless there in an explicit agreement to the contrary.

§ 20. Lease providing for division of crops—Cropping contract distinguished.

We have before referred to the distinction between a tenant and a "cropper," so called,¹⁰⁹ and the question whether one is

¹⁰⁴ See ante, at notes 41-50.

¹⁰⁶ *Luttrell v. Caruthers*, 5 Ill. App. (5 Bradw.) 544.

¹⁰⁵ *Center Creek Min. Co. v. Frankenstein*, 179 Mo. 564, 78 S. W. 785;

¹⁰⁷ *Cox v. Cunningham*, 77 Ill. 545.

Victory v. Stroud, 15 Tex. 373; *Blankenship v. Blackwell*, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175.

¹⁰⁸ See *Winestine v. Ziglatzki-Marks Co.*, 77 Conn. 404, 59 Atl. 496.

¹⁰⁹ See ante, § 10.

upon land in one capacity or the other has frequently arisen, it being a very usual custom in this country for the owner of land and another person to agree that the latter shall sow and raise a crop or crops on the premises, which, when raised, shall belong to the two in certain named proportions.¹¹⁰ If such an agreement creates a tenancy, it necessarily involves a lease, giving the lessee an interest in the land, while, if it does not create a tenancy, it is merely a contract, giving the cultivator no interest in the land. The controlling consideration in each case is whether the intention of the parties, as indicated by their words and acts, was to create the relation of landlord and tenant.¹¹¹ If the agreement between them is in writing, the intention is to be determined by a construction of the language thereof,¹¹² while if verbal it is for the jury to determine from the evidence as to the language and the acts of the parties whether a demise was intended.¹¹³

¹¹⁰ In Georgia it was held that where one entered as tenant, but without any express agreement as to the rent to be paid, a custom in that neighborhood to lease land for one-third of the corn and one-fourth of the cotton controlled, and the landlord was entitled to demand such portions of the crops. *Scruggs v. Gibson*, 40 Ga. 511.

An agreement by a tenant to pay "one-half of all the profits from the farm" was construed as meaning one-half of the gross receipts from sales, and not net receipts. *Richmond v. Connell*, 55 Conn. 403, 11 Atl. 853.

The question of the rights of the parties as to the crops in the case of a lease on shares is subsequently considered. Post, § 253.

¹¹¹ *Birmingham v. Rogers*, 46 Ark. 254; *Hammock v. Creekmore*, 48 Ark. 264, 3 S. W. 180; *Alwood v. Ruckman*, 21 Ill. 200; *Chicago & W. M. R. Co. v. Linard*, 94 Ind. 319, 48 Am. Rep. 155; *Orcutt v. Moore*, 134

Mass. 48, 45 Am. Rep. 278; *Gray v. Robinson*, 4 Ariz. 24, 33 Pac. 712; *Betts v. Ratliff*, 50 Miss. 561; *Walls v. Preston*, 25 Cal. 59; *Johnson v. Hoffman*, 53 Mo. 504; *Moser v. Lower*, 48 Mo. App. 85; *Reed v. McRill*, 41 Neb. 206, 59 N. W. 775; *Strangeway v. Eisenman*, 68 Minn. 395, 71 N. W. 617; *Anderson v. Listan*, 69 Minn. 82, 72 N. W. 52, 40 Am. Dec. 608; *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018; *State v. Page*, 1 Speer Law (S. C.) 408; *Aiken v. Smith*, 21 Vt. 172.

¹¹² *Orcutt v. Moore*, 134 Mass. 48, 45 Am. Rep. 278; *Johnson v. Hoffman*, 53 Mo. 504; *Reed v. McRill*, 41 Neb. 206, 59 N. W. 775; *Gray v. Robinson*, 4 Ariz. 24, 33 Pac. 712.

¹¹³ *Williams v. Cleaver*, 4 Houst. (Del.) 453; *Warner v. Abbey*, 112 Mass. 355; *McKenzie v. Sykes*, 47 Mich. 294, 11 N. W. 164.

In *Moser v. Lower*, 48 Mo. App. 85, it is said that if there is no dispute as to the language, the effect of the language may be declared as matter

As before stated,¹¹⁴ the fact that the possession of the land is intended to pass out of the owner into the person who is to cultivate it conclusively shows an intention that the relation of landlord and tenant shall be created, since one does not have possession, in the legal sense, unless he is tenant; while if there appears an intention not to give him possession, "exclusive possession" as it is ordinarily expressed, the relation of landlord and tenant cannot exist. Ordinarily, however, the intention of the parties as to the possession of the land does not appear, except as it may be deduced from the intention to create a tenancy or the reverse.

The fact that the landowner retains the right to control and supervise the operations of the other party to the agreement in cultivating the land has been regarded as tending to show that no tenancy is created,¹¹⁵ and most properly so, it would seem, since such retention of control by a lessor is most unusual, if not unknown.

Occasionally the courts have regarded the fact that by the agreement the cultivator is himself to make the delivery of the landowner's share of the crop to the latter, as tending to show an intention to regard that share as rent, and to create the relation of landlord and tenant;¹¹⁶ and conversely to regard the

of law. In *Swanner v. Swanner*, 50 Ala. 66, it is said to be a question for the jury whether the relation of landlord and tenant exists, even if there is no conflict in the evidence, the intention being doubtful and the agreement verbal.

¹¹⁴ See ante, § 10.

¹¹⁵ *Almand v. Scott*, 80 Ga. 95, 4 S. E. 892, 12 Am. St. Rep. 241; *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680; *McCutchen v. Crenshaw*, 40 S. C. 511, 19 S. E. 140. In *Freeman v. Underwood*, 66 Me. 229, an instrument signed by the landowner granted to another all the timber, grass, and berries found or grown on the land for a term of years, and gave him full power and authority to enter said lands for the

purpose of enjoying the property herein sold and conveyed, and to control and manage the same as he may see fit, and the court said that there was a sale of the timber, grass, and berries combined with a lease.

But stipulations made at the time of the agreement as to the mode in which the farming shall be carried on do not tend to show that a tenancy is not created. *Wentworth v. Portsmouth & D. R. Co.*, 55 N. H. 540.

¹¹⁶ *Strain v. Gardner*, 61 Wis. 174, 21 N. W. 35; *Steel v. Frick*, 56 Pa. 172 (semble); *Woodruff v. Adams*, 5 Blackf. (Ind.) 317, 35 Am. Rep. 122 (semble); *Harrison v. Ricks*, 71 N. C. 7; *McCutchen v. Crenshaw*, 40 S. C. 511, 19 S. E. 140.

fact that the landowner is to deliver to the cultivator the latter's share of the crop or of the proceeds thereof as tending to show a contrary intention.¹¹⁷

The fact that the instrument contains the ordinary words of demise, such as lease, let, or demise, is not conclusive that it is to take effect as a lease creating a tenancy,¹¹⁸ but it has been regarded as tending to show that such is the intention,¹¹⁹ and, it would seem, the use of such language might well be given controlling effect, in the absence of a clear showing of an intention, in the other parts of the instrument, that the cultivator shall not occupy as tenant. That the instrument, in reserving to the landowner a share of the crop, speaks of this share as rent has also been regarded as tending to show that it is a lease.¹²⁰

¹¹⁷ See *Harrison v. Ricks*, 71 N. C. 7.

¹¹⁸ *Bernal v. Hovious*, 17 Cal. 542, 79 Am. Dec. 149; *Adams v. Thornton*, 1 Cal. App. XVIII, 82 Pac. 215; *Griswold v. Cook*, 46 Conn. 198; *Ferris v. Hogland*, 121 Ala. 240, 25 So. 834; *Caswell v. Districh*, 15 Wend. (N. Y.) 379; *Putnam v. Wise*, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; *Taylor v. Bradley*, 39 N. Y. 138, 100 Am. Dec. 415; *Aiken v. Smith*, 21 Vt. 172; *State v. Page*, 1 Speer Law (S. C.) 408, 40 Am. Dec. 608; *Armstrong v. Bicknell*, 2 Lans. (N. Y.) 216.

In *Harrison v. Ricks*, 71 N. C. 7, it is said that the use of the word "rent," as that the owner has "rented" his land to another, has by itself, but little weight in the interpretation of an oral or inartificially and obscurely written contract.

¹¹⁹ *Walls v. Preston*, 25 Cal. 59; *Jones v. Durrer*, 96 Cal. 95; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Johnson v. Hoffman*, 53 Mo. 504; *Strain v. Gardner*, 61 Wis. 174, 21 N. W. 35; *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018; *Mundy v. Warner*, 61 N. J. Law, 395, 39 Atl. 697; *Steel v. Frick*, 56 Pa. 172; *Row-*

land v. Voechting, 115 Wis. 352, 91 N. W. 990. So the absence of words of demise has been referred to as showing that the instrument was not a lease. *Gray v. Robinson*, 4 Ariz. 24, 33 Pac. 712.

In New York it has been said that the "balance of the authorities" in that state seems to be that, notwithstanding the technical terms employed, such an agreement (for the division of crops) does not amount to a technical lease, that the relation of landlord and tenant is not contemplated, and the portion of the crops reserved to the owner is not rent. Per Woodruff, J., in *Taylor v. Bradley*, 39 N. Y. 229. The whole discussion of the subject in this opinion is admirable. But that there may be a tenancy created in this state in connection with an agreement for the division of crops, see *Lake v. Sweet*, 63 Hun, 636, 18 N. Y. Supp. 342; *Rawley v. Brown*, 71 N. Y. 85.

¹²⁰ *Neal v. Brandon*, 70 Ark. 79, 66 S. W. 200; *Reeves v. Hannon*, 65 N. J. Law, 249, 48 Atl. 1018; *Durant v. Taylor*, 89 N. C. 351 (semble):

The fact that the landowner furnishes part of the stock and provisions to be used on the premises does not exclude the relation of tenancy.¹²¹

By some cases the fact that the agreement contemplates the growing of one crop only, as distinguished from successive crops extending through two or more years, is regarded as tending to show that no demise is intended.¹²² By other cases, however, this line of distinction is repudiated,¹²³ and it is not frequently asserted at the present day.

Other provisions which have been regarded as tending to show that the instrument was to take effect as a lease are stipulations against under letting,¹²⁴ that the occupant shall keep buildings in repair,¹²⁵ that he shall pay the taxes,¹²⁶ and that he shall give

Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312.

In Hoskins v. Rhodes, 1 Gill & J. (Md.) 266, it is said that the reservation of a share of the grain as "rent" necessarily shows the instrument to be a lease. But the use of the word "rent" is not ordinarily regarded as conclusive. See Moser v. Lower, 48 Mo. App. 85; Ponder v. Rhea, 32 Ark. 435; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; Haywood v. Rogers, 73 N. C. 320.

¹²¹ See Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Wentworth v. Portsmouth & D. R. Co., 55 N. H. 540; Baughman v. Reed, 75 Cal. 319, 17 Pac. 222, 7 Am. St. Rep. 170; Smith v. Meech, 26 Vt. 233; Hatchell v. Kimbrough, 49 N. C. (4 Jones Law) 163; Harrison v. Ricks, 71 N. C. 7; Schlicht v. Callicott, 76 Miss. 487. And see post, § 254.

¹²² Bradish v. Schenck, 8 Johns. (N. Y.) 151; Herskell v. Bushnell, 37 Conn. 36, 9 Am. Rep. 299; Ponder v. Rhea, 32 Ark. 436; Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 318; Armstrong v. Bicknell, 2 Lans. (N. Y.) 216; Bishop v. Doty, 1 Vt. 37; Warner v. Hoisington, 42 Vt. 94 (semble).

So the fact that the agreement was to endure for the space of one year, this being more than a cropping season, was regarded as tending to show a lease. Strain v. Gardner, 61 Wis. 174, 21 N. W. 35.

The decisions are based on Hare v. Celey, Cro. Eliz. 143, where it was decided that "exposing" the land to another "to sow at halves" was not a lease, "but otherwise if it be for two or three crops." No reasons for the distinction are given in the report.

¹²³ Woodruff v. Adams, 5 Blackf. (Ind.) 317, 35 Am. Rep. 122; Moulton v. Robinson, 27 N. H. 550; Putnam v. Wise, 1 Hill (N. Y.) 246, 37 Am. Dec. 309; Aiken v. Smith, 21 Vt. 172. See Chicago & W. M. R. Co. v. Linard, 94 Ind. 319, 48 Am. Rep. 155.

¹²⁴ Walls v. Preston, 25 Cal. 59; Reeves v. Hannon, 65 N. J. Law, 249, 48 Atl. 1018.

¹²⁵ Strain v. Gardner, 61 Wis. 174, 21 N. W. 35; Rakestraw v. Floyd, 54 S. C. 288, 32 S. E. 419; Steel v. Frick, 56 Pa. 172; Reeves v. Hannon, 65 N. J. Law, 249, 48 Atl. 1018.

¹²⁶ Steel v. Frick, 56 Pa. 172.

up possession at the end of the time named.¹²⁷ On the other hand, stipulations that the cultivator shall behave in a moral manner and be respectful to the landowner and to his family tends to show that a lease is not intended.¹²⁸

In two or three states the question whether in a particular case the relation of landlord and tenant exists between the landowner and one cultivating the land on shares is determined with reference to statutory provisions there existing. In Alabama it is provided that such relation shall exist when one party furnishes the land and another party the labor and team to cultivate it, and the crops are to be divided, while "the contract of hire" shall be held to exist if one party furnishes the land and the team and the other the labor, thus making the existence of a tenancy dependent on the question of whether the landowner furnishes the team.¹²⁹ In a Kentucky case it was apparently stated that,

¹²⁷ Since he could not give up possession if he did not have it. *Johnson v. Hoffman*, 53 Mo. 504; *Rakestraw v. Floyd*, 54 S. C. 288, 32 S. E. 419. And see *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027, apparently to this effect.

It was held that a tenancy existed when it was agreed that the cultivator was to give a lien on his crop for advances, which by statute a laborer cannot give, that he was to keep the place in repair, clear out the ditches, and clear the river banks of brush. which provisions seemed to contemplate his control of the premises, that he was not to hire out his hands (a laborer does not usually have hands), and was to give up possession at a certain date. *Rakestraw v. Floyd*, 54 S. C. 288, 32 S. E. 419.

¹²⁸ *McCutchen v. Crenshaw*, 40 S. C. 511, 19 S. E. 140, 44 Am. St. Rep. 739.

¹²⁹ Code 1907, §§ 4742, 4743. See *Kilpatrick v. Harper*, 119 Ala. 452, 24 So. 715; *Ragsdale v. Kinney*, 119 Ala. 454, 24 So. 443; *Hunt v. Mat-*

thews, 132 Ala. 286, 31 So. 613. It seems that when there is no stipulation as to the furnishing of the team, the relation of tenancy exists by reason of the fact that in such case the occupant must furnish it. *Wilson v. Stewart*, 69 Ala. 302.

In *Hendricks vs. Clemmons*, 147 Ala. 590, 41 So. 306, it is held that the provision that a contract of hire shall exist when one party furnishes the land and team and the other the labor does not apply if each party is to furnish one-half the fertilizers. The court says that the parties are tenants in common of the crops, but it does not say what their relation is as regards the land.

In Georgia it is provided (Code 1895, § 3131) that "where one is employed to work for part of the crop, the relation of landlord and tenant does not arise." This seems to amount merely to a provision that the fact that one who is an employe is paid by a share of the crop does not necessarily make him a tenant, which is sufficiently obvious.

by reason of a statutory provision that contracts by which a landlord is to receive a portion of the crop as compensation for the use or rent of the land shall vest in him the right to such a portion of the crop, when planted, as he has contracted for, the relation of landlord and tenant exists in cases of an agreement for the division of crops,¹³⁰ but in a later case the possibility that such an agreement may not create a tenancy is clearly recognized.¹³¹

Occasionally it has been said that an instrument providing for the sharing of crops will not be construed as a lease unless such clearly appears to be the intention of the parties,¹³² and this would seem to be a reasonable rule, calculated to remove to some extent the difficulties with which the subject has been invested. An instrument providing for the cultivation and division of crops should not any more than any other instrument, be extended in effect so as to operate likewise as a lease, unless such appears to have been the intention of the parties. This view, that an agreement for a division of the crops is in itself no evidence that a lease is intended, is indicated, though not clearly stated, in a number of cases in which the construction of the instrument was adverse to the existence of a tenancy.¹³³

It has, in one state, been said that when there is any question as to whether an instrument providing for the division of crops between the cultivator and the landowner constitutes a lease or

¹³⁰ *Redmon v. Bedford*, 80 Ky. 13. *Reynolds*, 48 Hun (N. Y.) 142;

¹³¹ *Wood v. Garrison*, 23 Ky. Law Rep. 295, 62 S. W. 728. *McLaughlin v. Kennedy*, 49 N. J. Law, 519, 10 Atl. 391; *Gray v. Reynolds*, 67 N. J. Law, 169, 50 Atl. 670; *Wood v. Garrison*, 23 Ky. Law Rep. 295, 62 S. W. 728; *Culley v. Taylor*, 62 Neb. 651, 87 N. W. 334;

¹³² *Alwood v. Ruckman*, 21 Ill. 200; *Guest v. Opdyke*, 31 N. J. Law, 552. *Messinger v. Union Warehouse Co.*, 39 Or. 218, 56 Pac. 808; *Rogers v. Frazier Bros. & Co.* (Tex. Civ. App.) 108 S. W. 727. But see *Schlicht v. Callicott*, 76 Miss. 487, 24 So. 869; *Alexander v. Zeigler*, 84 Miss. 560, 36 So. 536, where a tenancy was regarded as created although there was apparently no language particularly indicative of an intention to that effect.

¹³³ *Shields v. Kimbrough*, 64 Ala. 504; *Bourland v. McKnight*, 79 Ark. 427, 96 S. W. 179; *Richards v. Wardwell*, 82 Me. 343, 19 Atl. 863; *Adams v. Thornton*, 1 Cal. App. XVIII, 82 Pac. 215; *Moore v. Linn* (Okla.) 91 Pac. 910; *Creel v. Kirkham*, 41 Ill. 344; *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52; *De Mott v. Hagerman*, 8 Cow. (N. Y.) 220, 18 Am. Dec. 443; *Caswell v. Districh*, 15 Wend. (N. Y.) 379; *Reynolds v.*

a mere agreement, the former construction will be preferred, upon the ground that the existence of the statutory lien¹³⁴ in such case in favor of the landlord will encourage such lettings to actual cultivators and so conduce to the common prosperity.¹³⁵ In another state, where no statutory lien exists, it has been said that the construction of the instrument as *not* constituting a lease is in accord with public policy, since in the case of a lease the title to the whole crop vests in the tenant, and the landlord is liable to lose his share.¹³⁶ Thus the consideration of public policy would have a directly opposite effect in different states. It seems questionable, however, whether such a consideration should be introduced to make the parties landlord and tenant when no intention to that effect appears.

§ 21. The parties to a lease—Personal capacity.

a. **Married women—(1) As lessors—(a) At common law.** At common law the husband acquires the right to the rents and profits of the wife's freehold estates during the continuance of the marital relation, that is, until his or her death, or other termination of the relation, as by divorce, and he acquires the absolute dominion over her chattel interests during his life. Consequently, a lease by a married woman is, at common law, absolutely void,¹³⁷ while the husband may make a valid lease of the wife's property, to endure during the marriage, even without the wife's joinder or consent.¹³⁸

Though the husband thus has the control over and right to the profits of the wife's freehold estates and may make a lease, valid so long as these rights endure, he cannot at common law, even by a lease in which she joins, make a demise which will be binding after his death, since if he dies before the wife she may avoid the lease, and if he survives her, while the demise will be effectual as against him so long as he may have an estate by the curtesy in the land, upon his death, or in case he has no

¹³⁴ See post, chapter XXXI.

¹³⁵ *Birmingham v. Rogers*, 46 Ark. 254.

¹³⁶ *Guest v. Opdyke*, 31 N. J. Law, 552. And see *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52.

¹³⁷ 1 Blackst. Comm. 444; Bishop,

Law of Married Women, § 538;

Murray v. Emmons, 19 N. H. 483; *Ables v. Ables*, 86 Tenn. 333, 9 S.

W. 692.

¹³⁸ *Roper, Husband & Wife*, 90; 1 Platt, Leases, 138.

estate by the curtesy, the wife's heirs may repudiate the lease.¹³⁹ The cases are to the effect, however, that, though the wife may repudiate the lease after the husband's death, and enter upon the lessee,¹⁴⁰ she may, on the other hand, if the lease was by deed,¹⁴¹ affirm the lease, as by the acceptance of rent thereunder,¹⁴² and it has been said that it is binding on her so long as she fails to disaffirm it.¹⁴³ Whether the wife has the right at common law thus to affirm the lease after her husband's death when she did not originally join therein, but it was executed by the husband alone, is a question upon which the cases are in conflict.¹⁴⁴

Of the chattels real of the wife, the husband has, at common law, the absolute right of disposal, and a lease thereof by him is valid as against her even after his death without reference to her assent or nonassent thereto.¹⁴⁵

By the enabling statute of 32 Hen. 8, c. 28, it was provided that one seised, in right of his wife, of land, which had not been under lease within a year, could, by a lease under seal in which his wife joined, reserving to the husband and wife and to the heirs of the wife so much yearly rent as had been customarily paid, create a term not to exceed twenty-one years, which should be valid and operative as against both the wife and the heirs of the wife.¹⁴⁶ Conceding this statute to be in force in any particular jurisdiction, it can supersede the common-law

¹³⁹ Roper, Husband & Wife, 91; wife's failure to properly execute Comyn, Landl. & Ten. 41; Bac. Abr., the lease did not prevent her recovery of rent after the husband's death. Leases (C); Jordan v. Wikes, Cro. Jac. 332; Miller v. Manwaring, Cro. Car. 397.

¹⁴⁰ Thetford v. Thetford, 1 Leon. 192; Jordan v. Wikes, Cro. Jac. 332; Greenwood v. Tyber, Cro. Jac. 563.

¹⁴¹ Walsal v. Heath, Cro. Eliz. 656; Greenwood v. Tyber, Cro. Jac. 564;

Turney v. Sturges, 1 Dyer, 91 b.

¹⁴² Bro. Abr., Acceptance, pl. 6; Greenwood v. Tyber, Cro. Jac. 563; Doe d. Collins v. Weller, 7 Term R. 478. See Trout v. McDonald, 83 Pa. 144.

¹⁴³ Toler v. Slater, L. R. 3 Q. B. 42, where it was decided that the

¹⁴⁴ See 2 Wms. Saund, 180, note (9) to Wotton v. Hele; 1 Platt, Leases, 143 et seq., reviewing the English cases. Winstell v. Hehl, 69 Ky. (6 Bush.) 58, is to the effect that she cannot affirm it in such case.

¹⁴⁵ Co. Litt. 46 b, 351 a; Bac. Abr., tit. Baron & Feme (C) 2; Anonymous, Poph. 5; Grute v. Locroft, Cro. Eliz. 287; 1 Platt, Leases, 139.

¹⁴⁶ This act is considered at length in 1 Platt, Leases, 154 et seq.;

1 Bishop, Married Women, § 550 et seq.

rules only in cases strictly within its terms, and in most cases it would itself be superseded by the modern legislation extending the rights of married women.

(b) **In equity.** Property settled upon a married woman "for her sole and separate use" is more or less withdrawn from the operation of the common-law rules depriving her of the power of alienation during coverture. In some jurisdictions she is allowed such power in the absence of a specific restriction in this respect contained in the instrument creating the trust, while in others she has the power of alienation only when it is expressly given to her.¹⁴⁷ Presumably her power to make a lease would be, in any jurisdiction, determined with reference to the general rule in this regard there prevailing.¹⁴⁸

(c) **Under statutes.** In all jurisdictions the husband's interest in and control over the property of his wife has been modified or entirely abrogated by the adoption of what are known as the "married woman's property acts," and consequently he has, as a general rule, no longer the power to dispose of the freehold or chattel interests of his wife even for the term of his own life, and a lease by him of her property, in which she failed to join, would be absolutely void.¹⁴⁹

Some of the statutes enlarging the rights of married women have been regarded as enabling her to dispose of her "statutory separate estate" without the joinder of her husband, this effect having been given to a statutory provision that she may "own, possess and enjoy" her property as if unmarried.¹⁵⁰ Some of the statutes expressly require the husband's consent to or joinder in a lease to endure for more than a named period.¹⁵¹ It has been

¹⁴⁷ See 2 Pomeroy, Eq. Jur. §§ 1104, 1105; 2 Perry, Trusts, §§ 661, 665; 25 Am. & Eng. Enc. Law (2d Ed.) 381.

¹⁴⁸ So it has been decided in England, in accordance with the general rule there prevailing, that, unless restricted by the instrument creating her sole and separate equitable estate, the wife may make a lease thereof. *Taylor v. Meads*, 4 De Gex, J. & S. 597. See *Adams v. Gamble*, 12 Ir. Ch. 102.

¹⁴⁹ But though such lease by him is void, the person entering thereunder may become a tenant of the wife by reason of the wife's subsequent consent to his retention of possession, as when she accepts rent from him. *Van Brunt v. Wallace*, 88 Minn. 116, 92 N. W. 521.

¹⁵⁰ *Parent v. Callerand*, 64 Ill. 97. See *Vandervoort v. Gould*, 36 N. Y. 639.

¹⁵¹ See *Melley v. Casey*, 99 Mass.

decided in several cases that a statutory requirement of the husband's joinder in a "conveyance" does not require his joinder in a lease by her.¹⁵² Not infrequently the statute requires a lease or other conveyance by a married woman to be acknowledged by her in a certain way, as on private examination apart from her husband, and the absence of such acknowledgment has been regarded as entirely invalidating the lease as against her.¹⁵³

(d) **Recovery of rent.** In the case of a lease by a married woman without the joinder of the husband, the lessee might perhaps, at common law, defend an action on the covenant for rent upon the principle elsewhere referred to, that a covenant by the lessee is not binding if the lease is not valid as against the lessor¹⁵⁴ and an action of debt for rent would, it seems, not lie, for the reason that, the lease being void, the reservation of rent is void. If however the wife could, in the particular case, be regarded as the representative of the husband in making the lease, the lessee entering thereunder would, at common law, be the tenant of the husband, and the latter could recover the value of the use and occupation so long as the lessee retains possession. Under the modern statutes which give the wife the right of possession and control of her property, she would, it seems, herself have a right of action for use and occupation against

241; *De Wolf v. Martin*, 12 R. I. 533. regarded as an "incumbrance" within a statute requiring the husband's joinder in the creation of an incumbrance.

¹⁵² *Perkins v. Morse*, 78 Me. 17, 2 Atl. 130, 57 Am. Rep. 780; *Sullivan v. Barry*, 46 N. J. Law, 1; *Id.*, 47 N. J. Law, 339, 1 Atl. 240. ¹⁵³ *George v. Goldsby*, 23 Ala. 326; *Worthington's Lessee v. Young*, 6 Ohio, 313; *Keller v. Klopfer*, 3 Colo. 132; *Carlton v. Williams*, 77 Cal. 89, 19 Pac. 185, 11 Am. St. Rep. 243.

In Indiana the word "conveyance" in such a statute has been held, in view of other statutory provisions, not to apply to a lease for three years or less. *Pearcy v. Henley*, 82 Ind. 129; *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803. And see *Nash v. Berkmeir*, 83 Ind. 536. And an oil and gas lease has been decided not to be within the statute. *Heal v. Niagara Oil Co.*, 150 Ind. 483, 50 N. E. 482.

In *Hoover v. Chambers*, 3 Wash. T. 26, 13 Pac. 547, a lease was re-

¹⁵⁴ See post, § 54. See *Toler v. Slater*, L. R. 3 Q. B. 42. Occasionally, however, the lessee has been held liable for rent under a lease made by a married woman, though this was not properly executed by her, the lessee having been allowed to retain possession undisturbed. *Agerter v. Vandergrift*, 138 Pa. 576, 21 Atl. 202, 12 L. R. A. 290; *Nash v. Berkmeir*, 83 Ind. 536.

the lessee so entering under a lease invalid as against her for want of joinder by her husband, or of an acknowledgment in the statutory mode.¹⁵⁵

In one state, where the "community system" prevails, it has been held that if the husband undertakes to lease community land without the joinder of his wife, the lessee cannot refuse to pay rent until the lessor and his wife give to the lessee a valid lease executed by both.¹⁵⁶ It would seem, however, that, apart from any such demand, the lessee could not, when sued by the husband for rent, deny that the latter alone had a full and complete title to the property, lack of title in the lessor not being recognized as a defense to an action for rent.¹⁵⁷

(2) **As lessees.** At common law a married woman may take a lease, as she may any other conveyance, and the husband's express assent is not necessary, the leasehold estate vesting in her until he actually dissents.¹⁵⁸ She may, however, avoid the lease after her husband's death.¹⁵⁹ The modern statutes excluding the husband's powers of control over her property, and authorizing her to take and hold property as if sole, it seems, abolished both the husband's power to invalidate the lease by dissenting therefrom and her power to repudiate it after his death.¹⁶⁰

At common law a married woman, having no power to contract, would not, by taking a lease with an express covenant on her part to pay rent, become personally liable thereon.¹⁶¹ The question of how far she can be subjected to personal liability upon her agreement to pay rent would, at the present day, depend upon the language of the statutes extending a married woman's ability to contract and the construction placed thereon. In some jurisdictions the common-law inability of the wife to contract is entirely removed;¹⁶² in some, no doubt, a contract by her to

¹⁵⁵ This is presumably what is meant by the statement in *Kinsey v. Minnick*, 43 Md. 112, that in such case the law implies a verbal agreement of similar import as to terms to that expressed in the writing.

¹⁵⁶ *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976; *Dietz v. Winehill*, 6 Wash. 109, 32 Pac. 1056; *Tryon v. Davis*, 8 Wash. 106, 35 Pac. 598.

¹⁵⁷ See post, § 78 c (3).

¹⁵⁸ Co. Litt. 3 a; 2 Blackst. Comm. 293; *Swain v. Holman*, - Hob. 204, Hutt. 7; *Baxter v. Smith*, 6 Bin. (Pa.) 427.

¹⁵⁹ Co. Litt. 3 a; 1 Platt, Leases, 531; Comyn, Landl. & Ten. 49.

¹⁶⁰ See *Darby v. Callaghan*, 16 N. Y. 71.

¹⁶¹ See *Draper v. Stouvenel*, 35 N. Y. 507.

¹⁶² That a married woman lessee

pay rent would be regarded as presumptively a contract for the benefit of her separate estate, within the meaning of the statutes enabling her to make such a contract; while in others it might be necessary to show that the particular contract was for the benefit of her separate estate, or that she expressly charged her separate estate with the liability. The question of a married woman's liability under her contract to pay rent is, it would seem, analogous to that involved in her assumption of the purchase price of property bought by her.

b. **Infants**—(1) **As lessors.** A lease by an infant, like any other conveyance by him, is ordinarily voidable but not void, and is consequently effectual to vest title in the lessee unless repudiated by the lessor,¹⁶³ or, in case of his death while an infant, by his heir or personal representative, according as the reversion is realty or personalty.¹⁶⁴ There are, moreover, decisions to the effect that an infant cannot disaffirm his lease until his majority,¹⁶⁵ this being the general rule applied in the case of a conveyance by an infant of an interest in land.¹⁶⁶ It is said, however, that he may, even during infancy, enter and enjoy the profits,¹⁶⁷ the effect of which would be, it seems, practically to avoid the lease. Any act on his part which shows an

is so liable for rent reserved in a lease to her, see *Prevot v. Lawrence*, 51 N. Y. 219; *Westervelt v. Ackley*, 2 Hun (N. Y.) 258; *Id.*, 62 N. Y. 505; *Ackley v. Westervelt*, 86 N. Y. 448; *Bush v. Babbitt*, 25 Hun (N. Y.) 213; *Fiske v. McIntosh*, 101 Mass. 66. See, also, *Rogers v. Coy*, 164 Mass. 391, 41 N. E. 652.

In Maryland Code, Pub. Gen. Laws 1904, c. 45, § 18, it is expressly provided that if a deed or lease be made to a married woman, she may bind herself by any covenant running with or relating to the land. See *Worthington v. Cooke*, 52 Md. 297; *Cruzen v. McKaig*, 57 Md. 454.

¹⁶³ Co. Litt. 45 b, 308 a; *Zouch v. Parsons*, 3 Burrow, 1794, 1 W. Bl. 575; *Slator v. Brady*, 14 Ir. C. L. 61; *Field v. Herrick*, 101 Ill. 110; *Bool*

v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

¹⁶⁴ 1 Platt, Leases, 32.

That an infant's contract or conveyance may be avoided by his heir or personal representative, see cases cited 18 Am. St. Rep. 697, note to *Craig v. Van Bebber*.

¹⁶⁵ *Slator v. Trimble*, 14 Ir. C. L. 342; *Hartshorn v. Earley*, 19 U. C. C. P. 139; *Lipsett v. Perdue*, 18 Ont. 575.

¹⁶⁶ See cases cited 18 Am. St. Rep. 670; 16 Am. & Eng. Enc. Law (2d Ed.) 298.

¹⁶⁷ See *Zouch v. Parsons*, 3 Burrow, 1794, 1808; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Cummings v. Powell*, 8 Tex. 80; cases cited 18 Am. St. Rep. 670, 671, note to *Craig v. Van Bebber*.

intent to repudiate the lease, at least if done within a reasonable time after his arrival at majority, is sufficient to avoid it.¹⁶⁸

The lessee has no right to avoid the lease on account of the minority of the lessor, but the option is with the lessor alone.¹⁶⁹

The lease, to be effective against the infant in any case, must be, it has been decided, his own personal act.¹⁷⁰ This is an application of the rule, adopted in most jurisdictions, that an infant cannot act through an agent.¹⁷¹

In one or two of the old cases there are *dicta* to the effect that a lease by an infant is absolutely void if no rent is reserved,¹⁷² but this is certainly not so if any advantage accrues to the infant from the lease, as when it is made for the purpose of trying title.¹⁷³ Even though rent is reserved, it has been said, if it would be more beneficial to the infant to regard the lease as absolutely void, as when otherwise it would work a forfeiture,¹⁷⁴ or make him liable in damages, or involve a breach of trust on his part,¹⁷⁵ it will be so treated.

Any act on the part of the lessor, after attaining his majority, which shows an intention to repudiate the lease, will, it seems, be sufficient to avoid it. Such, for instance, will be the effect of a re-entry by him on the land, an action by him to recover possession, a suit to set aside the lease, or a notice to the lessee of his intention to that effect.¹⁷⁶ A conveyance or lease to another per-

¹⁶⁸ See 2 Tiffany, Real Prop. 1149. 216, per Southcote, J.; Anonymous,

¹⁶⁹ Slator v. Trimble, 14 Ir. C. L. 3 Salk. 196.

342; Zouch v. Parsons, 3 Burrow, ¹⁷³ Humphreston's Case, 2 Leon. 1794. See Clayton v. Ashdown, 216, per Gawdy, J.; Davis v. Mannington, 2 Sid. 109; Anonymous, 3 Vin. Abr., Infant (G 4) pl. 1; Forrester's Case, 1 Sid. 41; Smith v. Salk. 196; Rames v. Machin, Noy, 130; Zouch v. Parsons, 3 Burrow, Bowen, 2 Keb. 581. 1806.

¹⁷⁰ Doe d. Thomas v. Roberts, 16 Mees. & W. 778.

¹⁷¹ See authorities cited 22 Cyclopaedia Law & Proc. 514. But see the discussion of the authorities in 18 Am. St. Rep. 629, note to Craig v. Van Bebber.

¹⁷² Blunden v. Baugh, Cro. Car. 302; Humphreston's Case, 2 Leon.

¹⁷⁴ Zouch v. Parsons, 3 Burrow, 1807. See Ashfield v. Ashfield, Godb. 364.

¹⁷⁵ Zouch v. Parsons, 3 Burrow, 1807.

¹⁷⁶ See 2 Tiffany, Real Prop. 1151; 18 Am. St. Rep. 662-668, note to Craig v. Van Bebber; 16 Am. & Eng. Enc. Law (2d Ed.) 288.

son will operate as a disaffirmance of the earlier lease only if inconsistent therewith.¹⁷⁷

The lessor may, by some act affirming the validity of the lease after arriving at full age, disable himself from thereafter denying its validity. Such an effect has been given to his act in making a mortgage in terms subject to the lease,¹⁷⁸ and to his acceptance of rent under the lease.¹⁷⁹ And, in an old case,¹⁸⁰ the act of the lessor in saying to the lessee "God give you joy of it" was regarded as a ratification of the lease. It is even said to have been decided that the receipt of rent by the lessor during infancy is so far a confirmation of the lease as to prevent the termination of the lease by the lessor without notice.¹⁸¹

Upon the question whether equity has inherent power to direct the sale or leasing of land belonging to an infant, the cases are not in accord.¹⁸² In some states there is a statutory grant of such power.

(2) **As lessees.** A lease to an infant, like a lease by him, is voidable and not void, and it is optional with him whether he will repudiate liability thereunder for rent or otherwise.¹⁸³ He must,

¹⁷⁷ *Slator v. Brady*, 14 Ir. C. L. 61; *Philips v. Green*, 10 Ky. (3 A. K. Marsh.) 7, 13 Am. Dec. 124; *Leitensdorfer v. Hempstead*, 18 Mo. 269; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Dominick v. Michael*, 6 N. Y. Super. Ct. (4 Sandf.) 374, 421; *McGan v. Marshall*, 26 Tenn. (7 Humph.) 121; *Stuart v. Baker*, 17 Tex. 417.

¹⁷⁸ *Story v. Johnson*, 2 Younge & C. Exch. 586.

¹⁷⁹ *Smith v. Low*, 1 Atk. 489; *Van Doren v. Everitt*, 5 N. J. Law (2 South.) 460, 8 Am. Dec. 615.

¹⁸⁰ Anonymous, 4 Leon. 4, pl. 15.

¹⁸¹ *Comyn, Landl. & Ten.* 288, citing *Rees v. Evans*, an unreported case.

It has been held that where a lease was made by an agent in the name of an infant, it was absolutely void, so as to justify an ejectment by the infant against the lessee without

any notice to quit. *Doe d. Thomas v. Roberts*, 16 Mees. & W. 778. But as to this view that a conveyance or contract by an infant, through an agent is absolutely void. See 18 Am. St. Rep. 629, note to *Craig v. Van Bebber*.

¹⁸² See authorities cited 22 Cyclopaedia Law & Proc. 563; *Pomeroy, Eq. Jur.* § 1309.

¹⁸³ *Ketsey's Case*, Cro. Jac. 320; *Blake v. Concannon*, Ir. R. 4 C. L. 323; *Cheshire v. Barret*, 4 McCord Law (S. C.) 241, 17 Am. Dec. 735; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Flexner v. Dickerson*, 72 Ala. 318. So the validity of the lease cannot be questioned by a third person. *Griffith v. Schwenderman*, 27 Mo. 412. But it has been decided that where a lessee set up his infancy as exempting him from liability under the lease, other parties to the action could avail

it seems, disaffirm the lease and relinquish, or offer to relinquish, possession, within a reasonable time after his coming of age, and a failure so to do will render him liable for arrears of rent accruing before as well as after his majority.¹⁸⁴

As to whether the infant should be held personally liable for rent accruing during his minority, so long as he retains possession of the premises, the cases are not in accord. It has been decided in one case that he is not liable for an installment of rent because he has possession when it comes due,¹⁸⁵ and this seems to accord with the ordinary view that an infant purchaser of property may repudiate all liability under his contract, though he retains possession until his majority.¹⁸⁶ There is, however, a contrary decision to the effect that so long as the infant retains possession, he is liable for the accruing rent,¹⁸⁷ a view which is to be regarded as based, it seems, on the theory not that his contractual liability remains after his repudiation thereof but that there is an obligation, arising from the tenure, to pay the rent reserved in the case of an infant as well as in that of an adult lessee.¹⁸⁸ In accordance

themselves of his infancy as in validating a provision in the lease giving to the lessor a lien on his chattels on the premises, and claim the property under another agreement. *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177.

¹⁸⁴ *Boody v. McKenney*, 23 Me. 517; *McClure v. McClure*, 74 Ind. 108; *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429. See *Northwestern R. Co. v. McMichael*, 5 Exch. 114, 125.

¹⁸⁵ *Flexner v. Dickerson*, 72 Ala. 318. The dictum of *Jessel, M. R.*, in *Lempriere v. Lange*, 12 Ch. Div. 677, seems to be to this effect. In this case the lessee had obtained the lease by a false representation that he was of full age, and the court canceled the lease at the request of the lessor and ordered possession to be given up, but said that the lessor could not repudiate the lease and yet hold the lessee liable for use and occupation.

¹⁸⁶ See 18 Am. St. Rep. 673, note to *Craig v. Van Bebbber*.

¹⁸⁷ *Blake v. Concannon, Ir. R.* 4 C. L. 323. So in *Y. B. 21 Hen. 6*, 31 b, it is said by *Newton, J.*: "If one lease for a term of years, rendering rent, *in fait*" (that is, not by matter of record, see *Co. Litt.* 380), "to an infant within age, if he manures the land, a writ of debt is maintainable against him; the cause is, he has a *quid pro quo*."

The case of *Kirton v. Elliott*, 2 Bulst. 69, elsewhere reported as *Ketsey's Case*, *Cro. Jac.* 320; *Ketley's Case*, 1 Brownl. & G. 120; *Kettle v. Eliot*, 1 Rolle, Abr. 731, frequently referred to in this connection, is obscure. See the consideration of the case in 18 Am. St. Rep. 590; *Northwestern R. Co. v. McMichael*, 5 Exch. 114, and in *Blake v. Concannon, Ir. R.* 4 C. L. 323.

¹⁸⁸ That is, the liability is in debt and not in covenant. See post, §

with this view is a quite early case in which it was decided that, where an infant had attorned to the lessor's grantee, the latter could distrain on his goods for rent.¹⁸⁹

If the lessee repudiates liability during his infancy, and relinquishes possession of the land, he is unquestionably not liable for rent thereafter accruing.¹⁹⁰

An infant occupying under a lease is personally liable to his lessor, if the occupation can be considered as a "necessary."¹⁹¹ In that case, however, the liability is not on his contract to pay rent, nor by reason of privity of estate, but is *quasi* contractual in its nature, and is merely for the value of the occupation so long as this actually endures.¹⁹²

There is an Irish decision to the effect that an infant assignee of a leasehold interest, who takes possession under the assignment, is liable for rent to the same extent as any other assignee.¹⁹³ This seems to be the only decision bearing upon the question, and is in accord with the view above referred to that an infant lessee is liable for rent by reason of his holding of the property to which the liability is attached.^{193a}

It has been decided that an infant lessee may be made liable in trover for the conversion of crops on which the lessor had an express lien,¹⁹⁴ a decision in accord with the tendency of the cases in this country to hold an infant liable for a tort, although it grows out of his contract.¹⁹⁵

170. In Pollock, Contracts (6th Ed.) 63, the author adopts the view of Baron Parke in *Northwestern R. Co. v. McMichael*, 5 Exch. 114, according to which an infant lessee is to be regarded as in the same position as an infant purchaser of shares of stock, who "is not a mere contractor, but a purchaser of an interest in a subject of a permanent nature with certain obligations attached to it."

¹⁸⁹ Conny's Case, 9 Coke, 84 b.

¹⁹⁰ See *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Northwestern R. Co. v. McMichael*, 5 Exch. 114; *Blake v. Concannon*, Ir. R. 4 C. L. 323; *Ketley's Case*, 1 Brownl. & G. 120.

¹⁹¹ *Lowe v. Griffith*, 1 Scott, 458; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177.

¹⁹² *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. See Keener, *Quasi Contracts*, 20.

¹⁹³ *Kelly v. Coote*, 5 Ir. C. L. 469.

^{193a} See ante, note 188.

¹⁹⁴ *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429. As to the right of one having a lien on crops to bring trover for their conversion, see post, § 319 k, l.

¹⁹⁵ See 18 Am. St. Rep. 720, note to *Craig v. Van Bebber*.

c. **Persons non compos mentis**—(1) **As lessors.** The question whether a person has the mental capacity to make a lease is to be determined, no doubt, by the same considerations as control in the case of any other conveyance, and the general rule in this regard is that the validity of a conveyance is not affected by the fact that the grantor's mind is impaired, or that he is subject to a delusion, if this is not such as to have influenced him in making the conveyance.¹⁹⁶

In most jurisdictions, a conveyance by one mentally incapacitated is, like one by an infant, voidable only and not void,¹⁹⁷ unless a guardian has been appointed for the grantor and his property, after judicial inquisition into his sanity, in which case the conveyance is regarded as absolutely void.¹⁹⁸ By some decisions a conveyance by one mentally incapacitated to make it is regarded as in all cases absolutely void.¹⁹⁹

In jurisdictions where the conveyance is regarded as voidable only, it may be avoided either by the grantor after reacquiring his mental capacity,²⁰⁰ by his guardian or committee,²⁰¹ or, after his death, by his heir or personal representative, according as the one or the other is entitled to the property.²⁰²

¹⁹⁶ *Burgess v. Pollock*, 53 Iowa, 201, 66 N. W. 1; *Griswold v. Butler*, 273, 5 N. W. 179, 36 Am. Rep. 218; 3 Conn. 227; *Imhoff v. Witmer's Lindsey v. Lindsey*, 50 Ill. 79, 99 Adm'r, 31 Pa. 243; *Elston v. Jasper*, Am. Dec. 489; *Doe d. Guest v. Beeson*, 2 Houst. (Del.) 246; *Blakeley* 45 Tex. 409.

v. Blakeley, 33 N. J. Eq. (6 Stew.) 502; *Whittaker v. Southwest Virginia Imp. Co.*, 34 W. Va. 217; *Dennett v. Dennett*, 44 N. H. 531; *Stewart v. Flint*, 59 Vt. 144, 8 Atl. 801; *Buswell, Insanity*, § 393; *Hammon, Contracts*, § 182; *Pollock, Contracts* (6th Ed.) 91. ¹⁹⁹ *German Sav. & Loan Soc. v. De Lashmutt*, 67 Fed. 399; *Sullivan v. Flynn*, 20 D. C. 396; *Elder v. Schumacker*, 18 Colo. 433, 33 Pac. 175; *Van Deusen v. Sweet*, 51 N. Y. 378; *In re De Silver's Estate*, 5 Rawle (Pa.) 111; *Farley v. Parker*, 6 Or. 105.

¹⁹⁷ *Hammon, Contracts*, § 186; 9 *Nichol v. Thomas*, 53 Ind. 42; *Gibson v. Soper*, 72 Mass. (6 Gray) 279, 71 Am. St. Rep. 431, note to *Flach v. Gottschalk Co.* 66 Am. Dec. 414; *Henry v. Fine*, 23 Ark. 417; *Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 786.

¹⁹⁸ *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *New England Loan & Trust Co. v. Spitler*, 54 Kan. 560, 38 Pac. 799; *Wait v. Maxwell*, 22 Mass. (5 Pick.) 217, 16 Am. Dec. 391; *Thorpe v. Hanscom*, 64 Minn. ²⁰¹ *Gibson v. Soper*, 72 Mass. (6 Gray) 279, 66 Am. Dec. 414; *Halley v. Troester*, 72 Mo. 73; *Moore v. Hershey*, 90 Pa. 196. ²⁰² *Beverley's Case*, 4 Coke, 123 b;

The question whether a grantor can assert the invalidity of his conveyance for want of mental capacity without returning the consideration received, as to which the courts are not in agreement, will not ordinarily arise in the case of a lease, since the consideration is usually paid, not at the time of taking the lease, but, by means of rent, *pari passu* with the enjoyment of the property, and the effect of the avoidance of the lease is, while depriving the lessee of the possession and enjoyment of the property, also to relieve him from liability for rent.

(2) **As lessees.** A lease to a person wanting in mental capacity to understand the nature and merits of the transaction presumably vests the leasehold interest in him, subject to the possibility of its repudiation either by him on regaining his faculties, or by his guardian or committee, or personal representative.²⁰³ In many jurisdictions, however, provided the lessor acted in good faith in making the lease, the lessee cannot avoid the lease, and so free himself from liability for rent, without first paying all arrears of rent then due, and so placing the lessor in *statu quo*.²⁰⁴

That a party to a lease is, at the time of its execution unable, by reason of temporary intoxication, to understand the nature or merits of the transaction, is no doubt ground for the avoidance of the lease by him or his representatives to the same extent as if he had been insane at the time of its execution.²⁰⁵

d. **Corporations—(1) Power to make or take lease.** A private corporation may make a lease of its property, provided its purpose in so doing is not foreign to the object for which it is chartered, and it thereby violates no charter or statutory restriction or rule of public policy.²⁰⁶ A corporation of a *quasi* public

Northwestern Mut. Fire Ins. Co. v. Am. & Eng. Enc. Law (2d Ed.) 399; Blankenship, 94 Ind. 535; Hunt v. Hammon, Contracts, § 183. Rabitoay, 125 Mich. 137, 84 N. W. 59; McAnaw v. Tiffin, 143 Mo. 667, 45 S. W. 656.

²⁰³ See Co. Litt. 2 b; 2 Blackst. Comm. 291; Concord Bank v. Bellis, 64 Mass. (10 Cush.) 276; Campbell v. Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479.

²⁰⁴ See Hammon, Contracts, § 192, and cases there cited.

²⁰⁵ Buswell, Insanity, § 393; 17

²⁰⁶ Simpson v. Directors of Westminster Palace Hotel Co., 8 H. L. Cas. 712; Plant v. Macon Oil & Ice Co., 103 Ga. 666, 30 S. E. 567; Nye v. Storer, 168 Mass. 53, 46 N. E. 402; Temple Grove Seminary v. Cramer, 98 N. Y. 121; Phillip v. Aurora Lodge, 87 Ind. 505; Ardesco Oil Co. v. North American Oil & Min. Co., 66 Pa. 375; People v. Pullman's Palace Car Co., 175 Ill. 125, 51 N. E.

character, however, such as a railroad company, unless expressly authorized by its charter or legislative act, cannot lease property necessary to the conduct of its business, thereby disabling itself from performing the duties which it owes to the public,²⁰⁷ though it may lease parts of its property not appropriated to public use.²⁰⁸ Likewise, a municipal corporation, while it may lease property belonging to it of a private nature, cannot lease that which has been devoted to public use and which it holds in trust for the public.²⁰⁹

A corporation, whether public or private, may take a lease of property so far as this may be a proper means of carrying out the purposes for which it was created, and it will be bound by covenants on its part to be performed so far as these may be usual or proper, and not prohibited by its charter, such as a covenant to pay rent, to repair, or to keep the premises insured.²¹⁰

A lease by a corporation is not invalid because by its terms it is to run for a period continuing beyond that fixed for the duration of the lessor's charter,²¹¹ and no doubt the same may be said of a lease to a corporation which is to endure beyond the life of the latter. This must be so, since any other view would necessarily involve the invalidity of a conveyance in fee by or to a corporation merely because the corporation is not to have perpetual existence.²¹² A lease to a corporation not yet incorporated is void.²¹³

(2) **Effect of ultra vires lease.** Regarding a lease as a convey-

664, 64 L. R. A. 366; Bartholomew v. Derby Rubber Co., 69 Conn. 521, 38 Atl. 45, 61 Am. St. Rep. 57.

²⁰⁷ Thomas v. West Jersey R. Co., 101 U. S. 71, 25 Law. Ed. 950; Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 35 Law. Ed. 55; Brunswick Gaslight Co. v. United States Gas, Fuel & Light Co., 85 Me. 532, 27 Atl. 525; 1 Clark & Marshal, Corporations, 442.

²⁰⁸ Baldwin, Railroad Law, 462.

²⁰⁹ 2 Dillon, Mun. Corp. §§ 575, 580; 3 Abbott, Mun. Corp. p. 2196.

²¹⁰ 1 Clark & Marshall, Corporations, §§ 141, 188 (d); Jacksonville M. P. R. & Nav. Co. v. Hooper, 160

U. S. 514, 40 Law. Ed. 515; Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Crawford v. Longstreet, 43 N. J. Law, 325; Brewer & Hoffmann Brew. Co. v. Boddie, 181 Ill. 622, 55 N. E. 49; Davies v. City of New York, 83 N. Y. 207; Halbut v. Forest City, 34 Ark. 246; Fitton v. Hamilton City, 6 Nev. 196; Wade v. Newbern, 77 N. C. 460.

²¹¹ Tate v. Neary, 52 App. Div. 78, 65 N. Y. Supp. 40.

²¹² See Nicoll v. Railroad Co., 12 N. Y. (2 Kern.) 121.

²¹³ Utah Optical Co. v. Keith, 18 Utah, 464, 55 Pac. 155.

ance, which it primarily is,²¹⁴ the question arises whether the making of an *ultra vires* lease can in any way affect the lessor's right to the possession of the premises. An *ultra vires* conveyance by or to a corporation has usually been regarded as valid to transfer the title, and as open to objection only by the state,²¹⁵ and such a rule would, it seems, apply to a conveyance by way of lease as well as to one in fee simple. An exception to the above rule exists in the case of property vested in a corporation for a public or quasi public use, and a conveyance of such property by the corporation has been regarded as absolutely void on account of the possible resulting injury to the public. This principle has been applied in the case of an *ultra vires* lease by a public corporation.²¹⁶ The cases are, however, not entirely clear in regard to the rights of the corporation lessor to recover possession of the property from one holding under such an invalid lease. It would seem that, the lease being invalid as detrimental to the public, the possession of the property should be restored immediately to the lessor so as to avoid such public detriment, and that the courts will do this has been judicially asserted.²¹⁷ But it was decided in the supreme court of the United States that, in such case, the corporation lessor, being in *pari delicto* with the lessee, was not entitled to the aid of equity to obtain a cancellation of the lease.²¹⁸ It has been suggested that perhaps the court, though denying the lessor any relief in equity, might sustain an action at law by the lessor to recover possession from the lessee, since in such an action the making of the illegal lease need not appear from the plaintiff's pleadings or evidence.²¹⁹ There are cases at least suggesting that the lessor corporation cannot re-enter and take possession from the lessee without process of law.²²⁰ But conceding that, by rea-

²¹⁴ See ante, § 16.

²¹⁵ See Clark & Marshall, Corporations, §§ 228, 231.

²¹⁶ Thomas v. West Jersey R. Co., 101 U. S. 71, 25 Law. Ed. 950; Pennsylvania R. Co. v. St. Louis, A. & T. R. Co., 118 U. S. 290, 30 Law. Ed. 83; Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 35 Law. Ed. 55; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 32 Law. Ed. 837.

²¹⁷ Memphis & C. R. Co. v. Grayson, 88 Ala. 572, 7 So. 122.

²¹⁸ St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, 36 Law. Ed. 738.

²¹⁹ See an article on "Ultra Vires Leases by Corporations," by Edward Avery Harriman, Esq., 14 Harv. Law Rev. 332, an admirable discussion of the subject.

²²⁰ American Union Tel. Co. v. Union Pac. R. Co., 1 McCrary, 188,

son of the invalidity of the lease, the lessor, and not the lessee, is entitled to possession, it would seem that, in those jurisdictions in which the right of one entitled to possession to enter on the wrongful possession is recognized,²²¹ the lessor would be at liberty to enforce his rights in that manner.²²²

In so far as the making or the taking by a corporation of a conveyance by way of lease may be *ultra vires*, any covenants entered into by the parties in connection with the lease, the "covenants of the lease," as it is usually expressed, would seem to be absolutely void and unenforceable.²²³ In accordance with this view it has been held that, even though the lessee named in an *ultra vires* lease by a corporation occupies thereunder, there can be no recovery of rent,²²⁴ and a like holding has been made in the case of a lease to a corporation without power to accept it.²²⁵ In some jurisdictions, however, a lessee who has occupied under an *ultra vires* lease by a corporation has been regarded as precluded from asserting the invalidity of the lease,²²⁶ and the same principle has been applied as against a corporation lessee so as to preclude it from asserting, in defense to a claim for rent, that it had no power

1 Fed. 745; *Western Union Tel. Co. v. Burlington & S. W. R. Co.*, 3 McCrary, 130, 15 Fed. 863.

²²¹ See post, § 215.

²²² See 14 Harv. Law Rev. at p. 342.

²²³ See *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 Law. Ed. 950; *East St. Louis Connecting R. Co. v. Jarvis*, 34 C. C. A. 639, 92 Fed. 735; *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 27 Atl. 525.

²²⁴ *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 Law. Ed. 837; *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 35 Law. Ed. 55; *Cox v. Terre Haute & I. R. Co.*, 66 C. C. A. 433, 133 Fed. 371; *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 27 Atl. 525.

²²⁵ *Pennsylvania R. Co. v. St.*

Louis, A. & T. R. Co., 118 U. S. 290, 30 Law. Ed. 83.

²²⁶ *City of Helena v. Turner*, 36 Ark. 577; *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; *Appeal of Northampton County*, 30 Pa. 305; *Farmers Deposit Nat. Bank v. Western Pennsylvania Fuel Co.*, 29 Pa. Super. Ct. 69.

In *Rector v. Hartford Deposit Co.*, 190 Ill. 380, 60 N. E. 528, it was decided that in an action by a corporation for rent of part of a building erected by it, another part of which was occupied by the corporation itself, it could not be asserted in defense that it had abused its corporate powers in erecting a larger building than it needed, this being a question which could properly be raised only in a direct proceeding by the state.

to take the lease under which it occupied.²²⁷ These diverse decisions are ordinarily but applications of two diverse rules which have been adopted in the various jurisdictions in regard to the enforcement of *ultra vires* transactions as against one who has received full benefits thereunder.²²⁸

In one case at least, it has been asserted that while a corporation lessor cannot recover rent under the covenants of an *ultra vires* lease, it may recover "upon an implied agreement to pay a reasonable rent,"²²⁹ referring to the doctrine, quite generally accepted, that if an *ultra vires* contract is performed by one of the parties, that party may disaffirm the contract and sue to recover, as on a *quantum meruit*, the value of the benefit actually received by the other.²³⁰ In reference to this view, however, it may be remarked that the doctrine referred to has ordinarily been applied in cases in which there had been a payment of money, a furnishing of goods or other personal property, or the doing of work and labor, under the void contract, and in all these cases there is a right of recovery on the theory of *quasi* contract, entirely irrespective of the illegal contract. But a right of recovery for the use and occupation of land upon the theory of *quasi* contract has ordinarily been denied,²³¹ and consequently the right to recover a "reasonable rent" in such case seems most questionable.

§ 22. The parties to a lease—Official capacity.

a. **Trustees.** Even without any express authority to that

²²⁷ *Camden & A. R. Co. v. May's Landing & E. H. C. R. Co.*, 48 N. J. Law, 530, 7 Atl. 523; *Heims Brew. Co. v. Flannery*, 137 Ill. 309, 27 N. E. 286.

²²⁸ See *Clark & Marshall, Corporations*, § 211 et seq.

²²⁹ *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 27 Atl. 525.

In *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, 43 Law. Ed. 108, there was an *ultra vires* lease, so called, of personal property, and the lessor was allowed to recover, in equity, the value of the property together with the earnings which had accrued therefrom

to the lessee, on the theory, it appears, on which recovery in *quasi contract* is ordinarily allowed at law, that one party shall not be allowed to enrich himself unjustly at the expense of another. The opinion has been referred to as supporting the view that "the lessor should recover from the lessee the value of the use and occupation of the land from the time of the repudiation of the lease" (14 Harv. Law. Rev. 340), but this appears questionable.

²³⁰ 1 *Clark & Marshall, Corporations*, § 215 (b); *Hammon, Contracts*, 225.

²³¹ See post § 302, at note 35.

effect in the instrument creating the trust, a trustee who is charged with the receipt and disposal of the income has been regarded as authorized to make leases for reasonable periods and at reasonable rents, this being necessary for the purpose of obtaining an income from the property.²³²

It has been decided in New York, having reference to some extent to the provisions of the local statutes in regard to trusts, that a lease made by a trustee, so far as it may extend beyond the term of the trust, is invalid, unless such a lease is "expressly" authorized by the instrument creating the trust,²³³ even an express power to lease, given in general terms, being regarded as insufficient to validate such a lease.²³⁴ There is, likewise, in Pennsylvania a decision apparently to the same effect.²³⁵ There are on the other hand decisions in which the power of a trustee to make a lease extending beyond the term of the trust has been fully

²³² *Naylor v. Arnitt*, 1 Russ. & M. 501; *Bowes v. East London Water-works Co.*, Jac. 324; *Fitzpatrick v. Waring*, 11 L. R. Ir. 35; *Miller v. Smythe*, 92 Ga. 154, 18 S. E. 46; *Hutcheson v. Hodnett*, 115 Ga. 990, 42 S. E. 422; *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858; *City of Richmond v. Davis*, 103 Ind. 449, 3 N. E. 130; *Hedges v. Riker*, 5 Johns. Ch. (N. Y.) 163; *Greason v. Keteltas*, 17 N. Y. 491; *Corse v. Corse*, 144 N. Y. 569, 39 N. E. 630; *Newcomb v. Ketteltas*, 19 Barb. (N. Y.) 608; *Black v. Ligon*, Harp. Eq. (S. C.) 205; *In re Hubbell Trust*, 135 Iowa, 637, 113 N. W. 512.

²³³ *In re McCaffrey*, 50 Hun, 371, 3 N. Y. Supp. 96; *In re Armory Board*, 29 Misc. 174, 60 N. Y. Supp. 882.

In Gomez v. Gomez, 147 N. Y. 195, 51 N. E. 420, the lease was held to bind the infant remaindermen after the end of the trust, it having been sanctioned by the court, and the court having power to authorize the leasing of infants' lands.

²³⁴ *In re Armory Board*, 29 Misc. 174, 60 N. Y. Supp. 882; *In re One Hundred & Tenth St.*, 81 App. Div. 27, 81 N. Y. Supp. 32. See as to the possible effect of the statutory provision of the Real Prop. Law 1896, § 86, *Weir v. Barker*, 104 App. Div. 112, 93 N. Y. Supp. 732.

²³⁵ *In Standard Metallic Paint Co. v. Prince Mfg. Co.*, 133 Pa. 474, 19 Atl. 411, it was decided, without any discussion, that where a woman had an equitable life estate, with, apparently, a legal remainder to her

recognized, although the instrument creating the trust did not in terms authorize him to make such a lease.²³⁶

The question whether a trustee has power to make any leases at all, as well as whether he has power to make leases for a considerable length of time, is primarily a question of the intention of the creator of the trust, to be ascertained by a construction of the trust instrument as a whole, with reference to the surrounding circumstances, such as the character of the property, the customary length of leases, the desirability of procuring a fair income, and the like. This, it is conceived, is what is meant by the statement that the trustee may make leases for "reasonable" periods,²³⁷ a period being reasonable when a lease for such period appears to be essential or desirable for the purpose of effecting the purpose of the creator of the trust. That a particular lease may extend beyond the period of the trust is, it seems, merely one of the various circumstances to be considered in determining whether it is in accordance with the intention of the creator of the trust.²³⁸ The adoption of a positive rule that the trustee has no power, unless so authorized in express terms, to make a lease extending beyond the term of the trust would seem to involve, in

husband, a lease by the trustee could not extend beyond the life of the wife.

²³⁶ In *Greason v. Keteltas*, 17 N. Y. 491, it is apparently the opinion of the court that the lease would be valid after the termination of the trust. The later New York cases distinguished this case on the ground that the trust there in question was created before the Revised Statutes. That the lease is binding on the persons entitled after the termination of the trust is in effect decided in *Fitzpatrick v. Waring*, 11 L. R. Ir. 35, and that such is the case is clearly recognized in *Collins v. MacTavish*, 63 Md. 166; *Goddard v. Brown*, 12 R. I. 31. And that it *may* bind such persons is conceded in *In re Hubbell Trust*, 135 Iowa, 637, 113 N. W. 512. To the same effect, see *Hutch-*

eson v. Hodnett, 115 Ga. 990, 42 S. E. 422; *Hines v. McCombs*, 2 Ga. App. 675, 58 S. E. 1124.

²³⁷ See ante, note 232.

²³⁸ In *In re Hubbell Trust*, 135 Iowa, 637, 113 N. W. 512, such a consideration was regarded as ground for disapproving a lease for ninety-nine years. In the full and instructive opinion of Ladd, J., it is said that "there is no reason for departing from the elementary rule that when the power to do something is conferred, to do everything essential to effectuate the object contemplated is implied as incidental thereto. In determining what terms are reasonable, much necessarily depends on the nature of the property, the customs of the locality, and the conditions of the estate and the probable period of the trust."

many cases, a violation of such intention as rendering impossible a lease for any length of time, free from liability to premature termination, and as so compelling the acceptance of a rent considerably less than the actual rental value of the property. Such a rule would, in the case of a trust which is to endure for a single life only, render it difficult, as regards some classes of property, to make any lease whatsoever. It may be remarked that, it being the duty of a trustee to make leases only in accordance with his power, he should, it seems, under the New York rule, insert in any lease made by him a "special limitation" terminating the lease upon the termination of the trust, unless he has "express" authority to make leases for a longer term.

Conceding that a lease by the trustee would not be valid after the termination of the trust, a lease in terms to endure beyond that time has been recognized as valid until that time,²³⁹ this according with the rule that, where there is an excessive execution of a legal power of leasing, the lease will be good for the period authorized by the power.²⁴⁰

There is a decision to the effect that a trustee, though authorized to make a lease, has no power to make one with a covenant for renewal.²⁴¹ Whether, however, a trustee has power to make such a covenant should properly be regarded as a question of intention, to the same extent as the question whether he has power to make any lease whatever, and to assert broadly that a trustee never has such power is as incorrect as to say that he always has it. Accordingly it has been decided in particular cases that the language of the instrument creating the trust showed an intention that the trustee might make leases for ninety-nine years renewable forever.²⁴²

²³⁹ *In re one Hundred & Tenth St.*, 81 App. Div. 27, 81 N. Y. Supp. 32. See *Griffen v. Ford*, 14 N. Y. Super. Ct. (1 Bosw.) 123.

²⁴⁰ *Campbell v. Leach*, Amb. 740; *Alexander v. Alexander*, 2 Ves. Sr. 644; *Sugden, Powers* (8th Ed.) 519.

²⁴¹ *Bergengren v. Aldrich*, 139 Mass. 259, 29 N. E. 667. Here there was an express power "to sell and convey in fee simple or for any less estate." This language might pos-

sibly, it seems, have been differently construed.

In New York, the trustee having no power to make leases to endure after the termination of the trust, a covenant for renewal can not be enforced after that time. *Gomez v. Gomez*, 147 N. Y. 195, 41 N. E. 420.

²⁴² *Collins v. MacTavish*, 63 Md. 166; *Prather v. Foote*, 1 Disn. (Ohio) 434. In *Goddard v. Brown*, 12 R. I. 31, the court leaves it un-

A power in the trustee to make leases at a "rack rent," that is, at the full annual value of the premises, does not, it seems, enable him to enter into a covenant to renew at a certain specified rent.²⁴³

A trustee has, it is said, no power to lease if it is a simple trust and the *cestui que trust* is in possession, unless the latter consents to the lease.²⁴⁴ And it has been decided that, in such case, a lease by the trustee enures to the benefit of the *cestui que trust*, so as to entitle the latter to assert the rights of a landlord,²⁴⁵ a view which must, it seems, be based on the theory that the trustee in the particular case, in making the lease, acted as his agent,²⁴⁶ since the *cestui que trust* is otherwise in no legal privity with the lessee.

A direction to the trustee to sell *prima facie* precludes the implication of a power to lease.²⁴⁷ But a trustee for the benefit of creditors has been held to have a power to lease until he is in a position to make an advantageous sale.²⁴⁸ A provision that the trustee shall not "sell or dispose of" the trust property has been held not to preclude a lease for years.²⁴⁹

An express power to lease given to the trustee should be exercised in accordance with the power.²⁵⁰ A power to make leases "for twenty-one years from the making thereof" does not justify a lease for twenty-one years to begin *in futuro*.²⁵¹ And a power to lease "for the best rent attainable" obviously does not authorize a lease for a less rent.²⁵² In one state, however, it has been decided that, though a will authorizes the trustee to make leases only for ten years or less, equity may empower him to make a

decided whether the power in that case authorized covenants for renewal.

²⁴³ *Salamon v. Sopwith*, 35 Law T. (N. S.) 826.

²⁴⁴ See *Lewin, Trusts* (11th Ed.) 727; *Hefferman v. Taylor*, 15 Ont. 670.

²⁴⁵ *White v. Cannon*, 125 Ill. 412, 17 N. E. 753.

²⁴⁶ See *Morgell v. Paul*, 2 Man. & R. 303.

²⁴⁷ *Evans v. Jackson*, 8 Sim. 217; *In re Hoysratt*, 20 Misc. 265, 45 N. Y. Supp. 841.

²⁴⁸ *Geer v. Traders' Bank*, 132 Mich. 215, 93 N. W. 437.

²⁴⁹ *In re Hubbell Trust*, 135 Iowa, 637, 113 N. W. 512.

²⁵⁰ See *Bowes v. East London Waterworks Co.*, 3 Madd. 375, Jac. 324; *In re Hallett*, 52 Law J. Ch. 804, 48 Law T. (N. S.) 894. That this is so in the case of a legal power to lease see the numerous cases cited in *Sugden, Powers*, c. 18; *Farwell, Powers*, c. 17.

²⁵¹ *Griffen v. Ford*, 14 N. Y. Super. Ct. (1 Bosw.) 123.

²⁵² *Griffen v. Ford*, 14 N. Y. Super. Ct. (1 Bosw.) 123.

lease for ninety-nine years, it appearing that otherwise the estate would be almost entirely unproductive.²⁵³

A general power to lease has been held not to authorize an oil and gas lease, the premises having been previously used only for agricultural purposes.²⁵⁴ But a power to manage and control the testator's estate according to the trustee's own best judgment and discretion, "the same as I could do myself, if living," has been regarded as authorizing a lease of unopened as well as opened mines.²⁵⁵

A power given to trustees "to lease any portion of said real estate for such period, and upon such terms and conditions, as they shall think best" has been held to authorize leases for long terms of years, with provisions for the purchase of improvements made by the lessees, and for altering the rent from time to time by arbitration or appraisal,²⁵⁶ and a power to change investments has been held to authorize a lease for ninety-nine years renewable forever,²⁵⁷ as has a power "to dispose of any of my real estate, in fee simple, or for a term of years, or otherwise, in as full and large a manner in every respect as I could myself, if living."²⁵⁸

There are numerous English cases bearing upon the validity of leases made by trustees of a charity, the general result thereof being that such a lease will be supported if it can be shown to be reasonable and advantageous, or to accord with the intention of the founder of the charity, the presumption being that a lease made for an unusual length of term, having reference to the character of the lease, is not a proper exercise of their powers.²⁵⁹ And

²⁵³ *Marsh v. Reed*, 184 Ill. 263, 56 N. E. 306, afg. 64 Ill. App. 535. See *Denegre v. Walker*, 214 Ill. 113, 73 N. E. 409, and case cited post, note 262. This decision would perhaps not be accepted in all jurisdictions. As a general rule a court will not give a trustee powers other than those given him by the creator of the trust, the court's proper sphere of action being merely to approve and supervise the exercise by the trustee of those powers which have been given him. See *Pearse v. Baron*, Jac. 158, as to a power to make a lease for a limited term.

²⁵⁴ *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691, 75 Pac. 995. See *Wood v. Patterson*, 10 Beav. 541.

²⁵⁵ *Raynolds v. Hanna*, 55 Fed. 783. And see *Eley's Appeal*, 103 Pa. 300; *Daly v. Beckett*, 24 Beav. 114.

²⁵⁶ *Goddard v. Brown*, 12 R. I. 31.

²⁵⁷ *Collins v. MacTavish*, 63 Md. 166.

²⁵⁸ *Prather v. Foote*, 1 Disn. (Ohio) 434.

²⁵⁹ See *Lewin, Trusts* (11th Ed.) 632. In *Hill, Trustees*, p. 464, it is said: "With regard to the term to be granted, it may be laid down as a general rule (though subject to

a failure to reserve a sufficient rent, or otherwise to obtain an adequate consideration, will be ground for setting aside such a lease, if the inadequacy be very considerable.²⁶⁰ In one case in this country it has been decided that the trustees of a charity may make a "perpetual lease."²⁶¹

There are several decisions in this country as to the power of trustees to make leases, in which the fact that the trusts were for public and charitable purposes may have affected the decisions, though no emphasis is laid on this point. In one case it was held that the trustees of an educational fund, though forbidden to sell or alien the land belonging to the fund, could make a lease of vacant land for ninety-nine years, reserving no rent, the consideration taking the form of a gross sum to be paid in eight annual installments, this being in effect the only mode in which any income could be secured from the property, and valuable improvements having been made under the lease.²⁶² And it has been decided that where the trustees were directed to keep mines constantly leased upon leases not exceeding five years, and satisfactory tenants could not be obtained for so short a term, and such short leases would result in injury to the mines, equity would direct leases to be made for a longer term.²⁶³ And where the trustees of land given for educational purposes were required by the terms of the gift to improve a lot with buildings for the purpose of teaching, the court approved a lease by them for ninety-nine years to a corporation which was prepared to erect additional buildings and to use them for school purposes, the original buildings being out of repair and the trustees having no funds for the making of repairs.²⁶⁴

many exceptions) that it should be (1) for years and not on lives, (2) not for more than twenty-one years, or, in case of building leases, for ninety-nine years, (3) in possession and not reversionary, and (4) without any absolute covenant for renewal, still less for perpetual renewal.

²⁶⁰ *Lewin, Trusts*, 630; *Hill, Trustees*, 464; 1 *Platt, Leases*, 347 et seq.

²⁶¹ *City of Richmond v. Davis*, 103 Ind. 449, 3 N. E. 130.

²⁶² *Black v. Ligon*, Harp. Eq. (S. C.) 205.

²⁶³ *In re City of Philadelphia*, 2 Brewst. (Pa.) 462. See remarks in *Lewin, Trusts*, 634, in reference to *Attorney General v. Mayor of Rochester*, 2 Sim. 34.

In Appeal of Trustees of Proprietors School Fund, 2 Walk. (Pa.) 37, a mining lease for nine hundred and ninety-nine years was upheld

²⁶⁴ *Trustees of Madison Academy*

One of two or more cotrustees cannot, it has been decided, make a lease in behalf of the others, the exercise of the deliberate judgment and discretion of all the trustees being necessary for this purpose. Furthermore, as is remarked in the same case, such a lease would frequently involve a violation of the statute of frauds.²⁶⁵

It has been decided in Georgia that the trust fund is liable to the lessee for failure to repair as required by the law of that state.²⁶⁶ Elsewhere it has been decided that if a person occupying a trust position makes a lease in behalf of the trust, he has no authority to insert a covenant for quiet enjoyment, and that he is himself personally liable for a breach of such a covenant,²⁶⁷ a view which is in accord with the general rule as to the liability of a person occupying such a position upon a covenant in a conveyance by him.²⁶⁸ Accordingly, a trustee, in making a lease, should generally refrain from entering into personal covenants except against his own acts.

A *cestui que trust*, not having the legal title, has no power to make a lease, and the trustee may evict the lessee as a trespasser,²⁶⁹ unless it appears that in making the lease the trustee acted as agent for the trustee.²⁷⁰ The lessee would, however, ordinarily be precluded from questioning the title of the lessor in this as in other cases.²⁷¹ In view of the disability of the *cestui que trust* in this respect, and of the fact that a lease by the trustee alone may be questioned as being for an excessive period, or as being disadvantageous to the trust estate, it is desirable that the lessee procure the joinder of both the trustee and the *cestui que trust*.²⁷² In some jurisdictions, moreover, in view of the decisions

v. Board of Education of Richmond, Trustees, 282, 508; Rawle, Covenants for Title, §§ 33-36.

²⁶⁵ Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 Law. Ed. 635; ²⁶⁹ 1 Platt, Leases, 123.
Sinclair v. Jackson, 8 Cow. (N. Y.) 543. ²⁷⁰ See Vallance v. Savage, 7 Bing. 595; Howe v. Scarrot, 4 Hurl. & N. 723.

²⁶⁶ Miller v. Smythe, 92 Ga. 154, 18 S. E. 46. ²⁷¹ Blake v. Foster, 8 Term. R. 487; Alchorne v. Gomme, 2 Bing. 54;

²⁶⁷ Chestnut v. Tyson, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101. ²⁷² See post, § 78.

See Greason v. Keteltas, 17 N. Y. 491. ²⁷² In 1 Platt, Leases, 124, it is said: "The trustee should 'demise

²⁶⁸ See Lewin, Trusts, 516; Hill, and lease,' and on the part of the

to the effect that a lease by the trustee can endure only for the life of the trust, it is important to have the persons who are to take after the termination of the trust join in the lease, if they are *sui juris* at the time of its execution.

A lease may be made to one as trustee for another, and in such case he may be made personally liable thereunder,²⁷³ while the *cestui que trust* is exempt from liability on any of the covenants, although he goes into possession, there being no privity between him and the landlord.²⁷⁴

b. Executors and administrators—(1) **In absence of express authority.** Apart from statute, unless authority for the purpose is expressly given by decedent's will, an executor or administrator, having no rights in the decedent's real property, has no power to make a lease of land in which the decedent had an estate of freehold.²⁷⁵ Chattels real, however, including terms for years and interests from year to year, pass to the executor, and of these he may make leases or subleases, provided this seems for the advantage of the estate and a judicious mode of administering the assets.²⁷⁶ An option of purchase in such a sublease is bad, it has

cestuis que trust, words of demise should be inserted, as well as words of consent and approbation. If there be several *cestuis que trust*, the concurrence of all should be obtained,—for if a trustee under a will concur with some but not all of the *cestuis que trust* in making a lease, which recites part only of the trusts, the lessee cannot hold in opposition to the other *cestuis que trust* not parties to the lease. The circumstance of the recital rendering it incumbent on him to make further inquiry, he is considered as having had notice of the title of the other claimants under the will." Citing *Malpas v. Ackland*, 3 Russ. 273, in which case the lease was for sixty-one years, and there was no suggestion that it was within the powers of the trustee.

²⁷³ *Wise v. Perpetual Trustee Co.* [1903] App. Cas. 139.

²⁷⁴ *Walters v. Northern Coal Min. Co.*, 5 De Gex, M. & G. 629; *Ramage v. Womack* [1900] 1 Q. B. 116.

²⁷⁵ *Yarborough v. Ward*, 34 Ark. 204; *Rutherford's Heirs v. Clark's Heirs*, 67 Ky. (4 Bush) 27; *Lee v. Lee*, 74 N. C. 70; *In re Merkel's Estate*, 131 Pa. 584, 18 Atl. 931; *Stevens v. Stevens*, 69 Hun, 332, 23 N. Y. Supp. 520; *Murphy v. Thomas*, 41 Miss. 429.

It has been held that the administrator may lease land for the purpose of paying debts, if the heirs consent thereto. *Ashley v. Young*, 79 Miss. 129, 29 So. 822.

²⁷⁶ *Bac. Abr.*, Leases (I) 7; *Keating v. Keating*, Lloyd & G. t. Sugd. 133; *Hackett v. McNamara*, Lloyd & G. t. Plunk. 283; *Drohan v. Drohan*, 1 Ball & B. 185; *Magrane v. Archbold*, 1 Dow, 107.

been held, because it prevents a sale to any person other than the lessee.²⁷⁷

One of two or more executors or administrators may alone make a valid sublease, which, although not purporting to be the act of all, will be as valid as if the act of all.²⁷⁸

If a term of years is specifically bequeathed, the legal title vests in the legatee upon the executor's assent to the bequest,²⁷⁹ and thereafter the legatee could eject one holding under a lease made by the executor. For this reason a person proposing to take a lease from an executor should ascertain whether the property has been specifically bequeathed, and, if such is the case, he should obtain the legatee's concurrence in the lease.²⁸⁰

Even though an executor make a lease without any authority or power so to do, it does not seem that the lessee could assert this fact in defense to a claim for rent, the case being similar to that of any lease made by one having no title to the property.²⁸¹

For the reason that an executor or administrator has no power to bind the estate by a contract not arising from any obligation on the part of the decedent, it has been held that if the administrator exercises an option of renewal, contained in a lease to his intestate, he is personally liable for the rent thereunder.²⁸²

(2) **Express powers.** Occasionally the executor is, by the decedent's will, given power to make leases, as he may be given power to make sales.²⁸³ Such a power, if there is given to the executor no interest in the property, is a "naked" or "bare" power,²⁸⁴ while, if the legal title is given to him, he is in effect a trustee, and he has a power "coupled with an interest."²⁸⁵ In the latter case the executor will be the landlord of the lessee, but not in the former case, since the reversion is not in him but in the

²⁷⁷ *Oceanic Steam Nav. Co. v. Sutherberry*, 16 Ch. Div. 236.

²⁷⁸ *Pannel v. Fenn*, Cro. Eliz. 347; *Simpson v. Gutteridge*, 1 Madd. 609; *Doe d. Hayes v. Sturges*, 7 Taunt. 217. See *Woerner, Administration*, § 34.

²⁷⁹ *Doe d. Saye v. Guy*, 3 East, 120; 2 *Williams, Executors* (9th Ed.) 1231.

²⁸⁰ See 1 *Platt, Leases*, 370.

²⁸¹ See *Gregory v. Michaels*, 1 Misc. 195, 20 N. Y. Supp. 877, and post, § 78 g.

²⁸² *Chisholm v. Toplitz*, 82 App. Div. 346, 82 N. Y. Supp. 1081; *Id.*, 178 N. Y. 599, 70 N. E. 1096.

²⁸³ See 1 *Tiffany, Real Prop.* § 273.

²⁸⁴ *Killam v. Allen*, 52 Barb. (N. Y.) 605; *Morse v. Morse*, 85 N. Y. 53.

²⁸⁵ 1 *Tiffany, Real Prop.* §§ 276, 279.

heir or devisee, and the latter is the landlord,²⁸⁶ the lease taking effect as if made by the decedent.

A power in the executor to make leases has been inferred from a direction as to the disposition to be made by him of the rents from the land,²⁸⁷ and a power "to sell and dispose of so much of the real estate as may be necessary to fulfil the will" was held, under the circumstances, to authorize a lease by him.²⁸⁸ Where the widow was given for life such portion of the land as she desired, and the executor was directed to lease "the balance," he was regarded as having authority to lease all the land after the widow's death.²⁸⁹

(3) **Statutory powers.** In a few states the statute expressly authorizes the executor or administrator to make leases for purposes of administration until a final settlement of the estate.²⁹⁰ A lease not made "at public outcry" as required by the statute has been held to be ineffective.²⁹¹ Occasionally the executor or administrator is by statute authorized to lease by the direction or with the approval of the probate court.²⁹²

In a number of states the executor or administrator is by statute given the right to possession of the real estate as against devisees and heirs until the settlement of the estate,²⁹³ and under these statutes he would, it seems, have a right to make leases subject to termination upon the settlement of the estate.²⁹⁴

²⁸⁶ Page v. Davidson, 22 Ill. 112.

²⁸⁷ McCall v. Peachy's Adm'r, 3 Munf. (Va.) 288.

²⁸⁸ Hedges v. Riker, 5 Johns. Ch. (N. Y.) 163.

²⁸⁹ Doe d. Hoyle v. Stowe, 13 N. C. (2 Dev. Law) 318.

²⁹⁰ Alabama Code 1907, § 2618; Michigan 2 Comp. Laws 1897, § 9354; Texas Rev. St. 1895, art. 2105.

The Michigan statute authorizing a lease by the executor from year to year, it was held that a lease for two years was void, but that "the void lease for two years created a tenancy from year to year, as in ordinary cases." Grady v. Warrell, 105 Mich. 310, 63 N. W. 204. Presumably the court refers to the general rule that

one entering under a void lease, paying a yearly rent, becomes a tenant from year to year.

²⁹¹ Chighizola v. Le Baron, 21 Ala. 406; Martin v. Williams, 18 Ala. 190.

²⁹² See California Code Civ. Proc. § 1579; Burns' Ann. St. Indiana, § 2524; Maine Rev. St. 1903, c. 73 § 1; Miss. Code 1906, § 2071; New York Code Civ. Proc. § 2760.

²⁹³ See 2 Woerner, Administration, § 337; 11 Am. & Eng. Enc. Law (2d Ed.) 1037.

²⁹⁴ See Smith v. Park, 31 Minn. 70, 16 N. W. 490; Doolan v. McCauley, 66 Cal. 476, 6 Pac. 130; Burbank v. Dyer, 54 Ind. 392. That the executor has no power to lease after the

c. **Guardians—(1) Of infants.** A guardian “by nature” or “for nurture,” who has the custody of the infant’s person only, and not of his property, has no power to make a lease of the infant’s land,²⁹⁵ except perhaps at will.²⁹⁶ A guardian having charge of the infant’s property, on the other hand, may make leases thereof, and, apart from a statutory provision to the contrary, such guardian, if a guardian in socage, a testamentary guardian, or a guardian by election of the infant, has power to make a lease without authorization from any court, he having not a bare authority but an interest.²⁹⁷ A guardian appointed by a court of chancery is, it has been said, in the position of a mere receiver,²⁹⁸ and cannot make leases without the sanction of the court,²⁹⁹ but it has on the other hand been said that he may make leases.³⁰⁰ It would seem that a guardian appointed by a court of probate, by authority of statute, would be, in this regard, in the same position as if appointed by a court of chancery, in the absence of a specific provision in the statute as to the making of leases by him.³⁰¹ There are several cases in which the authority of a guardian to make leases is asserted in general terms, and in

settlement of the estate, see Jackson v. O’Rorke, 71 Neb. 418, 98 N. W. 1068.

²⁹⁵ May v. Calder, 2 Mass. 55; Darby v. Anderson, 1 Nott & McC. (S. C.) 369; Magruder v. Peter, 4 Gill & J. (Md.) 323; Ross v. Cobb, 17 Tenn. (9 Yerg.) 463; Indian Land & Trust Co. v. Shoenfelt, 5 Ind. T. 41, 79 S. W. 134.

In Maxwell v. Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124, it is held that a lease by a natural guardian expires on his death, thus apparently conceding the validity of such a lease.

²⁹⁶ Pigot v. Garnish, Cro. Eliz. 678, 734.

²⁹⁷ Osborn v. Carden, 1 Plowd. 293; Wade v. Baker, 1 Ld. Raym. 130; Rex v. Inhabitants of Oakley, 10 East, 491; Hutchins v. Dresser, 26 Me. 76; Richardson v. Richardson, 49 Mo. 29; Field v. Schieffelin, 7

Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; Emerson v. Spicer, 46 N. Y. 594. See 1 Platt, Leases, 371.

²⁹⁸ Per Patteson J., in Rex v. Sutton, 3 Adol. & E. 597.

²⁹⁹ 1 Platt, Leases, 380, citing McPherson, Infancy, 106; Woerner, Guardianship, 47.

³⁰⁰ It is stated *obiter* by Chancellor Kent in Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441, that a chancery guardian has the same power in this respect as a guardian in socage.

³⁰¹ A statutory provision that the guardian appointed by the probate court shall have the same powers as a testamentary guardian or guardian in socage removes any possible disability in this regard. See Thacker v. Henderson, 63 Barb. (N. Y.) 271; Holmes v. Seeley, 17 Wend. (N. Y.) 78; Pond v. Curtiss, 7 Wend. (N. Y.) 45.

which, it seems, the guardian in question may have been appointed by a court of chancery or a probate court, without any clear showing in this regard.³⁰²

Quite frequently there are express statutory provisions as to leases by guardians, ordinarily providing for the approval thereof by the court.³⁰³ It has been decided that a statute authorizing the guardian to lease the ward's land on such terms, and for such length of time as the court may approve, does not invalidate a lease executed by the guardian without such approval, but renders it voidable merely on the court's disapproval.³⁰⁴

A guardian having power to lease without authority of court may make a lease reserving a share of the crops as rent,³⁰⁵ but it has been held that he has no right to make an "oil" or "gas" lease, since this involves the permanent withdrawal of a part of the corpus of the estate.³⁰⁶

In Michigan, provisions that the guardian appointed by the probate court "shall have the care and management of the estate," and shall "dispose of and mortgage all such estate and effects according to law," and shall "pay all just debts, * * * out of his personal estate and the income of his real estate, if sufficient, and if not, then out of his real estate, upon obtaining license for the sale thereof" (Comp. St. 1897, §§ 8703, 8704, 8717), were held to authorize the guardian to lease without authority from the court. *Kinney v. Harrett*, 46 Mich. 87, 8 N. W. 708.

³⁰² *Graham v. Chatoque Bank*, 44 Ky. (5 B. Mon.) 45; *Weldon v. Lytle*, 53 Mich. 1, 18 N. W. 533; *Thacker v. Henderson*, 63 Barb. (N. Y.) 271; *Hughes' Appeal*, 53 Pa. 500; *Stoughton's Appeal*, 88 Pa. 198; *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

In *Indian Land & Trust Co. v. Shoenfelt*, 5 Ind. T. 41, 79 S. W. 134, it is said that "a general guardian at common law, having been ap-

pointed by the court, and having given bond, may lease his ward's land without the order of the court." No authority is cited.

In *Talbot v. Provine*, 66 Tenn. (7 Baxt.) 502, it was held that the Chancery court could authorize or confirm a lease made by a guardian if to the advantage of the ward. It does not appear how the guardian in this case was appointed.

³⁰³ See e. g., *Mills' Ann. St. Colorado* 1891, § 2081; *Maine Rev. St.* 1903, c. 73, § 1; *Massachusetts Rev. Laws* 1902, c. 146, § 29; *Ohio Rev. St.* 1906, § 6295 et seq.; *Rhode Island Gen. Laws* 1906, c. 196, § 32; *Shannon's Code, Tennessee* 1896, § 4283; *Texas Rev. Civ. St.* art. 2633; *Virginia Code* 1904, §§ 2615-2621; *West Virginia Code* 1906, § 3228 et seq.; *Wisconsin Rev. St.* 1898, § 3991.

³⁰⁴ *Field v. Herrick*, 101 Ill. 110. Compare *Bates v. Dunham*, 58 Iowa, 308, 12 N. W. 309.

³⁰⁵ *Weldon v. Lytle*, 53 Mich. 1, 18 N. W. 533.

³⁰⁶ *Stoughton's Appeal*, 88 Pa. 198; *Wilson v. Youst*, 43 W. Va. 826, 28

The guardian has, at most, power to make a lease extending only to the time of the ward's majority, and if he undertakes to make one extending beyond that time it may be avoided by the ward upon coming of age.³⁰⁷ If the guardian's authority expires by law before the ward becomes of age, the lease may be avoided by another guardian then appointed.³⁰⁸ A lease by a guardian for a term extending beyond the term of the guardianship has been asserted to be absolutely void,³⁰⁹ but it seems rather to be voidable merely, so that the ward may, on coming of age, adopt it if he thinks fit.³¹⁰

A guardian making a lease of his ward's property is not, it has been held, liable as upon an implied covenant upon the lessee's eviction.³¹¹ The ward is not liable upon a stipulation in the lease by the guardian to pay the value of improvements made by the lessee,³¹² but the guardian has been held liable upon such a stipulation, although made with the approval of the court,³¹³ and if he undertakes to enter into a covenant for quiet enjoyment he is personally liable thereon.³¹⁴

S. E. 781; *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533.

³⁰⁷ *Watkins v. Peck*, 13 N. H. 360, 377; *Graham v. Chatoque Bank*, 44 Ky. (5 B. Mon.) 45; *Jackson v. O'Rourke*, 71 Neb. 418, 98 N. W. 1068.

³⁰⁸ *Snook v. Sutton*, 10 N. J. Law (5 Halst.) 133; *Emerson v. Spicer*, 46 N. Y. 594; *In re Stafford*, 3 Misc. 106, 22 N. Y. Supp. 706.

³⁰⁹ *Ross v. Gill*, 4 Call (Va.) 250; *Roe d. Parry v. Hodgson*, 2 Wils. 129.

³¹⁰ *Van Doren v. Everitt*, 5 N. J. Law (2 South.) 460, 8 Am. Dec. 615; *People v. Ingersoll*, 20 Hun (N. Y.) 316, 58 How. Pr. 351; *Graham v. Chatoque Bank*, 44 Ky. (5 B. Mon.) 45. It is said in *Bac. Abr., Leases* (I) 9: "For such leases were not derived barely out of the interest of the guardian, or to be measured thereby, but take effect also by virtue of his authority, which, for the time, was general and absolute; and therefore all lawful acts done during the continu-

ance of that authority are good, and may subsist after the authority itself, by which they were done, is determined; and consequently the infant, when he comes of age, may by acceptance of rent or other act, if he thinks fit, make such leases good and unavoidable."

³¹¹ *Webster v. Conley*, 46 Ill. 13, 92 Am. Dec. 234. There the lease was made without authority of court as required by statute, but the court says that the rule would be the same had the lease been authorized.

³¹² *Barrett v. Cocke*, 59 Tenn. (12 Heisk.) 566.

³¹³ *Nichols v. Sargent*, 125 Ill. 309, 17 N. E. 475, 8 Am. St. Rep. 378. The court says that he may obtain indemnity from the ward, a view which is not in accord, apparently, with the case cited in the next preceding note.

³¹⁴ *Chestnut v. Tyson*, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101.

(2) **Of lunatics.** At a common law, it seems, the committee or guardian of a lunatic has no power to lease the land of the ward without authority from the court, he being in effect a mere bailiff,^{314a} but this rule has been asserted not to apply to a lease from year to year.³¹⁵ Occasionally the matter is controlled by an express statutory provision on the subject.³¹⁶ It has been decided that under a statute providing that he "shall have the charge of" and "manage" the property of the ward, he may make a lease for a reasonable time without authority from the court.³¹⁷ A lease made without the order of court as required by statute will be set aside if made for an inadequate rent.³¹⁸ Whether this would be done when an adequate rent was reserved would presumably depend on whether the lease was for the advantage of the lunatic as a whole.

d. **Receivers.** A receiver may make a lease, when authorized by the court so to do and not otherwise.³¹⁹ The court will not

^{314a} 1 Platt, Leases, 38, citing *Cocks v. Darson*, Hob. 215 a; Hutt. 16; *Foster v. Marchant*, 1 Vern. 262, 1 Eq. Cas. Abr. 277, pl. 4, 326, pl. 13; *Knipe v. Palmer*, 2 Wils. 130; *Den d. Brooks v. Brooks*, 25 N. C. (3 Ired. Law) 389. See *Pharis v. Gere*, 110 N. Y. 336, 18 N. E. 135, 1 L. R. A. 270.

In *Richardson v. Richardson*, 49 Mo. 29, it was decided that a guardian appointed by a testator for his insane son could make a lease. He presumably was in the position of a trustee, or if the son was an infant, which does not appear, he was in the position of a guardian to an infant.

³¹⁵ *De Treville v. Ellis*, Bailey Eq. (S. C.) 35, 21 Am. Dec. 518.

³¹⁶ See *Mills*, Ann. St. Colorado 1891, § 2945; *Connecticut* Gen. St. 1902, § 241; *Virginia* Code 1904, §§ 1705, 2615-2621; *West Virginia* Code 1906, § 3228 et seq.

³¹⁷ *Palmer v. Chesboro*, 55 Conn. 114, 10 Atl. 508. See *Campau v. Shaw*, 15 Mich. 226.

³¹⁸ *Alexander v. Buffington*, 66 Iowa, 360, 23 N. W. 754. In *Pharis v. Gere*, 110 N. Y. 336, 18 N. E. 135, 1 L. R. A. 270, the court refused to decide whether a statute providing for a lease by order of court, with a further provision that the property of a lunatic should "not be leased for more than five years, or mortgaged or aliened or disposed of otherwise than herein directed," dispensed with the necessity of such an order in the case of a lease for less than five years, but held that a lease made without such an order, for a rent dependent on the success of the lessee corporation, in order to give the lessee the control of a certain product, was unauthorized.

³¹⁹ 1 Platt, Leases, 389; *Morris v. Elme*, 1 Ves. Jr. 139; *Weeks v. Weeks*, 106 N. Y. 626, 13 N. E. 96; *Simmons v. Allison*, 118 N. C. 761, 24 S. E. 740; *Neale v. Bealing*, 3 Swanst. 304; *Roberts v. Armstrong*, 1 Moll. 27, note; *Wynne v. Newborough*, 1 Ves. Jr. 164; *Farmers' Loan & Trust Co. v. Eaton*, 51 C. C.

ordinarily, it seems, order a lease for such a length of time that it is likely to endure beyond the termination of the litigation,³²⁰ though if such a lease is made it will not terminate with the litigation.³²¹

An application for a direction to a receiver, appointed in creditors' proceedings, to make a lease binding on an infant remainderman, has been refused.³²²

A receiver may, no doubt, under authority of the court, take a lease of property if this is necessary or desirable for the conduct of the receivership. He cannot, without such authority, bind the fund in his hands by a lease extending beyond the receivership.³²³

§ 23. Lease to two or more persons.

In the case of a lease to two or more persons they will take as joint tenants or tenants in common accordingly as they would take in the case of a conveyance to them in fee simple. That is, at common law, they would take the leasehold as joint tenants, with the right of survivorship, in the absence of words of severance,³²⁴ but in many jurisdictions a tenancy in common in the leasehold would exist by reason of statutory provisions, either abolishing joint tenancy or providing that it shall exist only when such an intention is plainly expressed or clearly apparent.³²⁵

A. 640, 114 Fed. 14. In *Shreve v. Hankinson*, 34 N. J. Eq. 413, however, it was decided that a receiver could, without a special order to that effect, make a lease of a farm for one year, the order appointing the receiver giving him authority to let the property from time to time.

It is said in a recent edition of *Daniel's Chancery Practice* (7th Ed., at p. 1443) that a lease may be made for three years or less without the order of the judge, citing an unreported decision of the master of the Rolls. Formerly it was provided by the 64th order of 1828 that, in every order directing the appointment of a receiver of landed estates, there be inserted a direction that such receiver shall manage, as well as let, the estate with the approbation of the master. See *Duffield v. Elwes*, 11 Beav. 590.

receiver shall manage, as well as let, the estate with the approbation of the master. See *Duffield v. Elwes*, 11 Beav. 590.

³²⁰ *Weeks v. Weeks*, 106 N. Y. 626, 13 N. E. 96; *Alderson, Receivers*, 305.

³²¹ *Farmers' Loan & Trust Co. v. Eaton*, 51 C. C. A. 640, 114 Fed. 14; *Weeks v. Weeks*, 106 N. Y. 626, 13 N. E. 96; *Shreve v. Hankinson*, 34 N. J. Eq. 413.

³²² *Gibbins v. Howell*, 3 Madd. 469.

³²³ *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 Law. Ed. 819.

³²⁴ 2 Blackst. Comm. 193; 1 Platt, Leases, 537, 540.

³²⁵ See 1 Tiffany, Real Prop. p. 375.

§ 24. What may be the subject of a lease.

a. **Corporeal and incorporeal things.** A lease may be made not only of a corporeal real thing, that is, of land or of that which may be so annexed thereto as to constitute a part thereof, but also of an incorporeal real thing, such as a franchise,³²⁶ a right as to the use of water,³²⁷ a right of way,³²⁸ or a right of profit in another's land.³²⁹ That is, any such incorporeal thing may be granted for a period of less duration than the interest of the grantor. But though a lease may thus be made of an incorporeal thing, it cannot be regarded as creating the relation of landlord and tenant between the lessor and lessee.³³⁰ There is in such case nothing of which tenure can be predicated.

A so-called "lease" of "power," whether water, steam, or electric, is, it seems, merely a contract to furnish the power or to allow another to utilize it for a stipulated time.³³¹

b. **Personal chattels.** Personal or movable chattels may, it seems, be the subject of a gift or grant for a limited period,³³² and we not infrequently meet with the expression "lease" in this connection. At the present day, however, whatever it may have been in former times,³³³ a lease of a chattel is merely a species

³²⁶ *St. Louis & C. R. Co. v. East*, 39 Ill. App. 354; *Id.*, 139 Ill. 401, 28 N. E. 1088; *Walker v. Tipton*, 33 Ky. (3 Dana) 3; *Hunting v. Hartford St. R. Co.*, 73 Conn. 179, 46 Atl. 824; *State v. King County*, 29 Wash. 359, 69 Pac. 1106; *Felton v. Deall*, 22 Vt. 170, 54 Am. Dec. 61.,

³²⁷ *Williams v. Ladew*, 171 Pa. 369, 33 Atl. 329; *Ex parte Miller*, 2 Hill (N. Y.) 418; *Tipping v. Eckersley*, 2 Kay & J. 264; *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, 64 N. E. 680.

³²⁸ *Newmarch v. Brandling*, 3 Swanst. 99; *Ledyard v. Morey*, 54 Mich. 77, 19 N. W. 754.

³²⁹ *Sury v. Brown, Latch*, 99; *Inhabitants of Watertown v. White*, 13 Mass. 477; *Read v. Granberry*, 30 N. C. (8 Ired. Law) 109.

³³⁰ *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. 561; *Smith, Landl. & Ten.* (3d Ed.) 80; 1 Washburn, *Real Prop.* 310.

But in *Williams v. Ladew*, 171 Pa. 369, 33 Atl. 329, one to whom a lease of the right to take water from adjoining land is given is apparently regarded as a tenant, becoming a tenant at sufferance if he "holds over, that is, if he takes the water after the period named, and being as such liable for use and occupation. And see authorities post, § 301, to the effect that use and occupation lies for the enjoyment of an incorporeal thing.

³³¹ See post, § 136.

³³² *Sheppard's Touchstone*, 268; *Bac. Abr., Leases, A.*

³³³ See *Gray, Perpetuities* (2d Ed.) § 826.

of "bailment," a "contract of hiring," or, if made *gratis*, a loan, and it would seem desirable to confine the use of the term "lease" to things of a real character with which it has always been associated. Leases or bailments of chattels, it is evident, do not create the relation of landlord and tenant, and consequently fall outside the scope of this work.

Not infrequently in the case of a lease of land, personal chattels are included, as when furniture is leased along with a house, or live stock and farming utensils along with a farm. The various decisions in regard to the apportionment of rent in such a case, and also as to the obligations of the lessee under special stipulations as to the return of the chattels, will be hereafter considered.³³⁴

c. **Part of building.** There may be a lease of merely a part of a building, a "floor" for instance, or an apartment or room. Such a lease, it has been generally decided in this country, does not pass any interest in the soil, and, consequently, upon a destruction of the building or of that part of the building, the whole subject of the lease is destroyed and the liability for rent terminates.³³⁵ Such a view of the operation of a lease of a part of a building seems reasonable and unobjectionable on principle. Though the building is, ordinarily, in legal theory, a part of the land, it is not physically a part of the soil or earth, that is, the building is one part of the land, and the earth or soil, land in its physical sense, is another part, and there is no more objection to leasing separately that part of the land which consists of a part of the building than to leasing that part of the land which consists of the earth or soil, or of a stratum thereof. In England, however, such a view has never been suggested, and there, upon the destruction of a building, an apartment in which has been

³³⁴ See post, §§ 169 c, 254, 255. Bloeser, 77 Mo. App. 172; Winton v.

³³⁵ *McMillan v. Solomon*, 42 Ala. Cornish, 5 Ohio, 477. See post, § 356, 94 Am. Dec. 654; *Leiferman v. Osten*, 167 Ill. 93, 47 N. E. 203, 39 L. R. A. 156; *Kerr v. Merchant's Exch. Co.*, 3 Edw. Ch. (N. Y.) 315; *Rowan v. Kelsey*, 4 Abb. Dec. (N. Y.) 125, 2 Keyes, 594; *Stockwell v. Hunter*, 52 Mass. (11 Metc.) 448, 45 Am. Dec. 220; *Shawmut Nat. Bank v. Boston*, 118 Mass. 125; *Seidel v.* 182 p (2). In *Leiferman v. Osten*, 167 Ill. 93, 47 N. E. 203, 39 L. R. A. 156, it is decided that a demise of one floor of a building passed no interest in the land under the building and that consequently a removal of the building to another part of the same lot did not constitute an eviction.

leased, the liability for rent is regarded as continuing, upon the theory, presumably, that the lease included an interest in the soil.³³⁶

§ 25. Necessity of writing—Statute of frauds.

a. **The English statute.** At common law a lease of land could be made without any writing, though, if for life, livery of seisin was necessary.³³⁷ On the other hand, a lease of an incorporeal thing, such as an easement, right of profit, or franchise, was always required to be by deed, that is, by writing under seal, since such things lay "in grant," and a grant necessarily involved the use of a seal.³³⁸

The rule allowing oral leases of land was changed by the first section of the statute of frauds,³³⁹ which provided that all leases, estates, interests of freehold, or terms of years or any uncertain interest, in, to, or out of lands, tenements or hereditaments, not put in writing and signed by the parties so making or creating the same or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only. But an exception was made, by the second section of the statute, of "leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount to two-thirds parts at the least of the full improved value of the thing demised."

The fourth section of the statute provides that no action shall be brought upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other

³³⁶ *Izon v. Gorton*, 5 Bing. N. C. 501, is in effect opposed to such a view, as is perhaps *Marshall v. Schofield*, 52 Law J. Q. B. 58. *Doe d. Freeland v. Burt*, 1 Term R. 701, is sometimes cited in support of such a view, but it has no bearing whatever on the question, it deciding merely that a lease of ground was not to be construed as passing a vault beneath it leased to another person.

³³⁷ Litt. § 60; Co. Litt. 9 a, 49 b; 2 Platt, Leases, 1. The only case in which a deed was necessary was that of a demise by a corporation aggregate. Co. Litt. 85 a.

³³⁸ *Tottell v. Howell*, Noy, 54; *Somerset v. Fogwell*, 5 Barn. & C. 875; *Bird v. Higginson*, 2 Adol. & E. 696.

³³⁹ 29 Car. 2, c. 3, § 1 (A. D. 1677).

person thereunto by him lawfully authorized. This section also names a number of other classes of contracts with which we are not here concerned, on which, if not in writing, no action can be brought.

The effect of these respective sections of the statute is stated by an English writer of high authority³⁴⁰ as follows: "The first and second sections appear to enact, that all interests actually created without writing shall be void, unless in the case of a lease not exceeding three years (at nearly rack rent).**** An actual lease for any given number of years, whether with or without rent, or any interest uncertain in point of duration, must, it should seem, equally fall within the provision of the first section, and cannot be sustained unless it come within the saving in the second section. This, however, of itself would not have prevented all the evils which the act intended to avoid, for although actual estates could not be created, yet still *parol agreements* might have been entered into respecting the future creation of them. To remedy this mischief, the provision in the fourth section was inserted, which relates not to contracts or sales of land, etc., but to any *agreement* made upon any contract or sale of lands, etc., and as agreements were more to be dreaded than contracts actually executed, no exception was inserted after the fourth section, similar to that which follows the first section, and consequently an *agreement* by *parol*, to create even such an interest as is excepted in the second section, would be merely void." Applying this view to the subject of the present work, a lease comes within the provision of the first section, while an executory contract to make a lease is governed by the fourth section. That this is the proper application of the respective sections has been stated or assumed by other leading writers,³⁴¹ and seems to be the necessary construction of the language of the statute. The English statute thus distinguishes, as regards the requirement of a writing, between a lease and a contract for a lease, matters which in themselves are clearly distinct.³⁴²

b. **The state statutes.** In this country the English statute of

³⁴⁰ Sugden, *Vendors & Purchasers* Cummins, 33 N. J. Law, 44, per (14th Ed.) 122. Beasley, C. J.; *Tillman v. Fuller*, 13

³⁴¹ Browne, *Statute of Frauds* (5th Ed.) § 5; *Dart, Vendors & Purchasers* (6th Ed.) 228. See *Birckhead v.*

Mich. 113, per Christlaney, J.

³⁴² See post, § 62.

frauds is in force in at least two jurisdictions,³⁴³ while in five states there are provisions substantially similar to the first section of that statute.³⁴⁴ In a considerable number of states it is provided in effect that no estate for over a term specified, usually one year, shall be created except by writing,³⁴⁵ such provisions

³⁴³ Maryland (see Alexander's British Statutes, p. 508); New Mexico (see Childers v. Talbott, 4 N. M. 168, 16 Pac. 275; Childers v. Lee, 5 N. M. 576, 25 Pac. 781). In Georgia the first two sections of the English statute were at one time recognized as in force. Presumably, however, they are to be regarded as displaced by the provision hereinafter referred to. See post, note 345.

³⁴⁴ Kirby's Dig. St. Arkansas 1904, § 3664; Missouri Rev. St. 1899, § 3414; 2 Gen. St. New Jersey, p. 1602, § 1; Pennsylvania Act March 21, 1772; South Carolina Civ. Code 1902, § 2416.

³⁴⁵ California Civ. Code, § 1091 (An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing). Mills' Ann. St. Colorado 1891, § 2019 (No estate or interest other than leases for not exceeding one year shall be created, granted, assigned or surrendered unless by act or operation of law or by deed or conveyance in writing). Delaware Rev. Code 1893, p. 866 (No demise, except it be by deed, shall be for a longer term than one year). District of Columbia Code 1901, § 1116 (Every estate for a greater term than one year attempted to be created by parol shall be an estate at sufferance). Florida Gen. St. 1906, § 2448 (No estate or interest of freehold, or for a term of years for more than two years, or any uncertain interest of, in, or out

of, any messuages, lands or hereditaments, shall be created, made or granted otherwise than by deed in writing). Georgia Code 1895, § 3117 (Contracts creating the relation of landlord and tenant for any time not exceeding one year may be by parol, and if made for a greater time shall have the effect of a tenancy at will). Idaho Civ. Code 1901, § 2400 (same as Colorado). Burns' Ann. St. Indiana 1901, § 3335 (Conveyances of lands or of any interests therein, except bona fide leases for a term not exceeding three years, shall be by deed in writing). Kansas Gen. St. 1905, § 3255 (No leases, estates or interests in lands exceeding one year in duration shall be assigned or granted unless by deed or note in writing). Carroll's St. Kentucky 1903, § 490 (No estate of inheritance or freehold or for a term of more than one year shall be conveyed unless by deed or will). Maine Rev. St. 1903, c. 75, § 13 (No estate to be created greater than tenancy at will except by some writing). Massachusetts Rev. Laws 1902, c. 127, § 3 (An estate or interest created without writing shall have force and effect of estate at will only). Michigan Comp. Laws 1897, § 9511 (same as Colorado). Minnesota Rev. Laws 1905, § 3487 (same as Colorado). Mississippi Code 1906, § 2763 (An estate of inheritance or freehold, or for a term of more than one year, shall not be conveyed unless the conveyance be declared by writing). Nebraska

being practically equivalent to the first two sections of the English statute, except that they reduce the period for which a lease may be made by parol. These provisions differ considerably in their language, and some of them, at least, cannot be regarded as superior in point of perspicuity to the English statute, however wanting this may be in that respect. With all their faults of expression, however, they are quite readily capable of comprehension as expressly invalidating leases by which estates of greater

Comp. St. 1905, § 3636 (same as Colorado). *Nevada* Comp. Laws 1900, § 2694 (same as Colorado). *New Hampshire* Pub. St. 1901, c. 137, § 12 (Every estate or interest in lands created or conveyed without an instrument in writing shall be deemed an estate at will only). *New York* Real Property Law, § 207 (same as Colorado). In *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434, the court apparently lost sight of this section of the Real Property Law, referring to section 224 (post, note 346) as if it had superseded the provision of the former law which corresponded with the present section 207. *North Carolina* Revisal 1905, § 976 (All leases and contract for leasing land for mining, of whatever duration, and all other leases and contracts for leasing lands exceeding three years from the making thereof, are void if not in writing). *North Dakota* Rev. Codes 1905, § 4968 (same as California). *Ohio* Rev. St. 1906, § 4198 (No lease, estate or interest of freehold or term of years, or any uncertain interest in lands, shall be assigned or granted except by deed or note in writing). *Bell & C. Ann. Codes Oregon*, § 793 (substantially same as Colorado). *Rhode Island* Gen. Laws 1896, c. 202, § 2 (Every conveyance of land for any term longer than one year shall be void unless made in writing). *South Carolina* Civ. Code, § 2416 (No parol lease shall give a tenant a right of possession for a longer period than twelve months from the time of entering on the premises). *South Dakota* Civ. Code 1903, § 938 (same as California). *Texas* Rev. St. 1895, art. 624 (approximately the same as Mississippi). *Utah* Comp. Laws 1907, §§ 1974, 2461 (same provision as that of Colorado, twice repeated). *Vermont* Pub. St. 1906, § 2582 (Estates or interests in lands, created or conveyed without an instrument in writing, signed by the grantor or by his attorney, shall have the effect of estates at will only). *Wisconsin* Rev. St. 1898, § 2302 (same as Colorado). *West Virginia* Code 1906, § 3020 (No estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed unless by deed or will).

In Washington it is provided (*Bal. Ann. Codes & St.* § 4517) that all conveyances of real estate or of any interest therein, and all contracts evidencing any incumbrance upon real estate, shall be by deed; while § 4568 declares that leases may be in writing or print, or partly in writing and partly in print, and shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses or seals.

than the excepted duration are sought to be created, and this is perhaps more than can be said of other forms of statutory provision bearing upon the subject, now to be considered.

In a number of states there is a provision to the general effect that an "agreement (or contract) for the leasing of land" for longer than one year is invalid if not in writing, the modes of expression varying to some extent, as in the class of provisions previously referred to.³⁴⁶ The distinguishing characteristic of this class of enactments is that they speak of an "agreement" or "contract" for leasing rather than of a lease or conveyance. As before stated,³⁴⁷ the reference to a lease as an "agreement" or a "contract" has the effect of obscuring the important fact that it is a conveyance, transferring an estate to the lessee, a fact which is clearly recognized by the first class of statutory provisions above referred to. Properly speaking, the expression an "agreement (or contract) for leasing" means an agreement to make a lease, and the fact that these statutory provisions usually invalidate in terms an agreement for leasing "or for the sale of" an interest in land would seem to show that this is the proper construction of the language used, an agreement to make a lease and an agreement to sell being evidently both executory contracts, clearly distinguishable from a lease or conveyance in fee, either of which involves an actual transfer of an estate. Thus regarded, the provisions here in question would correspond to the fourth section of the English statute rather than to the first and second,

³⁴⁶ *California* Civ. Code, § 1624 § 1237; *Utah* Comp Laws 1907, § (5); *Mills' Ann. St. Colorado* § 2021; 2463; *Wisconsin* Rev. St. 1898, § 2304; *Wyoming* Rev. St. 1899, § 2953. With these provisions may be classed that of *Alabama* (Code 1907, § 4289), invalidating every contract for the sale of lands, tenements or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the contract or a memorandum thereof is in writing, signed by the party to be charged, or unless the purchase money or a portion thereof be paid and the purchaser put in possession.

³⁴⁷ See ante, § 16.

Idaho Civ. Code 1901, § 2739; *Iowa* Code 1897, § 4625 (No evidence admissible of contract for the creation or transfer of any interest in lands, except leases for a term not exceeding one year, unless in writing); *Michigan* Comp. Laws 1897, § 9511; *Minnesota* Rev. Laws 1905, § 3488; *Montana* Rev. Codes 1907, § 5017 (5); *Nebraska* Comp. St. 1905, § 3638; *New York* Real Prop. Law, § 224; *North Dakota* Rev. Codes 1905, § 5332 (5); *Oklahoma* St. 1903, § 780 (5); *Bell. & C. Ann. Codes Oregon* § 797; *South Dakota* Civ. Code 1903,

and that this was the view of the persons who prepared the Revised Statutes of New York, from which the provision has been adopted in other states, appears from their own statement.³⁴⁸ So far as regards that state, and other states in which³⁴⁹ such a provision is found in addition to a provision of the character before referred to, expressly invalidating oral leases for over one year, the provision is, if regarded as referring to a lease, as distinct from a contract to make a lease, utterly superfluous.

There is still a third form of statutory enactment bearing upon the subject of parol leases which is found in a number of states, to the effect that "no action shall be brought upon" a lease (or contract for leasing) for a longer period than one year,^{349a} a form

³⁴⁸ This section (now New York Real Prop. Law, § 224) was originally section eight of the Revised Statutes, pt. 2, c. 7, tit. 1, while the provision previously referred to (supra, note 345, Real Prop. Law, § 207) was section six of the same title. The note by the revisers to section eight (see 3 N. Y. Rev. St. [2d Ed.] p. 655) states that it is "founded on the eleventh section of the present act," by which is meant the eleventh section of the act of Feb. 26, 1787, which is in the exact language of the fourth section of the English statute. The revisers' note to section six states that it "is intended as a substitute for the ninth, tenth and a part of the twelfth sections of the present statute," that is, of the act of 1787, which sections are identical with the first three sections and the seventh section of the English statute.

³⁴⁹ California, Colorado, Idaho, Michigan, Nebraska, New York, North Dakota, Oregon, South Dakota, Utah, Wisconsin.

^{349a} *Arizona* Rev. St. 1901, § 2696 (No action shall be brought upon any contract for the sale of real estate or the lease thereof for a

longer term than one year, unless the promise or agreement is in writing, signed by the part to be charged). *Kirby's Dig. St. Arkansas* 1904, § 3654, 5 (no action shall be brought to charge any person upon any lease for a longer term than one year, unless the agreement or contract be in writing). *Connecticut* Gen. St. 1902, § 1089 (No civil action shall be maintained on any agreement for the sale of real estate, or any interest in or concerning it, if not in writing. But this section not to apply to parol agreements for hiring or leasing real estate, or any interest therein, for one year or less, in pursuance of which the leased premises are actually occupied during the term). *Florida* Gen. St. 1906, § 2517 (No action shall be brought whereby to charge the defendant upon any contract for lease for a period longer than one year, unless in writing). *Hurd's Rev. Illinois* St. 1899, c. 59, § 2 (No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, if not in writing).

of provision which has the defect of regarding a lease purely as a contract rather than as primarily a conveyance. Such a provision might mean that no action can be brought upon any covenant of the lease, or upon any covenant implied therefrom or from the relation of landlord and tenant created thereby, or to obtain possession on the strength of the lease,³⁵⁰ but regarded as an intended substitute for the language of the first section of the English statute, an enactment so worded is evidently most defective in not providing for the simple case of one already in possession under such a parol lease who merely desires to retain possession until the end of his term. The statutory provision precludes him from himself bringing suit on the strength of the lease, but it in no way precludes him from defending his possession on the strength thereof.³⁵¹ So far as such a provision may be found in any jurisdiction in company with a provision of the first class above mentioned, expressly invalidating an oral lease,³⁵² it seems entirely

Kentucky St. 1903, § 470 (No action shall be brought to charge any person upon any contract for the sale of real estate, or any lease thereof for a longer term than one year, if not in writing). *Rhode Island* Gen. Laws 1896, c. 233, § 6 (No action shall be brought to charge any person upon any contract for the sale of lands, tenements and hereditaments, or the making of any lease thereof for a longer term than one year). *Shannon's Code Tennessee* 3142 (No action shall be brought upon any contract for the sale of lands, tenements or hereditaments, or the making of any lease thereof for a longer term than one year, if not in writing). *Virginia* Code 1904, § 2840 (No action shall be brought upon any contract for the sale of real estate, or for the lease thereof for more than one year, unless evidenced by writing). *West Virginia* Code 1899, c. 98, § 1 (same as *Virginia*).

³⁵⁰ Strictly speaking, no action can be brought on a lease, though it may

be brought on a covenant in the instrument in which the lease is incorporated, that is a "covenant of the lease," or on an oral contract made in connection with a conveyance by way of lease, or it may be brought to assert a right of possession given by the lease.

³⁵¹ In *Roberts v. Tennell*, 19 Ky. (3 T. B. Mon.) 247, it is said that as the statute merely declares that no action will lie on a verbal lease, and does not declare such a lease void, any use of it may be made by either party, except to maintain an action on it. *Gudgell v. Duvall*, 27 Ky. (4 J. J. Marsh.) 229, is to the same effect. But in *Simmons v. New Britain Trust Co.*, 80 Conn. 263, 67 Atl. 883, it is said, apparently with reference to such a provision, that "a contract upon which the legislature says that no action may be maintained cannot be used to defeat a demand otherwise legal and just."

³⁵² In *Arkansas*, *Florida*, *Kentucky* and *Rhode Island*, both provisions are found.

superfluous, unless it be construed as referring merely to an executory contract to make a lease, in accordance with the construction placed upon the fourth section of the English statute. Such a limited effect has not, however, been given to it by any judicial decision,³⁵³ and it is no doubt usually regarded as applying to actual leases. It represents, it seems, a crude attempt to make the language of the fourth section of the statute of frauds do the work of the first, so far as this is concerned with leases as distinct from other species of conveyance. Provisions of this third class usually adopt the language of the fourth section of the English statute in requiring the "lease" or "contract of lease" to be either itself in writing, or evidenced by some memorandum "signed by the person to be charged," and they also ordinarily form part of an enactment which in terms applies to the various classes of contracts named in such fourth section.

There is probably in every state a provision corresponding to that of the fourth section of the English statute, providing that no action shall be brought upon any agreement which is not to be performed within the space of one year of the making thereof, unless the agreement or a memorandum thereof be in writing, signed by the person to be charged. In a number of jurisdictions the courts have regarded this provision as applicable to the case of a lease, so as to invalidate any lease which will not terminate within a year from its making, as for instance a lease for a year to begin *in futuro*.³⁵⁴ In other jurisdictions a contrary view has

³⁵³ In *Morehead v. Watkyns*, 44 Ky. (5 B. Mon.) 228, in speaking of the statute prohibiting an action on an oral lease, and of that invalidating an oral lease for a term greater than a certain number of years, it is said that the first was intended to apply to "executory contracts," and the other to "executed contracts," but that the courts have indiscriminately applied the first to both classes of cases.

³⁵⁴ *Parker's Adm'r v. Hollis*, 50 Ala. 411; *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Bain v. McDonald*, 111 Ala. 269, 20 So. 77; *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252, 9 So. 318; *Wickson v. Monarch Cycle Mfg. Co.*, 128 Cal. 156, 60 Pac. 764; *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307; *Atwood v. Norton*, 31 Ga. 507; *Olt v. Lohnas*, 19 Ill. 576; *Wheeler v. Frankenthal*, 78 Ill. 124; *Wolf v. Dozer*, 22 Kan. 436; *Greenwood v. Strother*, 91 Ky. 482, 16 S. W. 138; *Thomas v. McManus*, 23 Ky. Law Rep. 837, 64 S. W. 446; *Delano v. Montague*, 58 Mass. (4 Cush.) 42; *Jellett v. Rhode*, 43 Minn. 166, 45 N. W. 13, 7 L. R. A. 671; *Brosius v. Evans*, 90 Minn. 521, 97 N. W. 373; *Briar v. Robertson*, 19 Mo. App. 66; *Beiler v. Devoll*, 40 Mo. App. 251;

been taken to the effect that this provision has no application to leases.³⁵⁵ That the latter view is correct seems to the present writer beyond any question. As we have before remarked, a lease is primarily a conveyance and not an executory agreement, and, so regarded, such expressions as "to be performed" and "not to be performed" are inapplicable thereto, nor can an action be brought upon a conveyance of any sort. The lessor may, indeed, at the time of making the verbal lease, stipulate to do something, to make repairs, for instance, but such a stipulation would but seldom be one that might not be performed within a year, and, to be within this clause of the statute, the agreement, it is conceded, must contemplate performance after the year.³⁵⁶ And even were a stipulation by the lessor within this clause, the fact that such a stipulation is unenforceible would be no reason for regarding the demise itself as invalid. And so as regards stipulations by the lessee made in consideration of the lease, as for instance to pay rent during the term thereof, conceding that these may be within this clause of the statute, this would furnish no reason for regarding the oral demise as insufficient to vest a term in the lease. Even assuming that there are, in the particular case, stipulations to be performed by the lessor as well as by the lessee, and assuming further that the unenforceibility of the lessee's stipulations would invalidate the stipulations by the lessor, on the theory that an oral agreement within the statute is insufficient as a consideration to support an agreement by the other party,³⁵⁷ this could not well affect the validity of the oral lease as a conveyance. In other

Cook v. Redman, 45 Mo. App. 397; Ind. 409; Whiting v. Ohlert, 52 Mich. Butts v. Fox, 96 Mo. App. 437, 70 S. 462, 18 N. W. 219, 50 Am. Rep. 265; W. 515 (semble); White v. Holland, Young v. Dake, 5 N. Y. (1 Seld.) 17 Or. 3, 3 Pac. 573; Wheeler v. 463, 55 Am. Dec. 356; Ward v. Has-Cowan, 25 Me. 283 (semble); James brouck, 169 N. Y. 407, 62 N. E. 434; v. Smith, 3 Ind. T. 447, 58 S. W. McCroy v. Toney, 66 Miss. 233, 5 So. 714; Robb v. San Antonio St. R. Co., 392, 2 L. R. A. 847; Hayes v. Arrington, 108 Tenn. 494, 68 S. W. 44; Mathews v. Carlton, 189 Mass. 285, Richards v. Redelsheimer, 36 Wash. 75 N. E. 637 (semble). 325, 78 Pac. 934.

³⁵⁵ Higgins v. Gager, 65 Ark. 604, ³⁵⁶ Browne, Statute of Frauds, c. 47 S. W. 848; Sears v. Smith, 3 Colo. 13.
287; Sobey v. Brisbee, 20 Iowa, 105; ³⁵⁷ See 29 Am. & Eng. Enc. Law Stem v. Nysonger, 69 Iowa, 512, 29 (2d Ed.) 821.
N. W. 433; Railsback v. Walke, 81

words the effectiveness of a conveyance as creating rights *in rem* in favor of the grantee cannot be affected by the fact that at the time of making the conveyance an ineffectual attempt was made to create in addition a right or rights *in personam*.³⁵⁸ It may furthermore be remarked that if this provision of the statute, requiring contracts not to be performed within a year, to be evidenced by writing, is to be regarded as applicable so as to invalidate a lease which may extend more than a year from the making thereof, the exception, in the second section of the English statute, of leases for not over three years, is rendered utterly futile, as applied to a lease for over one year.

c. **"Leases" within the statutes.** There have been a number of decisions as to whether, under the particular circumstances of the case, there was a lease of land calling for the application of the statute. The question of what constitutes a lease for this purpose is to be determined by the same considerations as apply in other cases. So an agreement for the cultivation of land on shares is not within the provision of the statute directed against oral leases, if it creates the relation of employer and employe merely,³⁵⁹ while it is within such provision if it creates the relation of landlord and tenant.³⁶⁰ So, since a contract for board and lodging does not create the relation of tenancy,³⁶¹ it is valid though oral,³⁶² so far as the statute in regard to leases is concerned. The case is otherwise, however, if the contract is for the exclusive occupation of particular rooms in a building, it being then in legal effect a lease.³⁶³ The statute obviously applies to a lease renew-

³⁵⁸ In *Higgins v. Gager*, 65 Ark. 604, 47 S. W. 848, however, it was decided that since an oral stipulation by the lessee not to engage in a competing trade during the term of the lease was invalid, as an agreement not to be performed within a year, "the whole contract must fail." The action was presumably for rent.

³⁵⁹ *Himesworth v. Edwards*, 5 Har. (Del.) 376; *Unglish v. Marvin*, 128 N. Y. 380, 28 N. E. 634. See ante, § 20. But it may be within the provision as to contracts not to be performed within one year. See e. g.,

Unglish v. Marvin, 128 N. Y. 380, 28 N. E. 634.

³⁶⁰ *Scotten v. Brown*, 4 Har. (Del.) 324; *Coan v. Mole*, 39 Mich. 454; *Jackson v. Brownell*, 1 Johns. (N. Y.) 267, 3 Am. Dec. 326.

³⁶¹ See ante, § 8.

³⁶² *White v. Maynard*, 111 Mass. 250, 15 Am. Dec. 28; *Wilson v. Martin*, 1 Denio (N. Y.) 602; *Wright v. Stavert*, 2 El. & El. 721.

³⁶³ See *Edge v. Strafford*, 1 Crompt. & J. 391; *Inman v. Stamp*, 1 Starkie, 12, as distinguished in *Wright v.*

ing or extending a previous lease.^{363a}

A license to enter upon land for the purpose of doing certain specified acts, not giving any right of exclusive possession, is to be distinguished from a lease in this connection as in others,³⁶⁴ and is valid though merely oral, but is revocable at the will of the owner of the land, unless, in some states, the licensee has done some acts on the strength of the license.³⁶⁵

An agreement by a lessee, during the lease, to pay a sum periodically, in addition to the rent originally reserved, does not involve the creation of a new tenancy, even though such increased sum be termed rent, and it is not within the statute.³⁶⁶

It is almost unnecessary to say that the statute applies to a sublease as well as to a lease by one not himself holding under a lease.³⁶⁷

d. **Short time leases.** The second section of the English statute of frauds, as above stated, excepts from the requirements of a writing "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount to two-thirds parts at the least of the full improved value of the thing demised." Such an exception presumably exists in those few jurisdictions in which the first section of the English statute is recognized as in force without re-enactment.³⁶⁸ Of those jurisdictions which have re-enacted the first section of the English statute, one retains the exception in the language of the second section of the English statute except that "one year" is substituted for "three years,"³⁶⁹ and two retain the exception of a lease "not exceeding three years from the

Stavert, 2 El. & El. 721; Porter v. Merrill, 124 Mass. 534.

^{363a} Williams v. Apothecaries' Hall Co., 80 Conn. 503, 69 Atl. 12.

³⁶⁴ See ante, § 7.

³⁶⁵ Browne, Statute of Frauds, § 21 et seq.; 1 Sugden, Vendors & Purchasers (14th Ed.) 124; 1 Tiffany, Real Prop. 680; Johnson v. Wilkinson, 139 Mass. 3, 29 N. E. 62, 52 Am. Rep. 698. But an agreement in pursuance of which one occupies as licensee may be unenforceable, as being one not to be performed within a year. De Mon-

tague v. Bacharach, 181 Mass. 256, 63 N. E. 435.

³⁶⁶ Hoby v. Roebuck, 7 Taunt. 157; Donellan v. Read, 3 Barn. & Adol. 899. See § 173 f (2). A different view seems to be taken in Walsh v. Colclough (C. C. A.) 56 Fed. 778, but there the case was decided to have been taken out of the operation of the statute by part performance.

³⁶⁷ Fratcher v. Smith, 104 Mich. 537, 62 N. W. 832.

³⁶⁸ See ante, § 24 b.

³⁶⁹ S. C. Civ. Code, § 2416.

making thereof'' without the qualifying language in regard to the amount of rent reserved,³⁷⁰ while in two there is no exception, in express terms, of a short time lease.³⁷¹

The theory of the qualifying language as to the amount of rent reserved seems to be that unless the rent reserved approximates the rental value of the property, the value of a term for three years or less would be so great as to create a temptation to perjury, as much as in the case of a longer term on which a greater rent is reserved.³⁷² That ''two-thirds of the value of the land'' means two-thirds of the rental value has been judicially recognized.³⁷³

The statutes which do not follow the language of the first section of the English statute ordinarily except from their operation leases for one year only.³⁷⁴ In a few states no exception is made of short time leases.³⁷⁵

The exception in the English statute, as in the state statutes modelled thereon, applies in terms to leases not exceeding a term of a certain length ''from the making'' of the lease, and consequently require the period to be computed from that time, without reference to the duration of the term itself. Under such a statute an oral lease for less than the excepted period is void if it is to begin so far in the future that it will not terminate till more than such period after its execution,³⁷⁶ while if it is to terminate within such expected period it is perfectly valid, though it is to begin in the future.³⁷⁷ Ordinarily, however, the clause of the statute

³⁷⁰ 2 Gen. St. N. J. p. 1602, § 1; Pennsylvania Act March 21, 1772. In New Jersey, formerly, the qualification as to the rent reserved existed. *Birckhead v. Cummins*, 33 N. J. Law, 44; *Gano v. Vanderveer*, 34 N. J. Law, 293.

³⁷¹ Kirby's Dig. St. Ark. 1904, § 3664; Mo. Rev. St. 1899, § 3414.

³⁷² Browne, Statute of Frauds, § 32.

³⁷³ Childers v. Talbott, 4 N. M. 168, 16 Pac. 275; *Birckhead v. Cummins*, 33 N. J. Law, 44. And see *Cody v. Quarterman*, 12 Ga. 386, in which this provision of the English statute is referred to.

³⁷⁴ See references ante, § 25 b.

³⁷⁵ In Maine, Massachusetts, New Hampshire, Ohio, Vermont, Washington. As to this last state, see *Richards v. Redersheimer*, 36 Wash. 325, 78 Pac. 934.

³⁷⁶ *Rawlins v. Turner*, 1 Ld. Raym. 736; *Whiting v. Pittsburgh Opera House Co.*, 88 Pa. 100; *Jennings v. McComb*, 112 Pa. 518, 4 Atl. 812; *Wheeler v. Conrad*, 6 Phila. (Pa.) 209, 24 Leg. Int. 61; *Birckhead v. Cummins*, 33 N. J. Law, 44, 51.

³⁷⁷ *Ryley v. Hicks*, 1 Strange, 651; *Union Banking Co. v. Gittings*, 45 Md. 181; *Birckhead v. Cummins*, 33 N. J. Law, 44; *Hayes v. Arrington*, 108 Tenn. 494, 68 S. W. 44; *Brown v. Kayser*, 60 Wis. 1, 18 N. W. 523.

which provides that it shall not apply to leases for a term of less than a certain period does not state from what time this period is to be computed. Such a statute is regarded as intended merely to limit the length of the term which may be orally created, making the statutory period computable, not from the date of the making of the lease but from the date of the beginning of the term. Thus, for instance, under a statute excepting leases for a term of one year or less, a lease for one year, to commence *in futuro*, has been regarded as perfectly valid.³⁷⁸

It is asserted in an English case ³⁷⁹ that an oral lease which may, by its terms, not endure beyond the excepted period, is valid, though it may endure beyond that period, and there are decisions in three states in this country to that effect.³⁸⁰ Elsewhere, however, it has been decided that a lease for a period greater than that named in the exception is not brought within the exception

³⁷⁸ Young v. Dake, 5 N. Y. (1 Seld.) 463, 55 Am. Dec. 356; Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434; Whiting v. Ohlert, 52 Mich. 462, 18 N. W. 219, 50 Am. Rep. 265; Steinger v. Williams, 63 Ga. 475 (semble); Sobey v. Brisbey, 20 Iowa, 105; Jones v. Marcy, 49 Iowa, 188; Higgins v. Gager, 65 Ark. 604, 47 S. W. 848; Bateman v. Maddox, 86 Tex. 546, 26 S. W. 51; Sears v. Smith, 3 Colo. 287; McCroy v. Toney, 66 Miss. 233, 5 So. 392, 2 L. R. A. 847.

A lease for a year, to commence *in futuro*, is not a lease for more than a year because it effects an immediate surrender of a present tenancy "by operation of law." (Nathan v. Stern, 13 Daly (N. Y.) 390) (see post, § 190 b), nor because the lessee is allowed to take immediate possession. Herrmann v. Heyde-
man, 36 Misc. 778, 74 N. Y. Supp. 862.

³⁷⁹ Ex parte Voisey, 21 Ch. Div. 442.

³⁸⁰ In Chaffe v. Benoit, 60 Miss. 34,

it was decided that an oral lease "for the crop season of 1880," which might or might not be for the period excepted in the statute, was valid. Citing Browne, Statute of Frauds, § 273 et seq., where, however, the effect of the clause of the fourth section requiring a contract not to be performed within a year to be in writing was alone in question. In Raynor v. Drew, 72 Cal. 307, it was decided that a lease until such time as the lessor should pay a certain sum to the lessee was not "an agreement for the leasing of land for a longer period than one year, within the statute." In Hintze v. Krabben-
schmidt (Tex. Civ. App.) 44 S. W. 38, and Burden v. Lucas, 19 Ky. Law Rep. 1581, 44 S. W. 86, it was decided that a lease not necessarily extending beyond a year need not be in writing, apparently on the ground that a contract which may be performed within a year is not within the clause as to contracts not to be performed within a year.

by the existence of an option in the lessor,³⁸¹ or in the lessee,³⁸² to terminate it within that period. The former view would seem to furnish an easy mode of avoiding the operation of the statute by the insertion of a special limitation terminating the lease within the excepted time upon the happening of some unlikely contingency. In this country, furthermore, it has been decided that a lease for less than the excepted period is within the statute, and so invalid when oral, if there is a covenant for renewal at the option of the lessee,³⁸³ while there is an English decision to the contrary.³⁸⁴ So, while there are decisions that a lease for a period less than that excepted in the statute is within the statute if there is a provision for extension^{384a} beyond that period,^{384b} there is at least one decision that in such case the statute does not apply.^{384c} In accordance, it appears, with the former view, are decisions that the statute cannot be avoided by naming in the lease two terms, each for less than the excepted period, one to follow upon the other.³⁸⁵

There is a decision to the effect that though the term named in the lease was merely a year, and consequently was within the exception in the statute, a provision that the lessee should have the right, after the end of the term, to enter and reap the crop, involved an attempt to create an interest in land extending over a year, and that both the lease and such special provision were void.³⁸⁶ It might, it is conceived, be questioned whether such per-

³⁸¹ *Evans v. Winona Lumber Co.*, 30 Minn. 515, 16 N. W. 404.

³⁸² *Hand v. Osgood*, 107 Mich. 55, 64 N. W. 867, 30 L. R. A. 379, 61 Am. St. Rep. 312 (Lease for year, with right of extension); *Donovan v. Schoenhoefen Brew. Co.*, 92 Mo. App. 341 (ditto); *Bateman v. Maddox*, 86 Tex. 546, 26 S. W. 51 (ditto). See post, §§ 218, 219.

³⁸³ *Schmitz v. Lauferty*, 29 Ind. 400; *Williams v. Mershon*, 57 N. J. Law, 242, 30 Atl. 619 (semble); *Rosen v. Rose*, 13 Misc. 565, 34 N. Y. Supp. 467; *Hess v. Martin*, 36 Misc. 541, 73 N. Y. Supp. 946. But as to New York, see *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434.

³⁸⁴ *Hand v. Hall*, 2 Exch. Div. 355.

^{384a} See post, § 218.

^{384b} *Hand v. Osgood*, 107 Mich. 55, 64 N. W. 867, 30 L. R. A. 379, 61 Am. St. Rep. 312; *Donovan v. Schoenhoefen Brew. Co.*, 92 Mo. App. 341; *Bateman v. Maddox*, 86 Tex. 546, 26 S. W. 51.

^{384c} *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434.

³⁸⁵ *Carling v. Purcell*, 19 N. Y. Supp. 183; *Holzderber v. Forrestal*, 13 Daly (N. Y.) 34.

³⁸⁶ *Carney v. Mosher*, 97 Mich. 554, 56 N. W. 935.

In *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567, is said by Folger, J.: "It is admitted by counsel *argu-*

mission to enter for a limited purpose constitutes an interest in land, rather than a mere license.³⁸⁷

The decisions are to the effect that a lease from year to year is not within the statute and is valid though created orally.³⁸⁸ This seems to accord with the view that a lease is not within the statute if it may terminate within the excepted period, though it may possibly continue for a longer time. In those few states where the statute contains no exception of a short time lease, it seems that an oral lease expressed to be from year to year would be within the statute.

In an English case it is said that the effect of the statute of frauds, so far as it applies to parol leases not exceeding three years from the making, "is this, that the leases are valid, and that whatever remedy can be had upon them, in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession,"³⁸⁹ and in that case it was decided, in apparent conformity with a previous decision,³⁹⁰ that no action would lie against the lessee under such a lease for not taking possession.³⁹¹ In view of the fact that a lessee is ordinarily under no obligation to take possession, provided he pays the stipulated rent,³⁹² it is difficult to understand the assertion

endo, in *Wigglesworth v. Dallison*, regarded as extending the tenancy 1 Doug. 201, that when the usual crop of the country is such that it cannot come to maturity in one year, a right to hold over after the end of the term, in a parol demise, may be raised by implication. But no authority is cited; nor does it seem consistent with a statute which declares that no estate or interest in land, save a lease for a term not exceeding one year shall be created by parol." The admission of counsel referred to was, more correctly, that where the usual crop of the country cannot come to maturity in a year, a custom by which the tenant is allowed to hold over is valid.

³⁸⁷ But in England a custom allowing the tenant to hold over for the purpose of gathering the crop is

itself. *Beavan v. Delahay*, 1 H. Bl. 5; *Knight v. Benett*, 3 Bing. 364; *Griffiths v. Puleston*, 13 Mees. & W. 358; *Boraston v. Green*, 16 East, 81. ³⁸⁸ *Browne*, Statute of Frauds, § 35; *Legg v. Strudwick*, 2 Salk. 414; *Birch v. Wright*, 1 Term R. 378; *Swan v. Clark*, 80 Ind. 57; *Wessells v. Rodifer*, 30 Ky. Law Rep. 51, 97 S. W. 341; *Brown v. Kayser*, 60 Wis. 1, 18 N. W. 523.

³⁸⁹ *Edge v. Strafford*, 1 Crompt. & J. 391, 1 Tyrw. 295, per Bayley, B.

³⁹⁰ *Inman v. Stamp*, 1 Starkie, 12; *Selwyn's Nisi Prius* (13th Ed.) 859.

³⁹¹ They are cited, with approval, as so holding. In *Union Banking Co.*

v. Gittings, 45 Md. 181; *Childers v. Talbott*, 4 N. M. 168, 16 Pac. 275.

³⁹² See post, § 122.

that he is not liable in damages for not taking possession under an oral lease. The decision is stated to be based on the fourth section of the statute of frauds and the idea of the court is apparently that, until entry by the lessee, what is in terms a lease is a mere contract for a lease, and is consequently a contract for an interest in land within such section.³⁹³ This would involve an extension of the view, hereafter referred to, that before entry the lessee has no estate,³⁹⁴ and is evidently not in accord with a later decision to the effect that before entry the lessee has a right *in rem* as distinguished from a mere contractual right.³⁹⁵ It is difficult, in any case, it would seem, to infer a contract by a lessee to take possession from his mere acceptance of a lease, and it has been suggested that the cases referred to merely decide that an express agreement by a lessee to take actual possession is within the fourth section.³⁹⁶

e. **Sufficiency of writing.** Apart from the question of the necessity of signing, to be considered elsewhere,³⁹⁷ the question of the sufficiency of the writing has been but rarely considered judicially. That the writing must describe the premises seems clear, and it has accordingly been decided that an instrument merely referring to the premises "as I described them" was insufficient.³⁹⁸ It has also been decided that a letter to the effect that if the addressee would move on the writer's farm he might have it for five years, and perhaps longer, was insufficient as a lease for years as not stating the terms on which the farm was to be leased.³⁹⁹

³⁹³ Such a construction of the decisions referred to is apparently adopted in the subsequent case of *Bolton v. Tomlin*, 5 Adol. & E. 856.

³⁹⁴ See post, § 37.

³⁹⁵ *Gillard v. Cheshire Lines Committee*, 32 Wkly. Rep. 943. See post, note 679.

³⁹⁶ *Birkhead v. Cummins*, 33 N. J. Law, 44, where it was decided that an action would lie, in the case of such a short-time parol lease, for the rent reserved, although the lessee had not taken possession. In *Huffman v. Starks*, 31 Ind. 474, the court refused to follow these English cases, assuming them to be

authority for the view that no action would lie in favor of the lessee against the lessor to obtain possession of the premises.

³⁹⁷ See post, § 27.

³⁹⁸ *Jarboe v. Mulry*, 49 N. Y. Super. Ct. (17 Jones & S.) 525.

³⁹⁹ *Cunningham v. Roush*, 157 Mo. 336, 57 S. W. 769. It does not clearly appear what is meant by the statement that the writing did not state the "terms" of the lease. If by that is meant that it did not name any rent, it may be remarked that a lease is perfectly valid though no rent is reserved. The writing in question could not operate as a

f. **Right to assert the statute.** It has been decided that the benefit of the fourth section of the English statute of frauds, as affecting only the remedy on the contract, may be waived by the party "to be charged," and that a third person has no right to deny that the contract is binding upon such party, in order thereby to avoid his own obligations growing out of the existence of the contract.⁴⁰⁰ The courts have occasionally undertaken to apply this rule to the case of a "contract of lease," so-called, with the result of holding that, if the lessor himself failed to assert the invalidity of the lease, neither the transferee of the reversion,⁴⁰¹ nor a prior lessee, whose term had expired but who was seeking to retain possession,⁴⁰² nor one to whom the lessee had mortgaged the crop,⁴⁰³ could do so. On the other hand it has been asserted that a statute requiring a lease to be in writing, having to do with the creation of rights *in rem*, should be available to third persons as well as to the parties to the lease.⁴⁰⁴

So far as the decisions first referred to are based on the theory that a lease is a contract, and that, since third persons cannot assert the invalidity of an oral contract as being within the statute of frauds, they cannot assert the invalidity of an oral lease, they are, it is submitted, erroneous. The grantee of land can always, it is conceived, assert that a previous conveyance in fee simple by his grantor to another person was invalid as against him because not in writing, and he should, it is conceived, have the same right as regards a previous conveyance for years. The transferee of the lessor has property rights in the land, and has a right to show the invalidity of any asserted incumbrance thereon. Whether,

lease for a term of years because it named no certain term, and also, it would seem, because it was evidently of a merely tentative character, a mere offer in fact, not intended as a lease. took possession was held to be precluded from asserting the invalidity of the lease as against one claiming under a mortgage on the crops made by the lessee before he took possession.

⁴⁰⁰ Browne, Stat. of Frauds, § 135.

⁴⁰¹ Shakespeare v. Alba, 76 Ala. 351. 178 Mass. 172, 59 N. E. 763, 86 Am.

⁴⁰² Boyce v. Graham, 91 Ind. 420. St. Rep. 473, per Holmes, C. J. Contra, Best v. Davis, 44 Ill. App. 624. That a subsequent lessee, as being in privity with the lessor, can assert the invalidity of a prior lease to another because within the statute, see Best v. Davis, 44 Ill. App. 624.

⁴⁰³ Grisham v. Lutric, 76 Miss. 444, 24 So. 169, where one claiming under a mortgage on crops made by a lessee of the land after the latter

however, a person other than the lessor, if not in the position of a subsequent transferee of the lessor, should be allowed to question the validity of the lease because not in writing, as required by the statute, would seem to be doubtful. Though the lessee cannot claim any rights under the terms of the lease itself, he is, it is conceived, even before taking possession, at least a lessee at will,⁴⁰⁵ and as such has a right to the possession as against any person other than the lessor or one claiming under him. On this view the decision above referred to, that a tenant wrongfully holding over could not, as against one claiming under a subsequent oral lease made by the same landlord, assert the invalidity of the lease, was rightly decided. Though the lessee was not entitled to possession as a lessee for years under the lease, he was so entitled as a lessee at will, the mere making of the lease being equivalent to a grant of permission to take possession.⁴⁰⁶

It has been decided that the fact that the lease under which the plaintiff claims is within the statute of frauds is available as a defense only if specially pleaded,⁴⁰⁷ unless this fact appears upon the face of the complaint.⁴⁰⁸ This is the rule generally recognized in the case of an action on a contract within the fourth section of the English statute and the local equivalents thereof in the different states,⁴⁰⁹ but it seems questionable whether such a rule

⁴⁰⁵ See ante, § 13 a (3).

⁴⁰⁶ The decision referred to in note 403, supra (*Grisham v. Lutric*, 76 Miss. 444, 24 So. 163), would not harmonize with this theory, it being apparently based on the view that a lessee named in an oral lease within the statute does not become a lessee at will till he takes possession.

The fact that a lease is oral does not, it has been decided, render it inadmissible, in favor of the lessor as against a building contractor, to show the amount of rents lost by the latter's failure to complete the building. *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875. The decision is in terms based on the language of the statute, which provides merely that

no action shall be brought on a "contract for the lease of real estate if not in writing," but the same view would presumably be taken when the statute in terms invalidates an oral lease; the purpose of the introduction of the evidence being to show what rent could have been obtained rather than that such rent was actually agreed upon.

⁴⁰⁷ *Shakespeare v. Alba*, 76 Ala. 351; *Geneva Mineral Springs Co. v. Coursey*, 45 App. Div. 268, 61 N. Y. Supp. 98.

⁴⁰⁸ *Carling v. Purcell*, 19 N. Y. Supp. 183; *Robb v. San Antonio St. R. Co.*, 82 Tex. 392; 18 S. W. 707, 24 L. R. A. 183.

⁴⁰⁹ *Browne*, Stat. of Frauds, c. 20. This chapter, it will be noticed,

should be applied in a possessory action in which either the plaintiff or defendant claims under an unwritten lease. The case would seem to be similar to that of any other action of ejectment in which either party is allowed to show defects in his opponent's title under general allegations.

g. **Effect of noncompliance with the statute—(1) Resulting tenancy at will or periodic tenancy.** The first section of the English statute of frauds provides that leases or interests created otherwise than in accordance with its requirements shall "have the force and effect of leases or estates at will only." In several states in this country, likewise, it is provided in effect that an oral lease within the prohibition of the statute shall create a tenancy at will.⁴¹⁰ As has been previously shown, a tenancy at will ordinarily becomes, by the payment of a periodic rent, a periodic tenancy,⁴¹¹ and this doctrine has been applied, in jurisdictions in which there is such a provision as to the effect of a parol lease, to a tenancy at will resulting from the making of such a lease.⁴¹² In Maine and Massachusetts, however, it is considered that, in view of the provision of the statute that an oral lease shall create a tenancy at will only, taken in connection with the absence of any exception in favor of short time leases, the tenancy at will cannot be converted into a tenancy from year to year or other periodic

is in "Part IV." of the work, which begins at chapter 8 and treats of "Contracts" as distinguished from "The Creation and Transfer of Estates in Land," which is covered by Part I (chapters 1-5). The subject of "leases" is treated exclusively in Part I., and consequently the chapters in the latter part of the work are evidently not intended to apply thereto. In citing the book, courts frequently lose sight of the division into parts.

⁴¹⁰ Kirby's Dig. St. *Arkansas*, 1904, § 3664; *Georgia* Code 1895, § 3117; *Maine* Rev. St. 1903, c. 75 § 13; *Massachusetts* Rev. Laws 1902, c. 127, § 3; *Missouri* Rev. St. 1899, § 3414; *New Hampshire* Pub. St. 1901, c. 137, § 12; *Pennsylvania* Act March 21, 1772; *South Carolina* Civ. Code 1902, § 2650; *Vermont* St. 1894, § 2218. In the District of Columbia it is provided (Code 1901, § 1116) that such a lease shall create a "tenancy at sufferance."

⁴¹¹ See ante, § 14 b (2) (a).

⁴¹² *Dumn v. Rothermel*, 112 Pa. 272, 3 Atl. 800; *Walter v. Transue*, 17 Pa. Super. Ct. 94; *Hellams v. Patton*, 44 S. C. 454, 22 S. E. 608; *Matthews v. Hipp*, 66 S. C. 162, 44 S. E. 577; *Barlow v. Wainwright*, 22 Vt. 88, 53 Am. Dec. 79; *Amsden v. Atwood*, 68 Vt. 322, 35 Atl. 311; *Sartwell v. Sowles*, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943.

tenancy.⁴¹³ And in another state a statute,⁴¹⁴ abolishing tenancies from year to year except when created by express written contract, would seem to render it impossible to regard as such a tenant one in possession under an invalid oral lease.⁴¹⁵

If one has, by entering under a void oral lease and the payment of rent, become a tenant from year to year, he will, it seems evident, so long as he continues his holding, in the absence of a new lease, continue to hold as a tenant from year to year, in the same way as if he had entered by permission without any lease for a specified term, and the fact that the time named in the void lease has expired could not change the terms of his holding.⁴¹⁶

There are occasional suggestions to the effect that one entering under a verbal lease, even though he pays a yearly rent, will become a tenant from year to year only after he has had possession for a year.⁴¹⁷ This view, it is submitted, is not justified on prin-

⁴¹³ *Ellis v. Paige*, 18 Mass. (1 Pick.) 43; *Davis v. Thompson*, 13 Me. 209; *Withers v. Larrabee*, 48 Me. 570.

In Georgia, also, this seems to be the case. *Nicholes v. Swift*, 118 Ga. 922, 45 S. E. 708, 98 Am. St. Rep. 145; *Western Union Tel. Co. v. Fain*, 52 Ga. 18; *Hayes v. City of Atlanta*, 1 Ga. App. 25, 57 S. E. 1087.

See, also, *Goodwin v. Clover*, 91 Minn. 438, 98 N. W. 322, where it is said that the lessee, having entered, was a tenant at will, and no statement is made as to what rent he paid, or whether he paid any rent.

⁴¹⁴ Ball. Ann. Codes & St. Wash. § 4568.

⁴¹⁵ Though the section above referred to abolishes tenancies from year to year when not created in express terms, the next section (4569) somewhat inconsistently provides that when premises are rented for an indefinite time, at a monthly or other periodic rent, a tenancy from month to month, or "from period to period on which rent is payable," shall

arise. In *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322, it was held that the entry and payment of a yearly rent under a lease invalid under the statute of frauds created a tenancy "terminable by either party at the end of any year," this ignoring completely, it would seem, the provision abolishing tenancies from year to year. In the previous case of *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934, it was said that if an oral lease is good at all, it must come under § 4569 and be construed as a lease from month to month.

⁴¹⁶ *Baltimore & O. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344. The court there speaks of the tenant, who thus retains possession after the period named in the void lease has elapsed, as "holding over the term." It is, it is submitted, not a case of holding over the term, because there was no term. He merely continues as tenant from year to year.

⁴¹⁷ *Talamo v. Spitzmiller*, 120 N. Y. 37, 23 N. E. 980, 8 L. R. A. 221,

eiple or authority. However short his possession may have been, provided the parties have by the payment and acceptance of an installment of annual rent, or otherwise, shown an intention that the holding shall be from year to year, it will assume that character.

In many of the states there is no provision that a lease within the statute shall be effective to create only a tenancy at will, but the statute in terms makes the lease invalid or unenforceable. The omission of any specific reference to a tenancy at will cannot, however, affect the principle that one entering under the invalid lease is primarily a tenant at will as having possession by permission of the owner.⁴¹⁸ The fact that the lease is void in so far as it attempts to create a term cannot affect its operation as showing a permission to the lessee to enter, and having so entered by permission, and thus become tenant at will, the tenant's payment of a periodic rent should, in accordance with the general rule, be regarded as evidence of an intention to create a periodic tenancy. This accords with the decisions as to one entering under a lease invalid for some reason other than noncompliance with the statute of frauds, such person being regarded as in the first place a tenant at will,⁴¹⁹ becoming a periodic tenant on payment of a periodic rent.⁴²⁰ There are a number of cases which assert this view, more or less clearly, in connection with leases within the statute of frauds, regarding the question whether the tenancy at will becomes a periodic tenancy as depending on the payment of a pe-

17 Am. St. Rep. 609; *Allen v. Bartlett*, 20 W. Va. 46, quoted in *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 857; *Baltimore & O. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344 (semble). See, also, *Amsden v. Blaisdell*, 60 Vt. 386, 15 Atl. 332.

⁴¹⁸ See ante, § 13 a (3). This seems to be lost sight of in *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934, it being assumed that if one enters under a void lease he can be a tenant only by reason of some express statutory provision. If one entering under an oral lease is not a tenant at will or a periodic

tenant, what is he? He is in possession, and his possession is not wrongful, being by permission. One in possession by permission must be a tenant.

In *Kofoed v. Lincoln Implement & Transfer Co. (Neb.)* 114 N. W. 937, one entering under a lease within the statute was regarded as having no right of possession as against the lessor.

⁴¹⁹ See cases cited ante, § 14 b (2) (a).

⁴²⁰ *Tiernan v. Johnson*, 7 Mo. 43; *Farley v. McKeegan*, 48 Neb. 237, 67 N. W. 161; *Kernochan v. Wilkens*, 3 App. Div. 596, 38 N. Y. Supp. 236.

periodic rent, and the question as to what is the character of the periodic tenancy, whether a tenancy from year to year or from month to month, for instance, as depending on whether the rent is paid with reference to a period of a year or a month.⁴²¹ In some

⁴²¹ In *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642, it is said that in the statement that the tenant at will becomes a tenant from year to year by "payment of rent," "payment," must mean payment with reference to a yearly holding, and whether the payment is such should be determined without reference to the void lease. The opinion proceeds: "When urban property is involved, occupancy and monthly payments as for each month's rent are insufficient, standing alone, to indicate an intention to create a yearly tenancy. They indicate merely an intention to create a tenancy from month to month."

In *Talamo v. Spitzmiller*, 120 N. Y. 37, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. Rep. 609, it is said that "the mere fact that a person goes into possession under a lease void because for a longer term than one year does not create a yearly tenancy. * * * While it is not required that a new contract be made in express terms, there must be something from which it may be inferred. Something which tends to show that is within the intention of the parties. The payment and receipt of an installment or aliquot part of the annual rent is evidence of such understanding, and goes in support of a yearly tenancy; and without explanation to the contrary, it is controlling evidence for that purpose." And so in *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567, and *Laughran v. Smith*, 75 N. Y. 205, the tenancy from year to year is

regarded as based on both the entry and the payment of the annual rent reserved. And in *Greaton v. Smith*, 1 Daly (N. Y.) 380, it is stated that payment of rent with reference to a yearly holding is necessary to change the tenancy at will so created into a tenancy from year to year.

In *Lockwood v. Lockwood*, 22 Conn. 425, the tenant was regarded as tenant from year to year by reason of his payment of yearly rent.

In a number of cases it is decided that payment of a monthly rent by the tenant holding under the void lease will show a tenancy from month to month. *Warner v. Hale*, 65 Ill. 395; *Creighton v. Sanders*, 89 Ill. 543; *Brownell v. Welch*, 91 Ill. 523; *Donohue v. Chicago Bank Note Co.*, 37 Ill. App. 552; *Lehman v. Nolting*, 56 Mo. App. 549; *Butts v. Fox*, 96 Mo. App. 437, 70 S. W. 515; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616; *People v. Darling*, 47 N. Y. 666; *Geiger v. Braun*, 6 Daly (N. Y.) 506; *Lawrence v. Hasbrouck*, 21 Misc. 39, 46 N. Y. Supp. 868. *Utah Loan & Trust Co. v. Garbutt*, 6 Utah, 342, 23 Pac. 758. In a quite recent case in Illinois, indeed (*Marr v. Ray*, 15 Ill. 340, 37 N. E. 1029, 26 L. R. A. 799), it is said that possession and payment of rent creates a tenancy from month to month, without any suggestion being made that a tenancy from year to year would be created if the rent were a yearly rent. In this case the rent was paid monthly,

cases, however, it is apparently considered that a tenancy from year to year arises in the particular case without reference to whether any rent is paid,^{422, 423} and in a number it is decided that the lessee's entry and payment of rent creates a tenancy from year to year, without any suggestion that his payment of rent, if not with reference to a yearly period, would create a periodic tenancy of a different sort, from quarter to quarter or month to month for instance.⁴²⁴

The question whether the reservation of a periodic rent in connection with the invalid lease will, apart from payment thereof, be regarded as evidence that the lessee taking possession is a periodic tenant, is a matter which has seldom been the subject of discussion. The answer to the question would seem to depend on the consideration whether, though the lease, regarded as a conveyance, is invalid under the statute, the attempted reservation of rent or

as in the previous cases in that state, cited above.

^{422, 423} *Larkin v. Avery*, 23 Conn. 304; *Strong v. Crosby*, 21 Conn. 398; *Morehead v. Watkyns*, 44 Ky. (5 B. Mon.) 228; *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812; *Nash v. Berkmeir*, 83 Ind. 536; *Brant v. Vincent*, 100 Mich. 426, 59 N. W. 169; *Cunningham v. Roush*, 157 Mo. 336, 57 S. W. 769; *Davies v. Baldwin*, 66 Mo. App. 577; *Drake v. Newton*, 23 N. J. Law (3 Zab.) 111; *People v. Rickert*, 8 Cow. (N. Y.) 226; *Lounsbery v. Snyder*, 31 N. Y. 514; *Taggard v. Roosevelt*, 2 E. D. Smith (N. Y.) 100, 8 How. Pr. 141; *Clark v. Smith*, 25 Pa. 137; *Ridgeley v. Stillwell*, 28 Mo. 400; *Scully v. Murray*, 34 Mo. 420, 86 Am. Dec. 116; *Harnett v. Kerscherak*, 110 N. Y. Supp. 986; *Duke v. Harper*, 14 Tenn. (6 Yerg.) 280, 27 Am. Dec. 462; *Rogers v. Wheaton*, 88 Tenn. 665, 13 S. W. 689. See, also, post, notes 427, 428.

Occupancy under a mere cropping agreement, invalid as not to be per-

formed within a year, does not create a tenancy from year to year. *English v. Marvin*, 128 N. Y. 380, 28 N. E. 634.

⁴²⁴ *Schneider v. Lord*, 62 Mich. 141, 28 N. W. 773; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146; *Goodfellow v. Noble*, 25 Mo. 60; *Ridgely v. Stillwell*, 25 Mo. 570; *Scully v. Murray*, 34 Mo. 420, 86 Am. Dec. 116; *Nichols v. Hicklin*, 127 Mo. App. 672, 106 S. W. 1109; *Blumenthal v. Bloomingdale*, 100 N. Y. 558, 3 N. E. 292; *Couderd v. Cohn*, 118 N. Y. 309, 23 N. E. 298, 7 L. R. A. 69, 16 Am. St. Rep. 761; *Humphrey Hardware Co. v. Herrick*, 5 Neb. Unoff. 524, 99 N. W. 233; *Williams v. Ackerman*, 8 Or. 405; *Rosenblatt v. Perkins*, 18 Or. 156, 22 Pac. 598; *Garrett v. Clark*, 5 Or. 464; *Walter v. Transue*, 22 Pa. Super. Ct. 617; *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338 (if holding and paying rent for a year); *Koplitv. Gustavus*, 48 Wis. 48, 3 N. W. 754 (semble).

covenant for the payment thereof can be regarded as effective for the purpose of bringing the case within the rule, before considered,⁴²⁵ that a letting for no named period, a "general" letting, creates *prima facie* a periodic tenancy if a periodic rent is reserved. The view that the stipulation as to rent is effective for this purpose is inferentially supported by the cases hereafter cited,⁴²⁶ to the effect that, if the lessee enters under the invalid lease, he becomes liable for the stipulated rent. If the stipulation as to rent is effective for the purpose of imposing liability on the lessee, it would seem also to be effective for the purpose of fixing the character of the holding. There is a Canadian decision which is explicit to the effect that the provision for a periodic rent does make the lessee who enters a periodic tenant, although he does not pay the rent,⁴²⁷ and there are a few cases in this country which indicate with more or less clearness a similar view.⁴²⁸ Or-

⁴²⁵ See ante, § 14 b (2) (b).

⁴²⁶ See post, § 25 g (4).

⁴²⁷ *Gibboney v. Gibboney*, 36 U. C. Q. B. 236, referring to several English text book statements in support of this view.

⁴²⁸ *Steketee v. Pratt*, 122 Mich. 80, 80 N. W. 989; *McIntosh v. Hodges*, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550; *Barrett v. Cox*, 112 Mich. 220, 70 N. W. 446; *Coan v. Mole*, 39 Mich. 454; *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124; *Packard v. Cleveland, C. & St. L. R. Co.*, 46 Ill. App. 244; *Stover v. Cadwalader*, 2 Penny. (Pa.) 117; *Williams v. Deriar*, 31 Mo. 13; *Julian v. Bernardino*, 49 Misc. 119, 96 N. Y. Supp. 1064; *Mades v. Howaldt*, 46 Wash. 450, 90 Pac. 588; *Hebbard v. Mayo*, 97 N. Y. Supp. 396; *Griswold v. City of Branford*, 80 Conn. 453, 68 Atl. 987. *Tress v. Savage*, 4 El. & Bl. 36, contains dicta that such would be the case if a lease were not sealed as required by statute. There, however, there were payments of rent.

In *Watkins v. Balch*, 41 Wash.

310, 83 Pac. 321, 3 L. R. A. (N. S.) 852, it is said that since the local statute provides that on a lease for an indefinite time, with a reservation of a periodic rent, a periodic tenancy shall arise, such is the effect of an oral lease, within the statute, reserving a periodic rent.

In *Steketee v. Pratt*, 122 Mich. 80, 80 N. W. 989, it is said that when there is no reservation of an annual rent, or rent payable at any stated intervals, a tenancy from year to year is not created by the verbal lease, but a tenancy at will; but that when there is a reservation of an annual rent, there is a tenancy from year to year, or at least for a year (in no other jurisdiction does it appear to have been suggested that the payment of an annual rent might create a tenancy for the term of one year). This seems to overrule *Brant v. Vincent*, 100 Mich. 426, 59 N. W. 169, where a tenancy from year to year was held to exist although the whole rent was paid in advance. In *Coan v. Mole*,

dinarily the courts, in passing upon the status and liability of a lessee entering under a lease within the statute, make reference exclusively to the periodic rent which may have been paid by him, ignoring the fact that, as is usually the case, there was a reservation of a periodic rent.⁴²⁹

If there is neither the reservation nor the payment of a periodic rent, but a gross sum is paid in lieu of rent, the lessee entering would on principle, it seems, become, not a periodic tenant, but a

39 Mich. 454, and *Schneider v. Lord*, 62 Mich. 141, 28 N. W. 773, it seems to be held that the fact that the rent paid is a monthly rent does not prevent the holding being from year to year. In *McIntosh v. Hodges*, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550, where the rent reserved on a void lease was a certain gross sum to be paid in monthly installments of a certain amount for the first nine months, and of another amount per month for the balance of the term, and the lessee took possession and paid the agreed amounts for twelve months, it was held that, since an annual rent was not reserved, a tenancy from year to year was not created, but a tenancy at will, though not a "strict" tenancy at will. In *Barrett v. Cox*, 112 Mich. 220, 70 N. W. 446, it is held that if the oral lease was for an indefinite period, as for the life of the lessee, and there is no reservation of a periodic rent, the lessee taking possession becomes a tenant at will, while "if it is for a term of years, thus evidencing an intent of an annual renting, it is to be held good as a lease from year to year." In *Barlum v. Berger*, 125 Mich. 504, 84 N. W. 1070, it seems to be considered that the tenant under an oral lease is a tenant from year to year though he pays a monthly rent, but it is there decided that if he holds

over after the term named in the lease, paying a monthly rent, he then becomes a tenant from month to month. In *Taft v. Hinchman*, 76 Mich. 672, 43 N. W. 680, it was apparently considered that the lessee taking possession under an invalid lease, and remaining in possession for more than a year, was, during the second year, a tenant for a term of one year, running from the end of the first year.

⁴²⁹ See *Talamo v. Spitzmiller*, 120 N. Y. 37, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. Rep. 607; *Jennings v. McComb*, 112 Pa. 518, 4 Atl. 812; *Lehman v. Nolting*, 56 Mo. App. 549; *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642; *Matthews v. Hipp*, 66 S. C. 162, 44 S. E. 577; *Utah Optical Co. v. Keith*, 18 Utah, 464, 56 Pac. 155; *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; and cases cited ante, note 421.

In *Clayton v. Blakey*, 8 Term R. 3, it is said by Kenyon, C. J.: "The meaning of the statute was that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been properly construed to enure as a tenancy from year to year." In the notes to this case, in 2 *Smith's Leading Cases* (8th Ed.) 106, it is said that "though there is no express mention of rent having

tenant at will.⁴³¹ But as before stated, there are cases which appear to regard one entering under such a lease as necessarily a tenant from year to year, without reference to the reservation or payment of a periodic rent.⁴³²

In Indiana it is expressly provided that tenancy at will shall be created only by express contract, and that all general tenancies shall be deemed tenancies from year to year,⁴³³ and there a holding under an oral lease within the prohibition of the statute will create a tenancy from year to year without reference, it seems, to the payment of rent.⁴³⁴ In Missouri it is expressly provided that an oral lease of land in a town or city shall create a tenancy from month to month.⁴³⁵

The view that one entering and paying rent becomes a periodic tenant necessarily means that he can relieve himself from liability for rent only at the end of one of the periods, and then only by giving the common-law or statutory notice necessary to terminate such a tenancy.⁴³⁶

been paid, yet, as the tenant had reserved or *paid*. Though the invalid lease reserves no periodic rent, if the lessee enters and actually pays such a rent, he becomes, no doubt, a periodic tenant. The same remark may be made in reference to *Williams v. Deriar*, 31 Mo. 13, where it is decided that a lessee entering under an invalid lease which does not reserve any rent is not a tenant from year to year.

been in possession for three years, and that, under a rent (for the action was for double rent), it is more than probable that some payment of rent had taken place during that period," and "it has not, it is believed, ever been held that a parol demise for more than three years, at a fixed rent, even when coupled with the lessee's entry under it, will, before payment or acknowledgment in account of any part of the rent reserved, have the effect of rendering him tenant from year to year."

⁴³¹ A tenancy at will was held to exist in *McIntosh v. Hodges*, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550; *Packard v. Cleveland*, C. C. & St. L. R. Co., 46 Ill. App. 244; *Stover v. Cadwallader*, 2 Penny. (Pa.) 117. These cases are in terms based upon the fact that no periodic rent was reserved. It would rather seem that they should be based on the ground that no periodic rent was either

⁴³² See ante, note 423.

⁴³³ See ante, § 14 b (2) (c).

⁴³⁴ *Railsback v. Walke*, 81 Ind. 409; *Nash v. Berkmeir*, 83 Ind. 536; *Michigan City v. Leeds*, 24 Ind. App. 271, 55 N. E. 799.

⁴³⁵ See ante, § 14 c (2).

⁴³⁶ *Lockwood v. Lockwood*, 22 Conn. 425; *Brownell v. Welch*, 91 Ill. 523; *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957. See ante, § 14 a, and post, § 196 c.

In *Thomas v. Nelson*, 69 N. Y. 118, it is said that "it is difficult to

Since one entering under an oral lease, invalid under the statute of frauds, enters by permission and becomes at least a tenant at will, he is not liable as a trespasser,⁴³⁷ and the profits of the land properly belong to him.⁴³⁸ He has the rights of a tenant,⁴³⁹ and the lessor has, as against him, the rights of a landlord.⁴⁴⁰

(2) **Effect of stipulations as to terms of holding.** It was said in an English case, frequently referred to,⁴⁴¹ that "though the agreement be void by the statute of frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, etc.," and it was there decided that the lease controlled in this latter regard the time for quitting. There seems to be no other English case in which a similar assertion is made

perceive how such a contract, declared to be void by the statute, can be held to be valid for a single hour, or upon what principle a tenant, entering under a void lease, could be compelled, by virtue of the lease, to pay for a longer period than he actually occupied." The question does not appear to have been directly presented so far as can be determined from the rather obscure report. In *Prial v. Entwistle*, 10 Daly (N. Y.) 398 on the strength of the above case, it was decided that one who entered and paid part of the annual rent was not liable for rent after he left the premises. Distinguishing *Reeder v. Sayre*, 70 N. Y. 181, 26 Am. Rep. 567, and *Langhran v. Smith*, 75 N. Y. 205, apparently on the ground that in those cases the occupation and payment of rent extended over two years or more, a distinction which is supported by no other authority. The view asserted in the two New York cases first cited is founded, it is conceived, on the mistaken theory that the tenant's liability is by reason of the terms of the oral lease. He would properly, it is submitted,

be liable for rent until the tenancy is terminated by notice, even though no term was specified, for the reason that he is a periodic tenant.

⁴³⁷ *Roberts v. Tennell*, 19 Ky. (3 T. B. Mon.) 247.

⁴³⁸ *Goodwin v. Clover*, 91 Minn. 438, 98 N. W. 322, 103 Am. St. Rep. 517; *Coe v. Griggs*, 76 Mo. 619. In the latter case it is said that one who enters under a verbal lease and raises a crop which he harvests is entitled to the crop. But that would be so even if he were a trespasser. The actual decision was that one who took a verbal lease of a quarry was entitled to the stone which he took out, and that consequently he was justified in charging the lessor as a thief if he took away such stone without the lessee's consent.

⁴³⁹ See *Goodwin v. Clover*, 91 Minn. 438, 98 N. W. 322, 103 Am. St. Rep. 517.

⁴⁴⁰ In *Martin v. Blanchett*, 77 Ala. 288, it is held that the landlord is entitled to attachment for advances made to one so entering, as being a tenant.

⁴⁴¹ *Doe d. Rigge v. Bell*, 5 Term R. 472, per Kenyon, C. J.

as regards an oral lease within the statute of frauds,⁴⁴² but a like doctrine has been applied in England when the lease was void as being an insufficient execution of a power,⁴⁴³ when it failed to comply with a statute requiring a seal, which statute provided that an unsealed lease should be "void,"⁴⁴⁴ and also when there was no attempt to create a term, but one having a contract for a lease for years entered by the owner's consent pending the execution of the lease.⁴⁴⁵ The application of the doctrine in these various cases shows that its applicability is not, in the case of a lease within the statute of frauds, in any way dependent, as has been suggested,⁴⁴⁶ upon the provision of the statute that the lease shall have the effect of creating an estate at will. The view thus asserted in England to the effect that, if the lessee enters by reason of the invalid lease, the terms of the tenancy are regulated by the language of the lease, has been not infrequently reiterated in this country.⁴⁴⁷ It has moreover been decided that the time in any year for the termination of the tenancy from year to year created by entry and the payment of annual rent was fixed by the original time of entry, and not with reference to the time at which the term named would come to an end.⁴⁴⁸ Furthermore, on the analogy of

⁴⁴² In *Berrey v. Lindley*, 3 Man. & G. 498, it is said by Maule, J., that "if a party enter under an invalid agreement, or under an agreement not amounting to a demise, he may still hold subject to the terms of that agreement, so far as they are not at variance with the species of tenancy which the law, under the circumstances, creates."

⁴⁴³ *Beale v. Sanders*, 3 Bing. N. C. 850.

⁴⁴⁴ *Lee v. Smith*, 9 Exch. 662; *Tress v. Savage*, 4 El. & Bl. 36.

⁴⁴⁵ See post, § 65.

⁴⁴⁶ *Browne*, St. of Frauds, § 39.

⁴⁴⁷ *Cody v. Quarterman*, 12 Ga. 386; *Marr v. Ray*, 151 Ill. 340, 37 N. E. 1029, 26 L. R. A. 799; *Nash v. Berkmeir*, 83 Ind. 536; *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 24 Am. St.

Rep. 146; *Kernochan v. Wilkens*, 3 App. Div. 596, 38 N. Y. Supp. 236; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 663; *People v. Rickert*, 8 Cow. (N. Y.) 226; *People v. Evans*, 8 N. D. 211, 77 N. W. 93; *Snyder v. Harding*, 38 Wash. 666, 80 Pac. 789.

⁴⁴⁸ *Coudert v. Cohn*, 118 N. Y. 309, 7 L. R. A. 69, 16 Am. St. Rep. 761, 23 N. E. 298, citing *Berrey v. Lindley*, 3 Man. & G. 498; *Doe d. Robinson v. Dobell*, 1 Q. B. 806, which tend to support it, though the first was the case of a holding under an agreement to make a lease, and the latter was the case of a tenant holding over his term. *Doe d. Rigge v. Bell*, 5 Term R. 471, seems opposed thereto. In the latter case a farm was leased orally for seven years, the lessee to enter on the land on Lady day (March 25th) and

English decisions that if one enters under an executory agreement for a lease for a term,⁴⁴⁹ or under an unsealed lease,⁴⁵⁰ the holding will terminate even without notice at the end of the term named, it has been decided in this country that if one enters under a lease invalid by reason of the statute of frauds the tenancy will, if not previously terminated by notice, come to an end on the expiration of the term named without any notice.⁴⁵¹ A different view has, however, been asserted in one case upon the ground that to give such effect to an attempt to create a term without writing is directly contrary to the statutory requirement of a writing for this purpose,⁴⁵² and on principle, it seems, this latter view is decidedly the more satisfactory.

There are a number of cases to the effect that if the lessee takes possession, the terms of the invalid letting as to the rent to be paid may be considered in determining the extent of his liability for use and occupation, and there are others to the effect that he is liable for "rent" at the rate named by the lease.⁴⁵³ It has been decided in England that one entering under a lease void as an insufficient execution of a power,⁴⁵⁴ or under an agreement for a lease,⁴⁵⁵ is bound by a provision therein that he should repair, but in at least one case in this country a lessee entering under a lease invalid because oral was held not to be bound by such stipulation.⁴⁵⁶

into the house on May 25th, and was to quit at Candlemas (February 2d), and it was held that, the landlord could terminate the tenancy, the lessee having entered and paid rent, at Candlemas only, and not at Lady day. If the lease was for seven years from Lady Day, a provision that the lessee should quit at Candlemas would seem to be ineffective. Presumably the lease was for seven years less the interval between Candlemas and Lady day.

⁴⁴⁹ *Berrey v. Lindley*, 3 Man. & G. 498; *Doe d. Tilt v. Stratton*, 4 Bing. 446.

⁴⁵⁰ *Tress v. Savage*, 4 El. & Bl. 36.

⁴⁵¹ See *Hollis v. Pool*, 44 Mass. (3 Metc.) 350; *Butts v. Fox*, 96 Mo.

App. 437, 70 S. W. 515; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 212; *Magee v. Gilmour*, 17 Ont. 620, to this effect. The question is left undecided in *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567.

⁴⁵² *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642; *Goodwin v. Clover*, 91 Minn. 438, 98 N. W. 322, 103 Am. St. Rep. 517.

⁴⁵³ See post, § 25 g (4).

⁴⁵⁴ *Beale v. Sanders*, 3 Bing. N. C. 850.

⁴⁵⁵ *Richardson v. Gifford*, 1 Adol. & E. 52.

⁴⁵⁶ *O'Leary v. Delaney*, 63 Me. 584, where it was held that an agreement by the lessor, upon making an oral lease within the statute

It is difficult to ascertain from the decisions the theory upon which the courts have acted in thus giving effect to the terms of the lease, while at the same time regarding the lease as invalid. So far as concerns the executory stipulations of the parties, entered into by them at the time of the attempted conveyance of a term, it would seem that the question of their effectiveness is simply a question whether, the conveyance being void, stipulations entered into with reference to the interest sought to be conveyed can be regarded as in force. There are decisions that covenants entered into by a lessee are not binding if no leasehold interest is created by reason of the lessor's failure to execute the instrument of lease,⁴⁵⁷ and there is a strong analogy between the two cases. On the other hand it may be claimed that the statute of frauds, invalidating a lease if not in writing, means by this merely a conveyance by way of lease, and has no reference to the executory stipulations (contracts) which the parties may choose to enter into in connection with such conveyance, and that, therefore, they should be bound to carry them out so far as is possible. On this theory, however, the liabilities of the parties by reason of their executory stipulations would be independent of the lessee's entry on the land, and the lessee could, for instance, not avoid liability on his contract to pay rent or to make repairs by refusing to enter. But the cases appear to regard his entry as necessary for the purpose of imposing on him any liability whatsoever. It seems, furthermore, that a distinction might occasionally exist between the case of possession under a written lease, invalid for some cause, and that of possession under an oral lease, as regards the binding effect of stipulations to be performed by one or the other of the parties, since such a stipulation might, in the latter case, be invalid under the fourth section of the English statute, or the local equiv-

of frauds, to repair the premises, land could not sue on the promise could not be enforced, though the lessee had entered and paid rent. The decision is based on *McMullen v. Riley*, 72 Mass. (6 Gray) 500, where, however, no possession was taken by the intended lessee, and it was apparently merely decided that an oral agreement to accept a lease and to pay for fixtures or improvements was entire, and the owner of the

land could not sue on the promise to pay for fixtures and improvements, since the agreement to take a lease was invalid within the statute. Citing *Vaughan v. Hancock*, 3 C. B. 766, which is exactly in point to this effect, it being said that the agreement was invalid under the fourth section of the statute of frauds.

⁴⁵⁷ See post, § 53 a.

alent thereof, as an oral agreement concerning an interest in land, or as one not to be performed within a year, without reference to the validity, under the first section, of the lease as a conveyance.⁴⁵⁸ No such distinction seems, however, to have been suggested, and the standard English text-books state broadly that if the lessee enters and pays rent under a "void" lease, he is bound by the stipulations thereof so far as applicable to the class of tenancy thus created.⁴⁵⁹ So far as concerns the language of the invalid lease with reference to the length of the term, it is impossible to see on what theory, the lease itself being invalid as a conveyance, it can be considered for the purpose of fixing the period of the tenancy. The limitation of the term is an integral part of the conveyance.

(3) **Lease not valid for part of term.** In the absence of a statutory provision to the contrary, an oral lease within the statute of frauds is not to be regarded as invalid only for the excess over the period for which an oral lease is valid. For instance, an oral lease for ten years is not valid for one year because the statute allows an oral lease for one year.⁴⁶⁰ There are, however, occasional judicial assertions to the contrary.⁴⁶¹ And in two states there are statutory provisions expressly validating the lease for the period of one year.⁴⁶²

⁴⁵⁸ See post, § 53 b, at notes 56-59. *Nickolls v. Barnes*, 39 Neb. 103, 57

⁴⁵⁹ See *Woodfall, Landl. & Ten.* N. W. 990, this holding is in terms approved, but the opinion subsequently says that the lessee becomes a tenant by the year in such case.

⁴⁶⁰ *Thomas v. Nelson*, 69 N. Y. 118; *Laughran v. Smith*, 75 N. Y. 205; *Wilder v. Stace*, 61 Hun, 233, 15 N. Y. Supp. 870; *Williams v. Mershon*, 57 N. J. Law, 242, 30 Atl. 619. This is in effect conceded by the numerous cases regarding as invalid a lease for longer than the excepted period. If such a lease were valid in part, it would be so stated.

⁴⁶¹ *Smith v. Hornback*, 14 Ky. (4 Litt.) 232, 14 Am. Dec. 122; *Shepherd v. Cummings*, 41 Tenn. (1 Cold.) 354. In *Friedhoff v. Smith*, 13 Neb. 5, 12 N. W. 820, it is decided that if the lessee enters and pays rent, the lease is good for one year, the time excepted in the statute. In the subject-matter, and, for the

⁴⁶² In *Arkansas* (*Kirby's Dig. St.* 1904, § 3664) it is provided that parol leases "shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater effect or force than as leases not exceeding the term of one year." In *Brockway v. Thomas*, 36 Ark. 518, it is said, after referring to "the obvious obscurity" of this section, that "under its provisions, and in accordance with its intent, a parol lease of three years may have such vitality as to support agreements with regard to

(4) **Lessee's liability for rent or for use and occupation.** If the lessee enters under a lease within the statute, he becomes liable for the value of his use and occupation. That an action for use and occupation will lie in such a case has frequently been decided,⁴⁶³ and the recovery in such action will, it is said, be measured by the amount of rent agreed on, if there was any agreement in this regard.⁴⁶⁴ Occasionally it has been asserted that the les-

purposes of justice, be enforced for one year, although made for a longer time. * * * If it were true that the improvements were made under such a contract, as some of the evidence tended to show, the lease should have force during one year at least, if necessary to protect the tenant in his expenditures."

In South Carolina, Civ. Code 1902, § 2416, provides that "no parol lease shall give a tenant a right of possession for a longer term than twelve months from the time of entering on the premises; and all such leases shall be understood to be for one year, unless it be stipulated to be for a shorter term." Section 2650 is substantially the same as the first and second sections of the English statute, except that one year is substituted for the three years of such second section. It is there held that a parol lease for over twelve months gives a tenant a right of possession for a term of twelve months from the time of his entry on the premises, and that after such twelve months it has the effect of an estate at will only, while if the landlord refuses to allow the tenant to enter, the former is not liable even though the lease is for less than twelve months. See *Hillhouse v. Jennings*, 60 S. C. 392, 38 S. E. 596; *Matthews v. Hipp*, 66 S. C. 162, 44 S. E. 577; *Davis v. Pollock*, 36 S. C. 544, 15 S. E. 718.

⁴⁶³ *Parker's Adm'r v. Hollis*, 50

Ala. 411; *Smith v. Pritchett*, 98 Ala. 649, 13 So. 569; *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 625; *Walker v. Shackelford*, 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61; *Ragsdale v. Lander*, 80 Ky. 61; *Jennings v. McComb*, 112 Pa. 518, 4 Atl. 812; *Sutton v. Graham*, 80 Miss. 636, 31 So. 909 (semble); *Robb v. San Antonio St. R. Co.*, 82 Tex. 392, 18 S. W. 707; *Scott v. Hawsman*, 2 McLean, 180, Fed. Cas. No. 12, 532; *De Medina v. Polson*, Holt N. P. 47; *Van Arsdale v. Buck*, 82 App. Div. 383, 81 N. Y. Supp. 1017; *McIntosh v. Hodges*, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550.

In *Greton v. Smith*, 33 N. Y. 245, after the lessee had entered under the verbal lease, the lessor threatened to expel the lessee and offered the premises to others, and the lessee then left, the lessor resuming control and leasing to a third person, and it was held that in view of the lessor's "disclaimer of the agreement, and his interference with the possession of the lessee," he could not hold the lessee liable for use and occupation "under the rule, which, at the election of the landlord, gives effect to a parol lease, void by the statute of frauds, by implying a tenancy from year to year." This perhaps means that the tenant was evicted, and that consequently there was no further liability on his part.

⁴⁶⁴ *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 625; *Roberts v. Tennell*,

see so entering can be held liable *only* in use and occupation,⁴⁶⁵ but it seems that the fact that the lessee after entering pays the rent at the rate named, and that such payment is accepted, is evidence of an actual demise at such rent, and that the rent may be recovered in an action of debt or special assumpsit as well as in an action for use and occupation. In support of this view are the decisions to the effect that a distress may be levied for the sum named in the lease,⁴⁶⁶ since distress is permitted only where there is a certain rent reserved.⁴⁶⁷ In a number of cases the liability of the person entering under an oral lease within the statute is spoken of as a liability for "rent" measurable by the terms of the oral letting, without any suggestion that there is a liability in use and occupation only.⁴⁶⁸ The lessee is evidently not liable in

19 Ky. (3 T. B. Mon.) 247; Jennings v. McComb, 112 Pa. 518, 4 Atl. 812; De Medina v. Polson, Holt N. P. 47; Marr v. Ray, 151 Ill. 340, 37 N. E. 1029, 26 L. R. A. 799; and authorities cited post, note 468. Contra, Ragsdale v. Lander, 80 Ky. 61 (semble).

In Bain v. McDonald, 111 Ala. 269, 20 So. 77, it is said that the agreement is admissible as evidence as to the amount of the recovery, and that the recovery cannot exceed the sum promised to be paid, but that if this sum exceeds the reasonable value of the use and occupation there can be no recovery of the excess, as otherwise the void agreement would be given effect.

⁴⁶⁵ Warner v. Hale, 65 Ill. 395; Chicago Attachment Co. v. Davis Sewing Mach. Co., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754; Marr v. Ray, 151 Ill. 340, 36 N. E. 1029, 26 L. R. A. 799; Bain v. McDonald, 111 Ala. 269, 20 So. 77 (semble).

⁴⁶⁶ Marr v. Ray, 151 Ill. 340, 36 N. E. 1029, 26 L. R. A. 799; Roberts v. Tennell, 19 Ky. (3 T. B. Mon.) 247; Edwards v. Clemons, 24 Wend. (N. Y.) 480. In Schuyler v. Leggett, 2 Cow. (N. Y.) 660, a distress for the

rent reserved by the invalid lease was upheld, though, so far as appears, there had been no payment of rent.

⁴⁶⁷ See post, chapter XXXII.

⁴⁶⁸ Crawford v. Jones, 54 Ala. 459; Smith v. Pritchett, 98 Ala. 649, 13 So. 569; Cody v. Quarterman, 12 Ga. 386; Nash v. Berkmeir, 83 Ind. 536; Goodwin v. Clover, 91 Minn. 438, 98 N. W. 322, 103 Am. St. Rep. 517; Ohio & M. R. Co. v. Trapp, 4 Ind. App. 69, 30 N. E. 812; Reeder v. Sayre, 70 N. Y. 180, 26 Am. Rep. 567; Kernochan v. Wilkens, 3 App. Div. 596, 38 N. Y. Supp. 236; Schuyler v. Leggett, 2 Cow. (N. Y.) 660; Evans v. Winona Lumber Co., 30 Minn. 515, 16 N. W. 404; Steele v. Anheuser-Busch Brew. Co., 57 Minn. 18, 58 N. W. 685; Currier v. Barker, 68 Mass. (2 Gray) 226; Inhabitants of Eastham v. Anderson, 119 Mass. 526; Toan v. Pline, 60 Mich. 385, 27 N. W. 557; Barlow v. Wainwright, 22 Vt. 88, 53 Am. Dec. 79; Arbenz v. Exley, Watkins & Co., 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; Norris v. Morrill, 40 N. H. 395.

If the lessee occupies for the full term of the lease, he cannot defend

use and occupation if he does not enter on the premises.⁴⁶⁹

There is an English decision suggesting a possibility that if the lessee enters and occupies, he may be held liable for the whole of the term named on the occasion of the invalid letting, though he retains possession for part only of that term.⁴⁷⁰

In several cases it is said that the liability of the lessee who takes possession claiming under a lease within the statute is measured by the terms of the lease as regards the time of payment of rent as well as its amount.⁴⁷¹

There are occasional decisions to the effect that if the lessee enters under the invalid letting, one who guaranteed the payment of the rent may be held liable upon his guaranty.⁴⁷² It is not en-

an action on notes given for rent on the ground that the lease was within the statute. *Gibson v. Wilcoxon*, 16 Ind. 333; *Lagerfelt v. McKie*, 100 Ala. 430, 14 So. 281.

⁴⁶⁹ *Mathews v. Carlton*, 189 Mass. 285, 75 N. E. 637.

⁴⁷⁰ *Smallwood v. Sheppards* [1895] 2 Q. B. 627. In that case there was an agreement that A should have the exclusive possession of B's land on three certain holidays during the year, for which A was to pay a "lump" sum, and it was held that, A having entered on the land on one of these days and paid one-third of this sum, he was liable for the balance, though he refused to occupy on the other two days (per *Wright and Kennedy, J. J.*). The court seems to have regarded the "agreement" as one for an interest in land within the fourth section of the statute, but, it is submitted, an agreement that one should have the exclusive possession of land is a lease, and consequently, if for less than three years, is valid under the second section, and does not fall within the fourth section as being an agreement. Ante, § 25 a.

⁴⁷¹ *Currier v. Barker*, 68 Mass. (2

Gray) 226; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567; *Barlow v. Wainwright*, 22 Vt. 88, 53 Am. Dec. 79. In *Norris v. Morrill*, 40 N. H. 395, it was held that the oral lease was admissible to show the time for payment of rent, although it named no time in this regard, it being left to the jury to find, "from an express agreement as to the length of the term, an implied agreement as to the time of payment."

⁴⁷² In *Duffee v. Mansfield*, 141 Pa. 507, 21 Atl. 675, the guarantor was held liable, the court merely saying "we need not discuss the legal effect of the omission of the lessor to sign the paper. It has no bearing upon the case. The lessee entered under the lease. So long as he remains in possession the surety is liable."

In *Lehman v. Nolting*, 56 Mo. App. 549, the liability of the guarantor is in terms based on the fact that the lessee entered and made some payments in accordance with the reservation, the court saying that the guarantor, being assumed to know the law, must have contracted "under the assumption that the lessee would enter the premises and pay rent as provided by the lease. And

tirely clear how, the lease being invalid, the rent reserved thereby can be regarded as existing for the purpose of the guaranty. The rent which may become due by reason of the lessee's entry is not that reserved, even though the amount thereof be the same.⁴⁷³

(5) **Part performance.** The equitable doctrine that a contract which is not evidenced as required by the statute of frauds may be enforced if one party has done certain acts in part performance or upon the faith of the contract has been freely applied in this country to cases not in writing as required by the statute. In two states only, it appears, has this doctrine of part performance been regarded as inapplicable to the case of an oral lease.⁴⁷⁴ In spite, however, of the frequency with which the view that this doctrine is applicable in the case of a verbal lease within the statute has been asserted by the courts, its soundness may be questioned, it is submitted, it having its origin in the mistaken idea that a lease is primarily a contract rather than a conveyance.

knowing that such action on the part of the lessee made of him a tenant from month to month, he guaranteed the faithful payment of such rent under such tenancy." But, it would seem, he did not guarantee the rent, a contract to pay which might be inferred from the possible entry and payment of rent by the lessee, but an entirely different rent, that reserved on the attempted making of a lease for a term of years, which reservation was void.

⁴⁷³ *Keller v. Fisher*, 7 Ind. 718, appears to be opposed to the view that the guarantor is liable.

⁴⁷⁴ In Iowa the doctrine of part performance is held not to apply to the case of a lease for the reason that the local statute of frauds contains a provision that the statute shall not apply to a contract for the purchase or sale of land when part of the purchase money has been paid or possession taken, and that this provision as to part performance in the case of a sale of land by im-

plication excludes the application of the doctrine in the case of a lease. *Hunt v. Coe*, 15 Iowa, 197; *Thorp v. Bradley*, 75 Iowa, 50, 39 N. W. 177; *Burden v. Knight*, 82 Iowa, 584, 48 N. W. 985; *Powell v. Crampton*, 102 Iowa, 364, 71 N. W. 579.

In Kentucky also it appears to be assumed that such a doctrine is inapplicable (*Wessells v. Rodifer*, 30 Ky. Law Rep. 51, 97 S. W. 341; *Poole v. Johnson*, 31 Ky. Law Rep. 165, 101 S. W. 955,) though the lessee, if he makes improvements, can remain in possession until he is reimbursed therefor. *Poole v. Johnson*, 31 Ky. Law Rep. 165, 101 S. W. 955. In *O'Neal v. Orr*, 68 Ky. (5 Bush) 649, it was decided that where a landlord promised his tenant, in consideration of repairs and improvements made by him, that he should retain possession so long as he paid the agreed rent, he could not evict the tenant without accounting for the improvements, though the promise was invalid because not in writing.

The doctrine of "part performance," and that of which it is a part, the doctrine of "specific performance," are in their nature applicable only to executory contracts, that is, to contracts calling for performance in the future. The expression "lease," as we have before remarked,⁴⁷⁵ is used in several senses, but its primary meaning is that of a conveyance, though it is used also to include the executory stipulations entered into by the parties at the time of the making of the conveyance. A conveyance by way of lease, whether valid or invalid, is not an executory contract, and is evidently incapable of "performance," either in whole or in part.⁴⁷⁶ We might as well speak of the "performance" of a conveyance in fee simple. On the other hand, the executory stipulations entered into by the parties *are* capable of performance, being indeed made to be performed, and any of them might be specifically enforced if of a character admitting of such relief, in accordance with the established rules of equity on the subject. But, it would seem, such relief should be sought and awarded with reference to each individual stipulation separately, and not to all "en masse," under the collective name of "lease," and the practical application of the doctrine of part performance in connection with the enforcement of a single one of several such executory stipulations might involve considerable difficulty. It may be remarked that the cases in this country, applying the doctrine of part performance in connection with an oral lease, quite frequently cite as authorities English cases in which the doctrine was applied to executory agreements to make a lease, without, apparently, any appreciation of the distinction between the two classes of transactions.

The least unsatisfactory theory perhaps on which to support the decisions that "part performance," so-called, of an oral lease, will take it out of the statute of frauds, is that such a lease is to be construed as an oral contract to make a lease, and that it is this contract which is the subject of the part performance.⁴⁷⁷ Such a

⁴⁷⁵ See ante, § 16.

⁴⁷⁶ See remarks of Sharswood, C. J., in *Kemble Coal & Iron Co. v. Scott*, 90 Pa. 332.

⁴⁷⁷ In England a lease which is, by the terms of the statute 8 & 9 Vict. c. 106, invalid as such because not

under seal, has been in several cases construed as a valid contract for a lease, of which specific performance would be decreed (*Parker v. Taswell*, 2 De Gex & J. 559; *Bond v. Rosling*, 1 Best & S. 371; *Rollason v. Leon*, 7 Hurl. & N. 73). No case ap-

view appears, however, never to have been judicially suggested.

There are a number of cases in which it is asserted that the doctrine of part performance in connection with an oral lease can be applied only in equity,⁴⁷⁸ and that the doctrine is purely equitable is ordinarily recognized.⁴⁷⁹ But in a considerable number of cases the courts have, in connection with such a lease, ignored this distinction, regarding "part performance" as sufficient to validate the lease for all purposes at law as well as in equity. These decisions may presumably be regarded as to some extent an outgrowth of the statutory merger of law and equity,⁴⁸⁰ though, so far as appears from the language of the courts, they may be the result merely of a misunderstanding of the doctrine of part performance.

As before stated, by numerous decisions, a lessee under an oral lease entering thereunder and paying rent becomes a tenant at will or a periodic tenant.⁴⁸¹ So far as the doctrine of part performance may in any jurisdiction be regarded as applicable at law to an oral lease, and such entry and payment of rent may be regarded as constituting such part performance,⁴⁸² it would seem

appears, however, in which this principle has been applied to an oral, as distinct from an unsealed, lease.

⁴⁷⁸ *Brockway v. Thomas*, 36 Ark. 518; *Warner v. Hale*, 65 Ill. 395; *Creighton v. Sanders*, 89 Ill. 543; *Leavitt v. Stern*, 159 Ill. 526, 42 N. E. 869; *Chicago & N. W. R. Co. v. Miller*, 233 Ill. 508, 84 N. E. 683; *Hunt v. Coe*, 15 Iowa, 197; *Trammell v. Craddock*, 100 Ala. 266, 13 So. 911; *Cram v. Thompson*, 87 Minn. 172, 91 N. W. 483; *Spota v. Hayes*, 36 Misc. 532, 73 N. Y. Supp. 959; *Birkhead v. Cummins*, 33 N. J. Law, 44; *Smith v. Phillips*, 69 N. H. 470, 43 Atl. 183; *Hawley v. Moody*, 24 Vt. 603.

⁴⁷⁹ See *Browne*, Stat. of Frauds (5th Ed.) § 448; 3 *Pomeroy*, Eq. Jur. § 1409; 29 *Am. & Eng. Enc. Law* (2d Ed.) 831.

⁴⁸⁰ In England, since the fusion of law and equity by the Judicature

Acts, it has been decided that the rule of equity has superseded that of law as regards a tenant in possession under a contract for a lease of which specific performance would be decreed, and that he is in the same position as if a lease had been executed, so far at least as concerns a court having jurisdiction both at law and in equity. See post, § 62, notes 14-18. Conceding that an actual lease, as well as a contract for a lease, is a subject for the application of the doctrine of part performance, the same principle would seem to be applicable in this country so far as there may have been, in the particular jurisdiction, a similar fusion of law and equity, with a provision that in case of conflict the doctrines of equity shall be controlling.

⁴⁸¹ See ante, § 25 g (1).

⁴⁸² See post, at note 487.

to override the doctrine that the lessee is in such case a tenant at will or a periodic tenant, since he cannot be both that and also a tenant for the full term named.⁴⁸³ In jurisdictions, on the other hand, in which this doctrine is regarded as applicable to an oral lease in equity only, the lessee under such a lease, entering and paying rent, is a tenant at will or a periodic tenant in a court of law, while in a court of equity he is a tenant for the full term named, if the lease is to be regarded as capable of specific enforcement.

Assuming that the doctrine of part performance is properly applicable to an oral lease within the statute, the question arises, what acts constitute part performance of a lease. There are decisions to the effect that the delivery of possession by the lessor to the lessee, or the latter's taking of possession, is sufficient for this purpose.⁴⁸⁴ The possession must, however, appear to have been delivered and assumed in reliance on the alleged lease, and consequently the fact that one already in possession of land by a lease or otherwise continues in possession does not render admissible evidence of a new lease which is not in writing,⁴⁸⁵ unless

⁴⁸³ In *O'Connor v. Oliver*, 45 Wash. 549, 88 Pac. 1025, the court considered that there was a case of part performance, and at the same time, apparently, undertook to apply the doctrine that the reservation of a periodic rent had the effect of making the holding periodic.

⁴⁸⁴ *Rosser v. Harris*, 48 Ga. 512; *Switzer v. Gardner*, 41 Mich. 164, 2 N. W. 191 (semble); *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Moore v. Beasley*, 3 Ohio, 294; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Noland v. Cincinnati Cooperage Co.*, 26 Ky. Law Rep. 837, 82 S. W. 627.

It has been said that if possession is actually taken under a verbal lease invalid under the statute, and the lessee retains possession through the term, the lease is in effect thereby validated, and the relation of landlord and tenant is created so as to authorize an attachment for advances. *Martin v. Blanchett*, 77 Ala.

288. But the relation is created, it may be remarked, although the lessee does not retain possession through the term.

In *Myers v. Crowell*, 45 Ohio St. 543, 15 N. E. 866, it was held that the taking by the lessee of possession of part of the leased premises was not such part performance as validated the lease as to the balance, if, by the terms of the lease, possession could not be taken of the balance until a later date. It would have been held otherwise, it seems, if all could be immediately taken possession of. In *Cockran v Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229, it is said that occupancy of part of the premises by the lessee under an oral lease, and payment of rent for such part, gives him no rights as to the balance.

⁴⁸⁵ *Simons v. New Britain Trust Co.*, 80 Conn. 263, 67 Atl. 883; *Koch*

perhaps his continued possession is unequivocally referable to the new lease.⁴⁸⁶ The taking of possession and payment of rent by the lessee have also, together, been regarded as sufficient acts of part performance,⁴⁸⁷ though there are decisions to the contrary,⁴⁸⁸ decisions which obviously, in effect, deny the sufficiency of the taking of possession alone. If the delivery of possession is followed by the making of beneficial improvements on the land by the lessee on the

v. National Union Bldg. Ass'n, 137 Ill. 497, 27 N. E. 530; Railsback v. Walke, 81 Ind. 409; Mahana v. Blunt, 20 Iowa, 142; Rosenthal v. Freeburger, 26 Md. 75; Spalding v. Conzelman, 30 Mo. 177; Armstrong v. Kattenhorn, 11 Ohio, 265; Crawford v. Wick, 18 Ohio St. 190; Jones v. Peterman, 3 Serg. & R. (Pa.) 543, 8 Am. Dec. 672; Dechenbach v. Rima, 45 Or. 500, 78 Pac. 666.

That the lessee, before the time named for the commencement of his term, by permission of a previous lessee, temporarily places his goods on the premises, does not affect the operation of the statute. Mathews v. Carlton, 189 Mass. 285, 75 N. E. 637.

⁴⁸⁶ Armstrong v. Kattenhorn, 11 Ohio, 265.

⁴⁸⁷ Stautz v. Protzman, 84 Ill. App. 434; Grant v. Ramsey, 7 Ohio St. 157; Randall v. Thompson, 1 Willson, Civ. Cas. Ct. App. § 1101; Koplit v. Gustavus, 48 Wis. 48, 3 N. W. 754.

In Alabama this conclusion is based on the terms of the statute (Code 1907, § 4289), which annuls all verbal agreements for the sale of land or any interest therein "except leases for a term not longer than one year, unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller."

Shakespeare v. Alba, 76 Ala. 351; Trammell v. Craddock, 100 Ala. 266, 13 So. 911; A. G. Rhodes Furniture Co. v. Weedon, 108 Ala. 252, 19 So. 318.

In Watkins v. Balch, 41 Wash. 310, 83 Pac. 321, it is said that entry and payment, by the lessee, of the rent for a fixed term under an oral lease, renders the lease good for the whole term. This is not stated to be an application of the doctrine of part performance, but presumably that is the idea intended to be conveyed.

⁴⁸⁸ Humphrey Hardware Co. v. Herrick, 5 Neb. Unoff. 524, 99 N. W. 233; Bard v. Elston, 31 Kan. 274, 1 Pac. 565.

In Nicholes v. Swift, 118 Ga. 922, 45 S. E. 708, it is said that "if mere possession and occupation of the rented premises, with the landlord's consent, would be sufficient to make such a contract binding on the tenant for the term specified therein, the provision of the statute would be meaningless." Distinguishing Petty v. Kennon, 49 Ga. 468, as merely deciding that if, by the terms of an oral lease, the lessee was to repair and to be paid the cost of the repairs by the landlord, and was to have a right to remain until he was paid, he could not be ousted without payment. Steininger v. Williams, 63 Ga. 475, does not appear to accord with Nicholes v. Swift.

faith of the lease, there is no doubt a sufficient part performance.⁴⁸⁹

The payment of rent alone is not sufficient part performance, the lessee not having taken possession on the strength of the oral lease.⁴⁹⁰ If, however, a tenant holding over under a new lease,

⁴⁸⁹ *Morrison v. Peay*, 21 Ark. 110; *Steel v. Payne*, 42 Ga. 207; *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. 537; *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565; *Benjamin v. Wilson*, 34 Minn. 517, 26 N. W. 725; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Wilber v. Paine*, 1 Ohio, 251; *Wallace v. Scoggins*, 17 Or. 476, 21 Pac. 558; *Jones v. Peterman*, 3 Serg. & R. (Pa.) 543, 8 Am. Dec. 672; *Anderson v. Anderson*, 13 Tex. Civ. App. 527, 36 S. W. 816; *Gibbs v. J. M. Horton Ice Cream Co.*, 61 App. Div. 621, 71 N. Y. Supp. 193; *Veeder v. Horstmann*, 85 App. Div. 154, 83 N. Y. Supp. 99; *Adams v. Bonnefon*, 124 Mo. App. 457, 101 S. W. 693 (semble); *O'Connor v. Oliver*, 45 Wash. 549, 88 Pac. 1025.

In *Wallace v. Scoggins*, 17 Or. 476, 21 Pac. 558, it was held that the lessee's removal of shrubbery to the premises, his purchase and laying down of carpets, and taking in of his winter's supply of fuel, constituted part performance.

That the lessee of rooms in a building in course of construction, by agreement with the lessor, has, at his own expense, a more elaborate finishing put into the rooms than had been intended by the lessor, and has his sign put on the windows, does not take the case out of the statute. *Wilder v. Stace*, 61 Hun, 233, 15 N. Y. Supp. 870.

In *Winters v. Cherry*, 78 Mo. 344, it was apparently decided that where, a year before the end of a lease, a new lease was made to include premises included in the old

lease and additional premises, the lessor to fit up the latter, and the fitting up was done and the lessee was placed in possession of the additional premises, the lessee was liable for rent reserved under the new lease, though he gave up possession at the end of the previous lease. The opinion is most obscure.

In *Smelling v. Valley*, 103 Mich. 580, 61 N. W. 878, an oral lease for two years was made, the rent to be paid by the lessee's services in clearing the land during the spring of the first year, and it was held that the lessor could maintain a summary proceeding under the statute to recover possession as for nonpayment of rent, the lessee having failed to clear the land, that the lessee could not claim the notice to which a tenant from year to year or at will is entitled, and that, since he, having entered on the land and partly cleared it, could have enforced the lease in equity, he could not repudiate his obligation to do the clearing on the theory that he would thereby pay rent for the whole term when he acquired no right to possession in return thereof. It seems to be assumed that the summary proceeding for nonpayment of rent does not lie if the lessee, by taking possession under an oral lease, became a tenant at will or from year to year.

⁴⁹⁰ *Rosen v. Rose*, 13 Misc. 565, 34 N. Y. Supp. 467; *Merchant's State Bank v. Ruettell*, 12 N. D. 519, 97 N. W. 853; *Hawley v. Moody*, 24 Vt. 603;

invalid because oral, pays an increased rent, even a single installment merely, this might be regarded as sufficient part performance, provided it can be shown to have been made in respect of the new lease.⁴⁹¹ Likewise, if one already in possession under a lease makes beneficial improvements in reliance on a verbal renewal lease, the latter is taken out of the statute.⁴⁹²

It is to be observed that this doctrine of part performance has been applied in favor of the lessor as well as the lessee, that is, while part performance by the lessee has been held to entitle him to specific performance by the lessor,⁴⁹³ or to retain possession for the term as against the lessor,⁴⁹⁴ part performance by the lessor has been held to entitle him to specific performance by the lessee,⁴⁹⁵ or to recover against the lessee on his covenant for rent.⁴⁹⁶ Occasionally it seems to be thought that a part performance by one party may render the lease enforceable against him as well as in his favor,⁴⁹⁷ but this seems to lose sight of the whole

Townsend v. Sharp, 2 Tenn. (2 Overt.) 192; *Webster v. Blodgett*, 59 N. H. 120, 47 Am. Rep. 179 ("parol contract to lease land").

⁴⁹¹ It has been so decided in reference to a contract for a lease. *Wills v. Stradling*, 3 Ves. Jr. 378; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Miller v. Sharp* [1899] 1 Ch. 622; *Spear v. Orendorf*, 26 Md. 37. In *Dahm v. Barlow*, 93 Ala. 120, 9 So. 598, it was decided that payment of rent under a renewal lease, not executed in compliance with the statute, by the tenant previously in possession, took the case out of the statute.

⁴⁹² *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. 537, commented on in *Koch v. National Union Bldg. Ass'n*, 137 Ill. 497, 27 N. E. 530; *Witman v. Reading*, 191 Pa. 134, 43 Atl. 140. Compare *Whiting & Co. v. Pittsburgh Opera House Co.*, 88 Pa. 100. The improvements must be of such importance as to be reasonably referable to the new lease, and not such as are usually made by any tenant

in possession. *Spalding v. Conzelman*, 30 Mo. 177. See *Browne*, Stat. of Frauds, § 480, and *Brennan v. Bolton*, 2 Dru. & War. 349, where it was so held as regards an agreement for a lease.

⁴⁹³ *Shakespeare v. Alba*, 76 Ala. 351; *Morrison v. Peay*, 21 Ark. 110; *Wallace v. Scoggins*, 17 Or. 476, 21 Pac. 558; *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. 537.

⁴⁹⁴ *Steele v. Payne*, 42 Ga. 207; *Rosser v. Harris*, 48 Ga. 512; *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565; *Benjamin v. Wilson*, 34 Minn. 517, 26 N. W. 725; *Wilber v. Paine*, 1 Ohio, 251; *Dennis v. Hanson*, 12 Ohio Cir. Ct. R. 445, 1 Ohio Civ. Dec. 465.

⁴⁹⁵ *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266.

⁴⁹⁶ *Moore v. Beasley*, 3 Ohio, 294; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938.

⁴⁹⁷ *Christopher v. National Brew. Co.*, 72 Mo. App. 121; *Grant v. Ramsey*, 7 Ohio St. 157.

theory of part performance, as being intended for the protection of one who has performed on the supposition that the other party would recognize the transaction as valid.⁴⁹⁸

§ 26. The form and parts of an instrument of lease.

a. **General considerations.** An instrument of lease which satisfies all statutory requirements as to execution need not follow any particular form, it being sufficient that it show an intention on the part of the lessor, by the making thereof, to dispossess himself of the tenements in question in favor of the lessee. A carefully drawn instrument, however, ordinarily consists of the following parts.

At the beginning the names of the parties are stated,⁴⁹⁹ and the date is frequently here given, though often placed at the end. Next come the "recitals," if there are any, these being statements of fact explanatory of the transaction, and these are followed by the words of demise⁵⁰⁰ with a description of the premises leased,⁵⁰¹ and any exception in favor of the lessor or any reservation of an easement or right of profit.⁵⁰² Then comes the *habendum*, which states the character and amount of interest conferred, as whether an estate for life, for years or at will, and, if an estate for years, the duration of the term, and then the *reddendum*, which states the character and amount of rent and the times of payment thereof. Thereafter are inserted any covenants entered into by the lessor and lessee respectively,⁵⁰³ and lastly a clause providing for the lessor's re-entry on nonpayment of rent or other nonperformance of covenants on the part of the lessee.⁵⁰⁴

b. **Words of demise.** The operative words of a lease are usually "lease" or "let," or "demise and lease," or "demise grant and farm let," but no particular words are necessary,⁵⁰⁵ and "whatsoever word amounteth to a grant may serve to make a lease."⁵⁰⁶ Whatever words are sufficient to explain the intent of

⁴⁹⁸ See Brown Stat. of Frauds, § 453. *Barnsdale v. Boley*, 119 Fed. 191; *Brown v. O'Byrne* (Ala.) 45 So. 129.

⁴⁹⁹ The general rule that one who merely signs a conveyance without having been named therein is not to be regarded as a party thereto (2 Tiffany, Real Prop. § 380) is presumably applicable to a lease as well as to a conveyance in fee. See

⁵⁰⁰ See post, § 26 b.

⁵⁰¹ See post, § 26 c.

⁵⁰² See post, § 26 d.

⁵⁰³ See post, chapter V.

⁵⁰⁴ See post, § 194.

⁵⁰⁵ See 2 Blackst. Comm. 318.

⁵⁰⁶ Co. Litt. 45 b.

the parties, that the one shall divest himself of the possession and the other come into it for a determinate time, such words, whether they run in the form of a license, covenant or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose.⁵⁰⁷ So permission given by the owner to another to enter and take the profits of the land,⁵⁰⁸ or to occupy or inhabit it,⁵⁰⁹ may amount to a lease. In the case of a tenancy at will, as has been before indicated,⁵¹⁰ the tenancy is ordinarily created by a lease of a most informal character, a mere permission to take possession. Such a lease, is however, usually not incorporated in a written instrument.

While, as above stated, the word "license" may operate as a word of demise,⁵¹¹ it does not necessarily do so, and if the intention is to give a right to enter for limited purposes only, and not the exclusive possession, the instrument cannot take effect as a lease, but a license only is created.⁵¹²

⁵⁰⁷ Bac. Abr., Leases (K) 612. And see to the same effect *West Chicago St. R. Co. v. Morrison*, Adams & Allen Co., 160 Ill. 288, 43 N. E. 393; *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. 1082; *Munson v. Wray*, 7 Blackf. (Ind.) 403; *Alcorn v. Morgan*, 77 Ind. 184; *Waller v. Morgan*, 57 Ky. (18 B. Mon.) 136; *Moshier v. Reding*, 12 Me. (3 Fairf.) 478; *Fiske v. Framingham Mfg. Co.*, 31 Mass. (14 Pick.) 491; *Mason v. Clifford*, 4 Fed. 177; *Watson v. O'Hern*, 6 Watts (Pa.) 362; *Bussman v. Ganster*, 72 Pa. 285; *Maverick v. Lewis*, 3 McCord (S. C.) 211; *Twiss v. Boehmer*, 39 Or. 359, 65 Pac. 18; *Pickering v. O'Brien*, 23 Pa. Super. Ct. 125; *Upper Appomattox Co. v. Hamilton*, 83 Va. 319, 2 S. E. 195.

In *Eastman v. Perkins*, 111 Mass. 30, it was held that a bill of sale of hay, with a receipt for the price thereon, which concluded "Left at stable on O. St., where A. P. (the purchaser) takes possession. Rent

to begin October 1, 1870, for one year at \$150," was, in connection with evidence that the owner had agreed to lease the premises, on which there was a stable, sufficient as a lease. In *Barrett v. Johnson*, 2 Ind. App. 25, 27 N. E. 983, it was held that a provision in a contract for the sale of land, that under certain circumstances the payments made by the purchaser "shall go towards paying rent on said lot at the rate of six dollars per month," converted the contract into a lease in that event.

⁵⁰⁸ Anonymous, 3 Salk. 223.

⁵⁰⁹ *Drake v. Munday*, Cro. Car. 207; *Tisdale v. Essex*, Hob. 34; *Doe d. Jackson v. Ashburner*, 5 Term R. 163.

⁵¹⁰ See ante, § 13 (a) (3).

⁵¹¹ *Hall v. Seabright*, 1 Mod. 14; *Treuer v. Roberts*, Hardres, 366; Y. B. 5 Hen. 7, 1; *Branch v. Doane*, 17 Conn. 402.

⁵¹² Anonymous, 3 Salk. 223; *Wood v. Lake, Sayer*, 3. See ante, § 7.

Even though there are no words of demise of any sort upon the part of the lessor, if an instrument as executed by him shows an intent to demise, there is a valid lease of the premises. If "one person agrees to take certain premises at a certain rent from a certain time, and both parties sign the paper, looking at the whole of such an instrument together, no body can doubt, that, though it contain no words of demise by the party who signs it as landlord, such an instrument would amount to a lease, because you cannot give effect to the signature, unless by supposing that there is an implied agreement to demise, besides the express words by which the tenant agrees to take."⁵¹³ So a mere offer to make a lease on certain terms, if accepted by the person to whom the offer is addressed, may constitute a lease,⁵¹⁴ as may an offer to accept a lease on certain terms, if assented to by the proposed lessor.⁵¹⁵ In the latter case, however, the assent must be in writing in order to create a lease sufficient under the statute of frauds.

c. **Description of premises—(1) Requirement of certainty.** A lease, like any other conveyance, must describe the premises leased with sufficient certainty to render them capable of identification.⁵¹⁶ If it fails so to do, the lease transfers no interest to

⁵¹³ Alderson, B., in *Gore v. Lloyd*, 12 Mees. & W. 463.

⁵¹⁴ So in *Baer v. Minock*, 128 Mich. 676, 8 Det. Leg. N. 847, 87 N. W. 1045, there was held to be a lease for six months where, in pursuance of oral negotiations, the owner of the land wrote to another: "Here-with please find receipt for advance rent on the premises beginning May 1st, 1900; rent \$25 per month, first six months," and the lessee replied "All right."

⁵¹⁵ *Steinfeld v. Wilcox*, 26 Misc. 401, 56 N. Y. Supp. 217; *Chapman v. Bluck*, 4 Bing. N. C. 187.

⁵¹⁶ *Patterson v. Hubbard*, 30 Ill. 201; *Diamond Plate-Glass Co. v. Tennell*, 22 Ind. App. 132, 52 N. E. 168; *Dixon v. Finnegan*, 182 Mo. 111, 81 S. W. 449; *Bingham v. Honeyman*, 32 Or. 129, 51 Pac. 735; *Goodsell v.*

Rutland-Canadian R. Co., 75 Vt. 375, 56 Atl. 7.

It has been decided in Indiana that a lease of a certain number of acres sufficiently describes the premises, although it does not locate them, it being provided that the lessor shall locate them and be being prepared to do so. *Indianapolis Natural Gas Co. v. Spaugh*, 17 Ind. App. 683, 46 N. E. 691; *Indianapolis Natural Gas Co. v. Pierce*, 25 Ind. App. 116, 56 N. E. 137. And in *Hunt v. Campbell*, 83 Ind. 48, it was held that a lease of "not less than ten, nor more than fifty acres," was made effective by a subsequent conveyance to such lessee of specific land. These decisions seem to accord in principle with the English decisions in regard to wills (see *Marshall's Case*, *Dyer*, 281, note, 8 Vin. Abr. 48, pl. 11;

the lessee. It has been decided, however, that though the description is insufficient, still if the lessee takes permissive possession of land belonging to the lessor, purporting to do so under the lease, he is liable for the stipulated rent, on the theory that this cures the uncertainty of description.⁵¹⁷ Presumably by this is meant that the fact that the lessee, with the consent of the lessor, takes possession of certain land, is evidence that the parties, by the language which they used, intended to designate this particular land.⁵¹⁸ This would involve merely one application of the rule, supported by many decisions, that, in order to apply the language used in a description to particular land, evidence of extrinsic facts, "parol evidence" as it is ordinarily expressed, is admissible,⁵¹⁹ a rule which is, however, it seems, subject to the proviso

Tapley v. Eagleton, 12 Ch. Div. 683; Duckmanton v. Duckmanton, 5 Hurl. & N. 219; Jarman, Wills, 331. In Sheppard's Touchstone, 251, it is said: "If one be seised of two acres of land, and he doth lease them for life, and grant the remainder of one of them, and doth not say of which, to I. S., in this case, if I. S. make his election which acre he will have, the grant of the remainder to him will be good." If such a conveyance is good when the election is made by the grantee, *a fortiori*, it would seem, it is good if the election is made by the grantor, especially when he is named to make it.

⁵¹⁷ Bulkley v. Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; Whipple v. Shewalter, 91 Ind. 114; Hoyle v. Bush, 14 Mo. App. 408; Weaver v. Shipley, 127 Ind. 526, 27 N. E. 146; Jackson v. Perrine, 35 N. J. Law, 137; McLennan v. Grant, 8 Wash. 603, 36 Pac. 682; Richards v. Snider, 11 Or. 197, 3 Pac. 177. See, also, Outtoun v. Dulin, 72 Md. 536, 20 Atl. 134. But see Dixon v. Finnegan, 182 Mo. 111, 81 S. W. 449. In Appleton v. O'Donnell, 173 Mass. 398, 53 N. E. 882, it is said that in such

case, "even if the covenant did not bind as such, the law would imply a promise to pay at the promised rate." This apparently means that the lessee is liable in such case as for use and occupation, and the amount of rent reserved in the lease is evidence as to the value of the use and occupation. The grounds of the asserted distinction are not explained.

⁵¹⁸ See Marske v. Willard, 169 Ill. 276, 48 N. E. 290; 4 Wigmore, Evidence, §§ 2470, 2473. It is sometimes said that the lessee is estopped to deny that the property thus taken possession of is that leased. But the usual elements of estoppel seem to be wanting. He has not misled the lessor to his prejudice.

⁵¹⁹ Doe d. Freeland v. Burt, 1 Term R. 704; Lyle v. Richards, L. R. 1 H. L. 222; Bulkley v. Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; Heyward v. Willmarth, 87 App. Div. 125, 84 N. Y. Supp. 75; Trimble's Heirs v. Ward, 53 Ky. (14 B. Mon.) 8; Sirey v. Braems, 65 App. Div. 472, 72 N. Y. Supp. 1044; Durr v. Chase, 161 Mass. 40, 36 N. E. 741; Dougherty v. Chesnutt, 86

that the language of the description is not, in itself, definite and unambiguous.⁵²⁰

The maxim *falsa demonstratio non nocet* is applicable to the description in an instrument of lease as in any other conveyance, and, consequently, if there is a sufficient description of the premises leased, an incorrect addition to the description, inserted to aid in identifying the property, may be rejected.⁵²¹ So, the premises being clearly ascertained, an erroneous measurement,⁵²² name,⁵²³ street number,⁵²⁴ or reference to present occupancy,⁵²⁵ may be rejected.

(2) **Scope and effect.** If the description is certain in terms, it will be strictly applied, and nothing more will pass. Thus, it has been decided that if a farm or a house is described as being in the occupation of a particular person, only so much thereof as is in his occupation will pass,⁵²⁶ and if it is described as being in a particular city, only so much as is so situated will pass.⁵²⁷

A lease of land, like any other conveyance thereof, passes the buildings as well as other structures thereon, which, as being "fixtures," are legally a part of the land.⁵²⁸

Tenn. 1, 5 S. W. 444; *Mittler v. Herter*, 39 Misc. 843, 81 N. Y. Supp. 494; *Harris v. Dub*, 57 Ga. 77; *Sargent v. Adams*, 69 Mass. (3 Gray) 72, 63 Am. Dec. 718; *Schneider v. Patterson*, 38 Neb. 680, 57 N. W. 398; *Chamberlain v. Letson*, 5 N. J. Law (2 South) 520; *Guy v. Barnes*, 29 Ind. 103; *House v. Jackson*, 24 Or. 89, 32 Pac. 1027.

⁵²⁰ *Ballance v. Peoria*, 180 Ill. 29, 54 N. E. 428; *Harris v. Oakley*, 130 N. Y. 1, 28 N. E. 530; *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 66 N. H. 267, 20 Atl. 330; *Morris v. Kettle*, 57 N. J. Law, 218, 30 Atl. 879; *Knapp v. Marlboro*, 29 Vt. 282.

⁵²¹ See 4 Wigmore, Evidence, § 2476.

⁵²² *Llewellyn v. Jersey*, 11 Mees. & W. 183; *Manning v. Fitzgerald*, 29 Law J. Exch. 24; *Hall v. Powell*, 4

Serg. & R. (Pa.) 456, 8 Am. Dec. 722; *Lush v. Druse*, 4 Wend. (N. Y.) 313. ⁵²³ *Rorke v. Errington*, 7 H. L. Cas. 62 b.

⁵²⁴ *Cowen v. Truefitt* [1898] 2 Ch. 551.

⁵²⁵ *Wrotesley v. Adams*, Plowd. 191; *Doe d. Smith v. Galloway*, 5 Barn. & Adol. 43; *Hibbard v. Hurlburt*, 10 Vt. 173.

⁵²⁶ *Magee v. Lavell*, L. R. 9 C. P. 107; *Morrell v. Fisher*, 4 Exch. 591; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117.

⁵²⁷ *Hall v. Combes*, Cro. Eliz. 368.

⁵²⁸ *Sachs v. Henderson* [1902] 1 K. B. 602; *Townsend v. Ford*, 72 App. Div. 621, 76 N. Y. Supp. 501; *St. Louis Public Schools v. Hollingsworth*, 34 Mo. 191. See cases cited 13 Am. & Eng. Enc. Law (2d Ed.) 662 et seq.

By accepting a lease of premises,

A lease in terms of a house or other building *prima facie* includes the soil covered thereby⁵²⁹ to the outermost edge of the eaves or projections.⁵³⁰ It also may include a yard, garden or orchard belonging to the house and used therewith,⁵³¹ or necessary to the convenient use of the building,⁵³² and outhouses necessary for such use.⁵³³

Though a lease of a building *prima facie* passes the soil or earth thereunder, it is possible to lease a building apart from the soil. It is a question of construction in each particular case whether a lease of a building includes the earth or soil, and, as above stated, there is a presumption in favor of such construction. So it is, it seems, a question of construction whether a lease of a part of a building includes the earth or soil.⁵³⁴ If the lease is in terms of a room or an apartment merely, it *prima facie* includes no part of the earth or soil,⁵³⁵ but there might be a lease in terms of a part of a building which would be so inclusive, as when a building is leased by name and one room only is excepted therefrom. And in the case of one building, divided into two residences by a vertical

one assumes no obligation to pay for fixtures thereon. *Goff v. Harris*, 5 Man. & G. 573.

⁵²⁹ *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Humiston, Keeling & Co. v. Wheeler*, 175 Ill. 514, 51 N. E. 893; *Hooper v. Farnsworth*, 128 Mass. 487; *Lanpher v. Glenn*, 37 Minn. 4, 33 N. W. 10; *Nashville, C. & St. L. R. Co. v. Heikens*, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298.

⁵³⁰ *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522.

⁵³¹ *Co. Litt.* 5 b, 56 b; *Sheppard's Touchstone*, 94; *Com. Dig.*, Grant (E) 6; note (1) to 2 Wms. Saund. (Ed. 1871) 806; cases cited 2 *Tiffany*, *Real Prop.* § 387.

⁵³² *Bennett v. Brittle*, 4 Rawle (Pa.) 339, where it was decided that the demise of a "barn" covered so much land only as was necessary for its use. See, also, *Patterson v. Graham*, 140 Ill. 531, 30 N. E. 460.

⁵³³ *Doe d. Clements v. Collins*, 2 Term R. 498; *Armstrong v. Crilly*, 51 Ill. App. 504.

⁵³⁴ In *P. H. Snook & Austin Furniture Co. v. Steiner*, 117 Ga. 363, 43 S. E. 775, a lease of premises, describing them by street and number, "including the second and third stories over the same, and including the kitchen in the rear of said premises, and including the second floor over" another building, was construed as a lease of the building alone.

In *Lanpher v. Glenn*, 37 Minn. 4, 33 N. W. 10, where the lease described the property as "the two-story (and rear basement) frame stores, and dwellings over head, situated on the westerly side of J. street," it was decided that the description covered the entire building and hence the lease passed an interest in the land.

⁵³⁵ See ante, § 24 c.

partition, it would be a question of construction whether a lease of one of such residences included the ground thereunder or adjoining.

A lease describing the premises as a certain number on a certain street would generally, it seems, pass not only the land covered by the building but also so much of the adjoining land as is enclosed and ordinarily used therewith and is necessary for its convenient occupation and use.⁵³⁶ Such a description does not, *prima facie* at least, include a part of the building which is not accessible by the door to which the number is affixed.⁵³⁷ A provision, in a lease which describes certain premises as the subject thereof, that the lessee shall have the right to use the adjoining land for certain purposes, does not, it seems clear, make the tenancy extend to such land.⁵³⁸

A lease of a "farm" includes the farm house and farm buildings on the farm,⁵³⁹ and the fact that the farm house is specifically mentioned does not restrict the meaning of the word "farm" so as to exclude the other buildings thereon.⁵⁴⁰

A lease, like any other conveyance, if of land bounded on a public or private way, *prima facie* passes the title to the center of the way if the lessor's title extends so far,⁵⁴¹ and so, in the case

⁵³⁶ *Patterson v. Graham*, 40 Ill. App. 399; *Id.*, 140 Ill. 531, 30 N. E. 668; *Armstrong v. Crilly*, 51 Ill. App. 504; *Hosher v. Hesterman*, 58 Ill. App. 265; *People v. Gedney*, 10 Hun (N. Y.) 151. But in *Schmidt v. Pettit*, 8 D. C. (1 MacArthur) 179, it is assumed that such a description passes the building only, and not the land thereunder.

⁵³⁷ *Houghton v. Moore*, 141 Mass. 437, 6 N. E. 517; *Hosher v. Hestermann*, 58 Ill. App. 265.

⁵³⁸ In *Richardson v. Richardson*, 75 Mass. (9 Gray) 213, it was held that the lessee of part of a house, with a right "to have the improvement of all the homestead land," did not empower the lessee to grant a license to a third person to use such land. But in *Bryant v. Sparrow*, 62

Me. 546, it was held that if the lessor "covenants" that "in connection with the above described premises" the lessee "may use, occupy and improve" the adjacent lot for garden purposes, except such portions as the lessor may sell or use for building, the lessee has the possession of the adjacent lot, so as to justify an action of trespass by him against the landlord. It would seem rather that the lessee was given merely a license to go upon the adjacent land for a particular purpose, for an interference with which he could have sued the lessor upon his covenant. The theory of the decision does not clearly appear.

⁵³⁹ *Sheppard's Touchstone*, 93.

⁵⁴⁰ *Hay v. Cumberland*, 25 Barb. (N. Y.) 594.

⁵⁴¹ See *In re White's Charities*

of a lease of land bounded on a stream, the bed of which belongs to the lessor, the lessee acquires title to the middle of the stream.⁵⁴²

A lease of the "east half" of certain land *prima facie* conveys a half computed by quantity, and not with reference to a line equally distant from the East and West boundaries.⁵⁴³

It has been said that all things which are on the premises for the purpose of making, and which do make, them fit as premises for the particular purposes for which they are used, will pass by a demise of the premises of such.⁵⁴⁴ This statement should, however, it seems, be taken with some qualification. A lease of a particular residence, though referred to as such in the lease, would not, it is presumed, ordinarily pass all furniture placed therein in order to make it suitable for residence purposes.

A lease does not pass to the lessee the right to things found by him on or in the premises, of which neither party knows at the time of the lease,⁵⁴⁵ even though he has a license to excavate for building purposes, and to remove and dispose of the soil excavated in the course of such operations, and though he finds the thing in question while making such excavation.⁵⁴⁶

A lease of a part of a building *prima facie* passes the outer wall adjacent to the rooms or apartment named as a part of the premises leased, and consequently the lessee has the exclusive right to

[1898] 1 Ch. 659; *Hooper v. Farnsworth*, 128 Mass. 487. See cases cited 2 Tiffany, Real Prop. § 392.

⁵⁴² *Ballance v. Peoria*, 180 Ill. 29, 54 N. E. 428; *Dwyer v. Rich, Jr.* 6 C. L. 144. See 2 Tiffany, Real Prop. § 391.

⁵⁴³ *Hartford Iron Min. Co. v. Cambria Min. Co.*, 80 Mich. 491, 45 N. W. 351.

⁵⁴⁴ Lord Esher, M. R., in *Tyne Boiler Works Co. v. Overseers of Longbenton*, 18 Q. B. Div. 81. This was a rating case, and it was said that the same standard would be applied in determining what was to be taken into consideration in determining the ratable value of the premises as in determining what would pass

under a lease, and it was held that machinery in a factory should be considered in determining the ratable value of the factory. That a conveyance of a factory by name, or by terms of description commonly understood to embrace all its essential parts, ordinarily includes machinery therein, see 13 Am. & Eng. Enc. of Law (2d Ed.) at page 668, article "Fixtures," by the present writer.

⁵⁴⁵ *Ferguson v. Ray*, 44 Or. 557, 77 Pac. 600, 102 Am. St. Rep. 648 (gold-bearing quartz deposited by person unknown).

⁵⁴⁶ *Elwes v. Brigg Gas Co.*, 33 Ch. Div. 562 (prehistoric boat).

use such wall for advertising purposes.⁵⁴⁷ But the landlord, or the lessee of other parts of the building, no doubt retains an easement in such walls for the purpose of supporting the balance of the building,⁵⁴⁸ and any serious changes in or injuries to the wall would be restrained.

A lease of one of the lower floors of a building does not include the roof,^{548a} and the same view has been taken of a lease of the upper floor,^{548b} and, likewise, of a lease of all that part of the building above the first floor.^{548c} And even in the case of a one story building, the lease of a store therein has been construed as leaving the roof in the exclusive possession and control of the lessor.^{548d} The lessee has, in such a case, of the lease of a part of the building, merely an easement in the roof for the purpose of protection from the weather.^{548e}

The lease of a floor or apartment ordinarily includes the ceiling thereof, so as to relieve the landlord from any obligations as to the repair of the ceiling during the tenancy.^{548f}

d. **Exceptions and reservations.** The purpose and effect of an exception in a lease, as in any other conveyance, is to exclude from the operation thereof some part of that which is covered by the terms of the general description,⁵⁴⁹ while the office of a reservation is to secure to the grantor some new thing "issuing out of"

⁵⁴⁷ Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388; Baldwin v. Morgan, 43 Hun (N. Y.) 355; Lowell v. Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422; Law v. Haley, 9 Ohio Dec. 785; Carlisle Cafe Co. v. Muse, 67 Law J. Ch. 53, 77 Law T. (N. S.) 515. Fuller v. Rose, 110 Mo. App. 344, 85 S. W. 931, contains a dictum that the lessee of a room in a building has no such right.

A lessee of a storeroom in a one-story building has no rights, it has been held, as to the use or control of the space on the outer wall above the ceiling joists. Booth v. Gaither, 58 Ill. App. 263.

⁵⁴⁸ See McConnel v. Kibbe, 33 Ill. 175, 85 Am. Dec. 265; Graves v. Ber-

dan, 26 N. Y. 501; Harris v. Ryding, 5 Mees. & W. 60.

^{548a} Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346.

As to the lessor's liability for injuries caused by defects in roof, see post, § 88, at notes 326-337.

^{548b} O. J. Gude Co. v. Farley, 28 Misc. 184, 58 N. Y. Supp. 1036.

^{548c} Valentine v. Woods, 110 N. Y. Supp. 990.

^{548d} Macnair v. Ames (R. I.) 68 Atl. 950. See Booth v. Gaither, 58 Ill. App. 263; Payne v. Irvin, 144 Ill. 482, 33 N. E. 756.

^{548e} See post, § 88, at note 328.

^{548f} See post, § 88, at note 319.

⁵⁴⁹ Co. Litt. 21 a; Sheppard's Touchstone, 77 et seq.

the thing granted.⁵⁵⁰ By the common-law authorities, and by the modern English cases, nothing can be the subject of a reservation but a "rent" or other service.⁵⁵¹ But in this country the expression is applied as well to any clause by which, upon a conveyance of land, an easement or right of profit is reserved for the benefit of the grantor.⁵⁵²

The subject of an exception may be a part of the land itself, as when one makes a lease of certain described land, "saving and excepting" a specified part thereof, or it may be of the trees or other vegetable products of the soil growing thereon,⁵⁵³ or the minerals therein,⁵⁵⁴ or of artificial annexations to the soil.⁵⁵⁵

The term, "exception" is not infrequently applied to what may more properly be regarded as a reservation as creating a new right in favor of the grantor or lessor, not previously existing, and so the term "reservation" is occasionally applied to what is properly as exception, as excluding from the operation of the conveyance some part of what would otherwise pass under the language of the description. The courts, in determining whether there is, in the particular case, an exception or a reservation, regard not the language used, but the character of the rights thereby created.⁵⁵⁶

An exception must be of part of the thing leased and not co-extensive therewith, so as to be repugnant thereto.⁵⁵⁷ Nor can it be of something already specifically leased, an exception, for instance, in a lease of twenty houses, of one of such houses, being void.⁵⁵⁸

⁵⁵⁰ Co. Litt. 47 a; Sheppard's Touchstone, 78. 24 S. W. 142, 25 S. W. 932; Sloan v. Lawrence Furnace Co., 29 Ohio St.

⁵⁵¹ Durham & S. R. Co. v. Walker, 2 Q. B. 940; Doe d. Douglas v. Lock, 2 Adol. & E. 705; Wickham v. Hawker, 7 Mees & W. 63; Corporation of London v. Riggs, 13 Ch. Div. 798. 568; Whitaker v. Brown, 46 Pa. 197; Mickethwait v. Winter, 6 Exch. 644; Tucker v. Linger, 8 App. Cas. 508.

⁵⁵² See authorities cited Tiffany, Real Prop. §§ 316, 383. ⁵⁵⁵ Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co., 13 Fed. 646; Badger v. Batavia Paper Mfg. Co., 70 Ill. 302; Sanborn v. Hoyt, 24 Me. 118; Leonard v. Clough, 133 N. Y. 292, 31 N. E. 93.

⁵⁵³ Sheppard's Touchstone, 78; Doe d. Douglas v. Lock, 2 Adol. & E. 705; Jenney v. Brook, 6 Q. B. 323; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Howard v. Lincoln, 13 Me. 122; Putnam v. Tuttle, 76 Mass. (10 Gray) 48. ⁵⁵⁶ 2 Tiffany, Real Prop. § 383, note 142.

⁵⁵⁴ Snoddy v. Bolen, 122 Mo. 479, ⁵⁵⁷ Sheppard's Touchstone, 78; Dorrell v. Collins, Cro. Eliz. 6.

⁵⁵⁵ Sheppard's Touchstone (Pres-ton's Ed.) 78; Co. Litt. 47 a.

The exception must also describe the part excepted with such certainty that it may be identified.⁵⁵⁹

An exception of "all the woods" has been construed as an exception of all the soil on which the wood is growing,⁵⁶⁰ and it has been held that an exception of all the woods, underwoods, and copse, includes the land thereunder, unless a contrary intention appear.⁵⁶¹ But an exception of "timber trees" has been held not to cover the soil,⁵⁶² and the same view has been taken of an exception of "all timber trees, wood, underwood, etc."⁵⁶³

§ 27. Signing of the instrument.

An instrument of lease, if intended to create an estate of such duration as to be within the statute of frauds, must be signed by the lessor in order to be operative,⁵⁶⁴ unless perhaps the presence of his seal might be regarded as dispensing with the necessity of his signature.⁵⁶⁵ Even though there is no signature by the lessor satisfying the statute of frauds, if the lessee enters into possession and pays rent, he holds, according to some cases,⁵⁶⁶ as a periodic tenant upon the terms orally agreed upon, so far as they may be applicable to such a tenancy; and the writing, it seems, would be available in such case for the purpose of refreshing the recollection of either of the parties as to what were the agreed terms,⁵⁶⁷ and might also be admissible against either party as an admission in that respect, so far as it may have been adopted by such party.⁵⁶⁸

Even though the case is not within the statute of frauds, owing to the brevity of the interest intended to be created,⁵⁶⁹ it does not seem that such an unsigned writing would be admissible in evi-

⁵⁵⁹ Sheppard's Touchstone, 78.

⁵⁶⁰ *Ive v. Sams*, Cro. Eliz. 521.

⁵⁶¹ *Whistler v. Paslow*, Cro. Jac. 487.

⁵⁶² *Whistler v. Paslow*, Cro. Jac. 487. And see *Pincomb v. Thomas*, Cro. Jac. 524.

⁵⁶³ *Legh v. Heald*, 1 Barn. & Adol. 622.

⁵⁶⁴ *Mentzer v. Hudson Sav. Bank*, 197 Mass. 325, 83 N. E. 1102; *Nickolls v. Barnes*, 32 Neb. 195, 49 N. W. 342; *Id.*, 39 Neb. 103, 57 N. W. 990;

Laughran v. Smith, 75 N. Y. 205;

Clemens v. Broonfield, 19 Mo. 118.

⁵⁶⁵ See *Cherry v. Heming*, 4 Exch. 631; *Cooch v. Goodman*, 2 Q. B. 580; *Pollock, Contracts* (6th Ed.) 161; *Williams, Real Prop.* (18th Ed.) 152; *Browne, Stat. of Frauds*, § 9.

⁵⁶⁶ See ante, § 25 g (2).

⁵⁶⁷ See 1 *Wigmore, Evidence*, § 734 et seq.

⁵⁶⁸ See 2 *Wigmore, Evidence*, § 1048 et seq.

⁵⁶⁹ See ante, § 25 d.

dence to show the terms of the letting, it being indeed a legal nullity,⁵⁷⁰ and it would presumably be available, as in the other case, only to refresh the recollection of one of the parties as to the terms of the letting, or as an admission against his interest.

The question whether an instrument of lease not signed by the lessor, but signed by the lessee, can operate against the latter, so as to subject him to liability on covenants on his part contained therein, is considered in another connection,⁵⁷¹ as is the question whether the lessee can be held liable on covenants on his part to be performed when the lessor alone signs the instrument.⁵⁷²

The first section of the English statute of frauds requires signing merely "by the parties making or creating" the leases or estates referred to in the statute. This seems plainly to mean that the lessor only need sign the lease; and that the lease is valid to vest an interest in the lessee, although not signed by the latter, would no doubt be everywhere conceded.⁵⁷³ That a conveyance in fee simple is valid without the signature of the grantee is unquestioned, and greater formality could not be required in the conveyance of a lesser estate.

⁵⁷⁰ In *Harris v. Harper*, 48 Kan. 418, 29 Pac. 697, a different view seems to have been taken. There the proposed lessee signed the lease and handed it to the lessor to sign, but the latter failed to do so. The lessee, however, took possession and cultivated the land, and it was held that the lease was valid, since the parties "had acted under it," and since also the lessee "signed the lease" and the lessor "accepted it," the court comparing it to the case of the acceptance of a conveyance by the grantee, which renders it binding on the latter. It has never, however, been decided that the grantor is bound by a conveyance signed by the grantee merely because he receives it from the latter for signature without objection. Likewise, in *Evans v. Conklin*, 71 Hun, 536, 24 N. Y. Supp. 1081, it seems to be

thought that the entry of the lessee validates a lease not signed by the lessor. But in such case it is the permissive entry which creates a tenancy. An entry by a lessee under a lease not executed by the intending lessor has no more effect in validating the lease than the entry of a grantee under an unsigned conveyance in fee would have in validating such a conveyance.

⁵⁷¹ See post, § 53 a.

⁵⁷² See post, § 53 b.

⁵⁷³ See *Crescent City Wharf & Lighter Co. v. Simpson*, 77 Cal. 286, 19 Pac. 426; *Dodd v. Pasch*, 5 Cal. App. 686, 91 Pac. 166; *Baltimore & O. R. Co. v. Winslow*, 18 App. D. C. 438; *Baragiano v. Villani*, 117 Ill. App. 372; *Libbey v. Staples*, 39 Me. 166; *Braman v. Dodge*, 100 Me. 143, 60 Atl. 799; *Witman v. City of Reading*, 191 Pa. 134, 43 Atl. 140.

§ 28. Sealing of the instrument.

The requirement of the statute of frauds that a lease be in writing and signed by the lessor does not involve any necessity that the instrument be sealed by him.⁵⁷⁴ In England it is provided by statute that a lease which is required to be in writing must be sealed,⁵⁷⁵ and occasionally in this country it is provided by statute that a lease creating an interest in land greater than a term of a specified number of years must be under seal.⁵⁷⁶ It has, in England, been decided that a lease, not complying with the statutory requirement of a seal, may be regarded as a valid contract for a lease,⁵⁷⁷ and so, ordinarily, in a court of equity, such a lease would be regarded as a contract for a lease, specifically enforceable, the lack of a seal being consequently, in such a court, immaterial.⁵⁷⁸

⁵⁷⁴ See *Farmer v. Rogers*, 2 Wils. 26; *Boggard v. Gale*, 107 Ill. App. 128; *Lake v. Campbell*, 18 Ill. 106; *Hill v. Woodman*, 14 Me. 38 (semble); *Gay v. Ihm*, 3 Mo. App. 588; *Hunt v. Hazelton*, 5 N. H. 216, 20 Am. Dec. 575; *Den d. Mayberry v. Johnson*, 15 N. J. Law (3 J. S. Green) 116; *Stoddard v. Whiting*, 46 N. Y. 627; *O'Brien v. Smith*, 37 N. Y. St. Rep. 41, 13 N. Y. Supp. 408; *Id.*, 129 N. Y. 620, 29 N. E. 1029; *Woolsey v. Henke*, 125 Wis. 134, 103 N. W. 267; *Browne*, Stat. of Frauds, § 6.

⁵⁷⁵ Stat. 8 & 9 Vict. c. 106.

⁵⁷⁶ See e. g., *Connecticut* Gen. St. 1892, §§ 4029, 4041 (Lease for over one year); *Delaware* Rev. Code 1893, p. 866 (Unsealed lease good for one year only); *Maryland* Pub. Gen. Laws 1904, art. 21, §§ 1, 10 (Estate above seven years); *Michigan* Comp. Laws 1897, § 8956 (semble); *New Hampshire* Pub. St. 1901, c. 137, § 3 (semble); *Ball. Ann. Codes Washington* 1897, § 4568 (Lease for over one year); *West Virginia* Code 1906, § 3020 (Lease for over five years).

Not infrequently the statute in

terms provides that a "conveyance" or a "deed" shall be under seal, without clearly stating whether this includes a lease. The word "conveyance" would seem, *prima facie* at least, to include a lease. The word "deed" itself properly means a sealed instrument, as is recognized in *ArbENZ v. Exley*, *Walkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957, where the statute providing that a lease for over five years shall be "by deed" is assumed to require a sealed instrument.

⁵⁷⁷ See *Bond v. Rosling*, 1 Best & S. 371; *Rollason v. Leon*, 7 Hurl. & N. 73; *Tidey v. Mollett*, 16 C. B. (N. S.) 298; *Parker v. Taswell*, 2 De Gex & J. 559.

⁵⁷⁸ Such is the view adopted by a court of equity in regard to an unsealed conveyance in fee. *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *Switzer v. Knapps*, 10 Iowa, 72, 74 Am. Dec. 375; *Jewell v. Harding*, 72 Me. 124; *Brinkley v. Bethel*, 56 Tenn. (9 Heisk.) 786; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

If the intended lessee enters and pays a periodic rent, he will ordinarily be, at law, a periodic tenant upon the terms stated in the instrument, so far as they are applicable to a tenancy of that character,⁵⁷⁹ as is one entering under a lease void under the statute of frauds.⁵⁸⁰

It has been said that a lease for a life or lives, as distinct from a lease for years, must, since it creates a freehold interest, be under seal.⁵⁸¹ This seems questionable, in the absence of any local statutory requirement to that effect. At common law a lease for life, as any other conveyance of a freehold interest, took effect by livery of seisin alone, and if the words of limitation necessary to create the estate intended were used,⁵⁸² and witnesses were present who could prove the use of such words, it was entirely immaterial whether they were put in writing,⁵⁸³ though writing, on account of its greater certainty, was ordinarily employed, and writings were usually sealed.⁵⁸⁴ It was not until the enactment of the statute of frauds that livery of seisin was required to be accompanied by writing in order to create a freehold estate, and this statute, while requiring the writing to be signed, imposed no requirement of a

⁵⁷⁹ *Stewart v. Apel*, 4 Houst. (Del.) 314, 5 Houst. 189; *Arbenz v. Exley*, *Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149 61 L. R. A. 957.

⁵⁸⁰ See ante, § 25 g (1).

⁵⁸¹ There are *dicta* to that effect, made without any discussion, in *Doe d. Warner v. Browne*, 8 East, 165 (per Lawrence, J.); *Browne v. Warner*, 14 Ves. Jr. 156 (per Eldon, L. C.). These are referred to with apparent disapproval in *Comyn, Landl. & Ten.* p. 55, note. And that no seal was necessary, in the case of a lease for life, previous to the statute 8 & 9 Vict., see 3 Preston, *Abstracts of Title*, 114. To the same effect, apparently, is 2 Platt, *Leases*, 3. The decision in *People v. Gillis*, 24 Wend. (N. Y.) 201, to the effect that a lease for life requires a seal, is based on the local statutory provision there referred to, requiring a

seal for the creation of a freehold interest.

Even a conveyance in fee simple is perfectly valid, it would seem, without any seal, in the absence of a statutory requirement of a seal, or unless it is to be regarded as taking effect as a conveyance by bargain and sale and the statute of Enrollments is in force in the particular jurisdiction. See 2 Tiffany, *Real Prop.* § 403. There are, however, a number of cases which have decided the contrary. *Id.*

⁵⁸² No words of limitation were necessary in the case of a lease for life. See *Co. Litt.* 42 a.

⁵⁸³ *Litt.* §§ 214, 216; *Co. Litt.* 48 b, 121 b, 143 a; *Sheppard's Touchstone*, 203. See *Challis, Real Prop.* (2d Ed.) 363; 2 *Pollock & Maitland, Hist. Eng. Law* (2d Ed.) 83.

⁵⁸⁴ *Williams, Real Prop.* (18th Ed.) 147.

seal. The common-law requirement of livery of seisin has been dispensed with by statute in some jurisdictions, and in others it would no doubt be regarded as obsolete, but the withdrawal of the necessity of livery does not, it is conceived, introduce any necessity of sealing. But a lease of an incorporeal thing, for however brief a period, must, at common law, be by deed, that is, by a sealed instrument, since it lies in grant and not in livery,⁵⁸⁵ and presumably this is the law in all jurisdictions where the efficacy of a seal is still recognized and no statutory change has intervened.⁵⁸⁶ If, however, an incorporeal thing is appurtenant to land, it will ordinarily pass, though not expressly mentioned, by a lease of the land itself.⁵⁸⁷

§ 29. Attestation of the instrument.

In some states an instrument of lease, in order to create an interest of a specified duration, is required to be witnessed.⁵⁸⁸ In one state it has been held that a want of such attestation will prevent the vesting of any legal interest in the lessee,⁵⁸⁹ but it more usually affects merely the validity of the lease as against third persons without notice of its contents.^{589a}

§ 30. Acknowledgment of the instrument.

In many states it is provided by statute that an instrument of lease shall be acknowledged before an official.⁵⁹⁰ Such a require-

⁵⁸⁵ *Somerset v. Fogwell*, 5 Barn. & C. 875; *Mayfield v. Robinson*, 7 Q. B. 486; *Williams, Real Prop.* (18th Ed.) 472.

⁵⁸⁶ See cases cited 2 *Tiffany, Real Prop.* § 403, note 333.

⁵⁸⁷ See post, § 125.

⁵⁸⁸ See e. g., *Connecticut Gen. St.* 1902, § 4041; *Maryland Pub. Gen. Laws* 1904, art. 21, §§ 1, 10; *Michigan Comp. Laws* 1897, § 8962 (semble); *Minnesota Rev. Laws* 1905, § 3346; *Nebraska Comp. St.* 1905, § 4754 (Lease for over one year); *New Hampshire Pub. St.* 1901, c. 137, §§ 3, 4; *Ohio Rev. St.* 1906, § 4106; *Ball. Ann. St. & Codes Washington* § 4568

(Lease for over one year); *Wisconsin Rev. St.* 1898, §§ 2216, 2326.

⁵⁸⁹ *Richardson v. Bates*, 8 Ohio St. 257, 32 Am. Dec. 707; *Abbott v. Bosworth*, 36 Ohio St. 605. So in *Langmede v. Weaver*, 65 Ohio St. 17, 60 N. E. 992, it is said that a lease not witnessed as required by law is at most a mere contract for a lease and conveys no interest in the land.

^{589a} *Weaver v. Coumbe*, 15 Neb. 167, 17 N. W. 357; *Johnson v. Phoenix Mut. Life Ins. Co.*, 46 Conn. 92; *Ripley v. Cross*, 111 Mass. 41.

⁵⁹⁰ See e. g., *Kirby's Dig. St. Arkansas* 1904, § 742 et seq.; *California Civ. Code*, § 1161; *Connecticut*

ment is ordinarily imposed only as a preliminary to the record of the instrument for the purpose of charging a subsequent purchaser of the land with notice thereof, and, though unacknowledged, the instrument is effective as between the parties.⁵⁹¹ Occasionally, however, the acknowledgment is regarded as necessary to render the instrument effective for any purpose.⁵⁹² In some states the lack of acknowledgment, as a prerequisite to record, may be supplied by proof by the witnesses of its execution.⁵⁹³

§ 31. Delivery of the instrument.

In order that a lease be effective to vest an interest in the lessee, it must be delivered,⁵⁹⁴ that is, there must be an expression on the

Gen. St. 1902, § 4041; Burns' Ann. St. *Indiana* 1901, § 3352; *Maryland* Code Pub. Gen. Laws 1904, art. 21, § 1; *Michigan* Comp. Laws 1897, §§ 8956, 8962; *Minnesota* Rev. Laws 1905, § 3348; *Missouri* Rev. St. 1899, § 906; *Nebraska* Comp. St. 1905, § 4755; 2 Gen. St. *New Jersey* p. 1036; *New Hampshire* Pub. St. 1901, c. 137, §§ 3, 4; *Ohio* Rev. St. 1906, § 4106; *Vermont* Pub. St. 1906, § 2581.

In *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280, it was decided that a lease for five years, with a covenant for renewal for five years, was a "lease for more than seven years from the making thereof," within a statute requiring such a lease to be recorded in order to be valid against a bona fide purchaser, so as to deprive the lessee of the right to the renewal as against such a purchaser, if not recorded. The court refuses to say whether it would be invalid as against the purchaser as regards the first five-year term.

⁵⁹¹ *Johnson v. Phoenix Mut. Ins. Co.*, 46 Conn. 92; *Lake v. Campbell*, 18 Ill. 106; *McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719; *Wihelm v. Mertz*, 4 G. Greene (Iowa) 54; *Wea-*

ver v. Coumbe, 15 Neb. 167, 17 N. W. 357; *Town of Lemington v. Stevens*, 48 Vt. 38.

⁵⁹² *Anderson v. Critcher*, 11 Gill & J. (Md.) 450, 37 Am. Dec. 72; *Bro-hawn v. Van Ness*, 1 Cranch, C. C. 366, Fed. Cas. No. 1, 920; *Richardson v. Bates*, 8 Ohio St. 257, 32 Am. Dec. 707. See *Wm. W. Kendall Boot & Shoe Co. v. Bain*, 55 Mo. App. 264.

In *McGlauffin v. Holman*, 1 Wash. St. 239, 24 Pac. 439, it is decided that though a lease is not acknowledged, if the lessee has taken possession and made improvements, he is entitled to specific performance. And see *Mounts v. Goranson*, 29 Wash. 261, 69 Pac. 740. But see ante, § 25 g (5) as to the theory of specific performance of a lease.

⁵⁹³ See *Michigan* Comp. Laws 1897, § 8969; *Minnesota* Rev. Laws 1905, § 3347; 2 Gen. St. *New Jersey* p. 1036; *Nebraska* Comp. St. 1905, § 4762; *New York* Real Prop. Law, § 241; *Vermont* Pub. St. 1906, §§ 2590-2596.

⁵⁹⁴ *Piper v. Simpson*, 6 Ont. App. 175; *Howard v. Carpenter*, 11 Md. 259; *Jordan v. Davis*, 108 Ill. 336; *Kelsey v. Tourtelotte*, 59 Pa. 184; *Whitford v. Laidler*, 94 N. Y. 145, 46

part of the lessor, by word or act, of his intention that the lease shall take effect.⁵⁹⁵ The requisites of a valid delivery in the case of a lease are no doubt the same as in the case of any other conveyance. In order that there be a valid delivery, it is not necessary that the written instrument itself be physically transferred by the lessor to the lessee, or to a third person on his behalf.⁵⁹⁶ And, on the other hand, though there is such physical transfer, it does not constitute a delivery, if it is for a special purpose and the instrument is not intended to take effect.⁵⁹⁷

The fact that the lessor has the lease recorded ordinarily raises a presumption of delivery, but this presumption may be overcome by evidence that there was no intent on his part that it should become immediately operative.⁵⁹⁸ It has been said that the fact that the lessee has gone into possession of the land raises a presumption of delivery of the lease,⁵⁹⁹ but this can be so, it seems, only if the entry is with the lessor's consent.

A lease, like any other conveyance, may be delivered in escrow, that is, it may be deposited with a third person to be held by him until the performance of a condition by the lessee, whereupon it will take effect as of the time when it was so deposited.⁶⁰⁰

§ 32. Acceptance of the instrument.

In order that a lease may operate to vest an interest in the lessee, it is not necessary, it seems, according to the English decisions, that it be accepted by him, or, in other words, his acceptance will

Am. Rep. 131; *Stetson v. Briggs*, 114 Cal. 511, 46 Pac. 603.

⁵⁹⁵ See 2 *Tiffany*, Real Prop. § 406, where the writer has discussed the subject of delivery at some length.

⁵⁹⁶ *Witman v. Reading*, 191 Pa. 134, 43 Atl. 140; *Reynolds v. Greenbaum*, 80 Ill. 416; *Oneto v. Restano*, 89 Cal. 63, 26 Pac. 788.

⁵⁹⁷ *Jordan v. Davis*, 108 Ill. 336. And see cases cited 2 *Tiffany*, Real Prop., § 406, note 376.

In *Lawrence v. Bell*, 132 Ala. 308, 31 So. 503, it was decided that there was a sufficient delivery although one of the duplicate copies of the

instrument was retained by the lessee instead of being returned to the lessor as was intended, and although an inventory of certain personal property included in the lease was not attached to the copies of the lease was intended.

⁵⁹⁸ See authorities cited 2 *Tiffany*, Real Prop., § 406.

⁵⁹⁹ *David Stevenson Brew. Co. v. Culbertson*, 18 Misc. 486, 41 N. Y. Supp. 1039.

⁶⁰⁰ *Gudgen v. Bessett*, 6 El. & Bl. 986; *Gorsuch v. Rutledge*, 70 Md. 272; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131.

be presumed until he expresses his dissent.⁶⁰¹ And this view would presumably be adopted in those states in which the courts have followed the English rule, that an acceptance of a conveyance in fee simple is not necessary to its validity.⁶⁰² In other states, however, in which a conveyance in fee simple is regarded as invalid until accepted, a conveyance by way of lease would no doubt also be so regarded.⁶⁰³ But even in these states, if a lease is made to an infant, or other person, not *sui juris*, and it is of a beneficial character, it is valid even though not accepted by him, or, as it is sometimes expressed, there is in such case a presumption of acceptance.⁶⁰⁴ A lease to such a person is perfectly valid unless and until repudiated by him.⁶⁰⁵

Though a lease is, as above stated, it seems, in some jurisdictions, valid, for the purpose of vesting an interest in the lessee, that is, as a conveyance, without any acceptance by him, he is not regarded as actually a tenant, as is explained later,^{605a} until he has entered on the premises. And until the lessee has in some way accepted or adopted the lease, he cannot be held personally responsible upon the covenants contained in the instrument.⁶⁰⁶ His entry on the premises is regarded as evidence of an acceptance for the purpose of imposing such liability on him.⁶⁰⁷

§ 33. Recording of the instrument.

The statutes of many of the states require that a lease for a term greater than a period named in the statute^{607a} shall be re-

⁶⁰¹ See 2 Platt, Leases, 5; Gorton's 36 N. Y. Supp. 801; Majors v. Good-Case, 2 Rolle, Abr. 787; Thompson rich (Tex. Civ. App.) 54 S. W. 919; v. Leach, 2 Vent. 198, 201. Shelton v. Durham, 76 Mo. 434;

⁶⁰² See authorities cited 2 Tiffany, Ahrns v. Chartiers Valley Gas Co., Real Prop. § 407. 188 Pa. 249, 41 Atl. 739 (semble);

⁶⁰³ See State Board of Land Com'rs Goldberg v. Wood, 45 Misc. 327, 90 v. Carpenter, 16 Colo. App. 436, 66 N. Y. Supp. 427.

⁶⁰⁴ See ante, § 53 b, at note 53. ^{607a} A lease for five years with a covenant for renewal for five more years has been regarded as a lease for more than seven years, within a statute requiring the record of such a lease. Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280; Leominster Gaslight Co. v. Hillery, 197 Mass. 267, 83 N. E. 870.

⁶⁰⁵ See ante, § 21 b (2).
^{605a} See post, § 37.
⁶⁰⁶ Adams v. Doelger, 15 Misc. 140,

corded,⁶⁰⁸ with the result that if not recorded it is invalid as against a bona fide purchaser for value from the lessor,⁶⁰⁹ or a subsequent lessee,⁶¹⁰ or, occasionally, as against creditors of the lessor.⁶¹¹ Such a requirement that a lease be recorded, as in the case of conveyances in fee, does not usually affect the validity of the instrument as between the parties,⁶¹² or as against third persons other than purchasers.⁶¹³ In two or three states, however, the statute has been construed as invalidating the instrument for all purposes if not recorded.⁶¹⁴

In states where the requirement of record is regarded as intend-

⁶⁰⁸ See e. g., *Connecticut* Gen. St. § 4041; *Burn's Ann. St. Indiana* 1901, § 3350 a; *Maine* Rev. St. 1903, c. 75, § 11; *Maryland* Code Pub. Gen. Laws 1904, art. 21, §§ 1, 10; *Massachusetts* Rev. Laws 1902, c. 127, § 4; *New Hampshire* Pub. St. 1901, c. 137, § 4; 1 *Gen. St. New Jersey*, p. 857; *New York* Real Prop. Law, §§ 240, 241; *North Dakota* Rev. Codes 1905, § 5038; *South Carolina* Civ. Code 1902, §§ 214, 2456; *South Dakota* Civ. Code 1903, § 986; *Vermont* Pub. St. 1906, § 2581.

It has been decided that a lease is a conveyance within a statute requiring a conveyance to be recorded in order to be effective as against a purchaser without notice. *Milliken v. Faulk*, 111 Ala. 658, 20 So. 594; *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *Commercial Bank of Santa Ana v. Pritchard*, 126 Cal. 600, 59 Pac. 130. *Contra*, *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. 873 (in view of other statutory provisions).

In *Faxon v. Ridge*, 87 Mo. App. 299, it is decided that a lease is to be recorded in the real estate records, as being an "instrument whereby real estate may be affected," within the meaning of the statute.

A mortgage of a leasehold is a conveyance to be recorded among the

real estate conveyances rather than among mortgages of chattels; see *Westchester Trust Co. v. Hobby Bottling Co.*, 185 N. Y. 577, 78 N. E. 1114.

⁶⁰⁹ *Milliken v. Faulk*, 111 Ala. 658, 20 So. 594; *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280; *City Council of Charleston v. Page*, *Speer Eq.* (S. C.) 159.

⁶¹⁰ *Thompson v. Christie*, 138 Pa. 230, 20 Atl. 934, 11 L. R. A. 236. Compare *Hodge v. Giese*, 43 N. J. Eq. 342, 11 Atl. 484.

⁶¹¹ *Clift v. Stockdon*, 14 Ky. (4 Litt.) 215; *Flower v. Pearce*, 45 La. Ann. 853, 13 So. 150; *Chapman v. Gray*, 15 Mass. 439.

⁶¹² *Johnson v. Phoenix Mut. Life Ins. Co.*, 46 Conn. 92; *Baldwin v. Walker*, 21 Conn. 168; *Lake v. Campbell*, 18 Ill. 106; *Kittle v. St. John*, 10 Neb. 605, 7 N. W. 271; *Clarke v. Merrill*, 51 N. H. 415.

⁶¹³ *Barnum v. Landon*, 25 Conn. 137; *Anthony v. New York, P. & B. R. Co.*, 162 Mass. 60, 37 N. E. 780.

⁶¹⁴ *Brohawn v. Van Ness*, 1 *Cranch*, C. C. 366, Fed. Cas. No. 1,920; *Anderson v. Critcher*, 11 *Gill & J.* (Md.) 450, 37 *Am. Dec.* 72; *Polk v. Reynolds*, 31 *Md.* 106; *Baltimore & O. R. Co. v. West*, 57 *Ohio St.* 161, 49 *N. E.* 344.

ed for the protection of purchasers only, notice of the lease on the part of the purchaser will be as effective as record for the protection of the lessee.⁶¹⁵ In most jurisdictions, presumably, the fact that the lessee is in possession of the premises would be sufficient to charge a purchaser with notice of the lease.⁶¹⁶

It has been decided, in jurisdictions where a lease is invalid as between the parties if not acknowledged or recorded, that the lessee entering thereunder and paying rent is to be regarded as tenant from year to year upon the terms of the lease except as to duration,⁶¹⁷ and that he holds upon the terms of the lease has been asserted, without reference to the question of payment of rent.⁶¹⁸ Ordinarily, it would seem, in accordance with the rules previously stated,⁶¹⁹ the lessee so entering would be in the first place a tenant at will, becoming a tenant from year to year or month to month upon payment of rent by him, according as the rent is a yearly or a monthly rent, or he might perhaps be regarded as a periodic tenant even without the payment of a periodic rent, by reason of the reservation of such a rent.^{619a}

§ 34. Lease made by agent.

a. Agent's power to make lease. There have been occasional

⁶¹⁵ *Whittemore v. Smith*, 50 Conn. 376; *McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719; *Anderson v. Harris*, 1 Bailey Law (S. C.) 315. heirs," the lessee entering thereunder was, as regards a purchaser from the lessor, a tenant from year to year upon the terms of the lease.

⁶¹⁶ It is so decided in *Scherer v. Cuddy*, 85 Cal. 270, 24 Pac. 713; *Haworth v. Taylor*, 108 Ill. 275; *Leebrick v. Stahle*, 68 Iowa, 515, 27 N. W. 490; *Disbrow v. Jones*, Har. (Mich.) 48. But see *Jokinsky v. Miller*, 44 Misc. 239, 88 N. Y. Supp. 928. Since the lease was, by the terms of the statute, valid as regards the lessor, the peculiar result follows that the lessee was a tenant for the term of the lease so long as the property was retained by the lessor, and became a tenant from year to year upon its conveyance to another.

⁶¹⁷ *Baltimore & O. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344.

⁶¹⁸ *Emrich v. Union Stock Yard Co.*, 86 Md. 482, 38 Atl. 943.

In *Thurber v. Dwyer*, 10 R. I. 355, it was decided that, though the statute requiring a lease to be acknowledged provided that it should be valid "between the parties and their

⁶¹⁹ See ante, §§ 14 b (2) (b), 25 g (1).

^{619a} See ante, §§ 14 b (2) (b), 25 g (1).

In *Baldwin v. Walker*, 21 Conn. 168; *Wilson v. Griswold*, 80 Conn. 14, 66 Atl. 783, it is apparently considered that if the statute requires

decisions as to the authority of a person to make a lease or a particular class of lease as agent on behalf of another. Thus it has been decided that one authorized to make a lease for three years cannot make one for that period with a provision for renewal,⁶²⁰ and that one authorized to lease cannot bind his principal by a covenant to irrigate.⁶²¹ Authority to collect rent does not in itself authorize one to make a lease.⁶²² There is one case in which it was apparently decided that an authority to take charge of land and obtain an income from it during the owner's absence from the country authorized the agent to make a lease, which was valid, however, only so long as the owner was absent.⁶²³

One taking possession under a lease made by one person purporting to act for another, but without authority from such other, does not become a tenant at will or periodic tenant under the asserted principal, since his possession is without the latter's assent.⁶²⁴ The general rule as to the status of one entering under an invalid lease⁶²⁵ cannot apply in such case. If, however, the asserted principal accepts rent from the lessor, or otherwise expresses assent to his taking and holding of possession, the latter will become a tenant at will or periodic tenant, as the case may be.

b. **Form of authorization.** The first section of the English statute requires leases to be in writing and signed by the parties making or creating the same, "or their agents thereunto lawfully

the record only of leases for over the one year, a lease for five years, though not recorded, is valid for one year.

⁶²⁰ *Schumacher v. Pabst Brew. Co.*, 78 Minn. 50, 80 N. W. 838.

⁶²¹ *Durkee v. Carr*, 38 Or. 189, 63 Pac. 117.

⁶²² *Dieckman v. Weirich*, 24 Ky. Law Rep. 2340, 73 S. W. 1119.

⁶²³ *Antoni v. Belknap*, 102 Mass. 193. The authority given the agent by the owner is stated to have been to "take charge of the land while he was gone and make it pay the best way he could," and the court says that "his return terminated the agency; and his demand upon

the defendants and entry upon the premises put an end to whatever estates the defendants (the lessees) had acquired therein." It seems that the court must have regarded the agent as having authority in effect only to make a lease subject to a special limitation terminating it upon the owner's return, and that, in so far as the lease undertook to omit such limitation, it was invalid. There is no statement of the grounds of the court's conclusion.

⁶²⁴ *Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 224. See *Sanford v. Johnson*, 24 Minn. 172.

⁶²⁵ See ante, §§ 14 b (2), 25 g 1.

authorized by writing," while the fourth section merely requires that the agreements therein referred to be signed by some person "lawfully authorized," thus dispensing with any necessity that the authorization be in writing.⁶²⁶ In this country, in the states in which the provisions of the first section of the English statute have been substantially re-enacted,⁶²⁷ the requirement that the agent's authority shall be in writing has been retained.⁶²⁸ In other states, likewise, it is sometimes so provided, but in some the language of the fourth section, requiring the agent to be "lawfully authorized," is adopted, and occasionally it is provided merely that the instrument shall be signed by the lessor "or his attorney."⁶²⁹

⁶²⁶ See Browne, Stat. of Frauds, § 370 a.

⁶²⁷ See ante, note 344.

⁶²⁸ See *Williams v. Mershon*, 57 N. J. Law, 242, 30 Atl. 619; *Jennings v. McComb*, 112 Pa. 518, 4 Atl. 812. But in *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938, the specific requirement of the statute that the agent's authority shall be in writing seems to be ignored. Compare *Lehman v. Nolting*, 56 Mo. App. 549; *Shea v. Seelig*, 89 Mo. App. 146.

That the person purporting to act as agent puts the lessee in possession does not validate the lease. *Elliott v. Bankston* (Ala.) 45 So. 173.

⁶²⁹ Of the statutes enumerated in note 345 ante, as providing that no estate for more than one year shall be created except by writing, those of California, Colorado, Idaho, Kansas, Michigan, Minnesota, Nebraska, Nevada, New York North Dakota, Ohio, Oregon, South Dakota, Texas, Utah and Wisconsin require the agent's authority to be in writing. In those of Maine, Massachusetts, New Hampshire and Vermont, it is provided that it shall be signed by the lessor "or his attorney" In North Carolina the agent is required

to be "lawfully authorized." In those of Delaware, District of Columbia, Georgia, Indiana, Kentucky, Mississippi, Rhode Island and West Virginia, there is no reference to an agent or attorney. See *Borderre v. Den*, 106 Cal. 594, 39 Pac. 946; *Coudert v. Cohn*, 118 N. Y. 309, 23 N. E. 298, 7 L. R. A. 69, 16 Am. St. Rep. 761; *Long v. Poth*, 16 Misc. 85, 37 N. Y. Supp. 670; *Chesebrough v. Pingree*, 72 Mich. 438, 40 N. W. 747; *Judd v. Arnold*, 31 Minn. 430, 18 N. W. 151. In *Toan v. Pline*, 60 Mich. 385, 27 N. W. 557, it is said that "while the statute of frauds makes leases for more than one year invalid if the agent is not authorized in writing, yet, where the lessee has been put in possession, and has enjoyed the premises for a full year, the executed agreement is good for that period at least, and is not within the statute." The cases cited in support of this statement involve applications of the doctrine of part performance.

Of the statutes referred to in note 346, supra, as requiring an agreement or contract for leasing to be in writing, those of California, Michigan, Minnesota, Montana, North

The fact that the instrument of lease executed by the agent is under seal does not necessitate that the authority be under seal, if the lease is valid without a seal,⁶³⁰ but if a seal is necessary to the lease, the authority must be under seal, this being in accord with the general rule in regard to the authority of agents.⁶³¹

c. **Ratification.** While a lease made by one who has no authority to make it is ordinarily not binding on the person for whom it purports to be made,⁶³² it may be ratified by such person, that is, he may render it valid as against him by his subsequent assent.⁶³³ The fact that one to whom a lease has been made by one acting without authority is permitted by the owner to enter on the land has been regarded as showing a ratification,⁶³⁴ and this conclusion is no doubt strengthened by the owner's re-

Dakota, Oklahoma, South Dakota and Utah require the authority of the agent to be in writing. Those of Iowa, New York, Oregon and Wisconsin require merely that the agent be "lawfully authorized," while those of Colorado, Nebraska and Wyoming make no reference to a signature by an agent.

Of the statutes enumerated in note 349, ante, providing that "no action shall be brought" on a lease if not in writing, those of Connecticut and Virginia merely provide that the writing shall be signed by "the party to be charged" or his agent, while those of Arkansas, Florida, Illinois, Kentucky, Rhode Island and Tennessee require such agent to be "lawfully" or "properly authorized," and that of Arizona makes no reference to a signature by an agent. See *Johnson v. Somers*, 20 Tenn. (1 Humph.) 268.

⁶³⁰ *Marshall v. Rugg*, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679; *Bless v. Jenkins*, 129 Mo. 647, 3 S. W. 938; *Lehman v. Nolting*, 56 Mo. App. 549; *Mechem*, Agency §§ 95, 141.

⁶³¹ *Lobdell v. Mason*, 71 Miss. 937; *Huffcut*, Agency (2d Ed.) § 26.

⁶³² See *Moore v. Rankin*, 33 Misc. 749, 67 N. Y. Supp. 179; *Hodges v. Howard*, 5 R. I. 149.

⁶³³ So a lease made by an agent of a corporation may be ratified by the corporation. *Swartzwelder v. U. S. Bank*, 24 Ky. (1 J. J. Marsh) 38; *Brahn v. Jersey City Forge Co.*, 38 N. J. Law, 74. See *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677, 67 Atl. 82.

In *Anderson v. Conner*, 43 Misc. 384, 87 N. Y. Supp. 449, it appears to be decided that the principal may ratify the lease though the agent in making it purported to be acting for himself and not for another. This does not accord with the general rule as to what acts are capable of ratification. See *Huffcut*, Agency (2d Ed.) 44; *Hamlin v. Sears*, 82 N. Y. 327.

⁶³⁴ *Hallberg v. Brosseau*, 64 Ill. App. 520. Allowing the lessee to occupy and giving the lease in evidence was held to show ratification, in *McClain v. Malone*, 5 Ind. 237.

ceipt of rent.⁶³⁵ The principal's acceptance of rent alone may show a ratification,⁶³⁶ if this is with knowledge of the terms of the letting.⁶³⁷

When the agent's authority is required to be in writing, a ratification of a lease made by an agent must be in writing, while if the original authority may be oral, the ratification may be oral.⁶³⁸

d. **Form and execution of lease.** One undertaking to make a lease under seal as agent for another must, ordinarily, provided the seal is not superfluous, execute the lease in the name of his principal and not in his own name.⁶³⁹ It has been decided, however, that though the instrument named the agent as the party of the first part, it might, if signed by the principal as such party, be regarded as the act of the latter.⁶⁴⁰ A lease not required to be under seal is properly executed in the same way, but is, it seems, valid though executed in the name of the agent.⁶⁴¹

If a lease appears to be the act of the lessor in his own behalf,

⁶³⁵ *Brahn v. Jersey City Forge Co.*, 38 N. J. Law, 74.

⁶³⁶ *Kriz v. Peege*, 119 Wis. 105, 95 N. W. 108.

⁶³⁷ *Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 225; *Galewski v. Appelbaum*, 32 Misc. 203, 65 N. Y. Supp. 694.

⁶³⁸ *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Judd v. Arnold*, 31 Minn. 430, 18 N. W. 151; *Long v. Poth*, 16 Misc. 85, 37 N. Y. Supp. 670; *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Dumn v. Rothermel*, 112 Pa. 272, 3 Atl. 800; *Williams v. Mershon*, 57 N. J. Law, 242, 30 Atl. 619. But see *Anderson v. Conner*, 43 Misc. 384, 87 N. Y. Supp. 449.

If the lease is made without the necessary written authority, it has been held, a conveyance of the premises which excepts the lease from the general warranty therein constitutes a valid ratification. *Christopher v. National Brewing Co.*, 72 Mo. App. 121.

In *Kriz v. Peege*, 119 Wis. 105, 95

N. W. 108, involving an action for rent, while the statute required a lease to be signed by the maker or his agent authorized in writing, the ratification was oral merely. The court says that this "made a good contract for a lease, enforceable in equity as from the date thereof, and binding upon the lessee at law as regards the rent, so long as the enjoyment of the property actually continued." No explanation of this language is given. Perhaps it has reference to the equitable doctrine of part performance of a lease invalid under the statute of frauds. Ante, § 25 g (5).

⁶³⁹ *Murray v. Armstrong*, 11 Mo. 209; *Potter v. Bassett*, 35 Mo. App. 417; *Harms v. McCormick*, 132 Ill. 104, 22 N. E. 511. See *Huffcut, Agency* (2d Ed.) § 127.

⁶⁴⁰ *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631; *Douglass v. Branch Bank*, 19 Ala. 659.

⁶⁴¹ See 1 *Clark & Skyles, Agency*, p. 672; *Huffcut, Agency* (2d Ed.) 251.

the lessee cannot ordinarily show that the lessor acted in making it as the agent of another,⁶⁴² since this would involve an assertion by the tenant of defects in the lessor's title.⁶⁴³ But an undisclosed principal may, if the instrument is not under seal, ordinarily sue upon the contractual stipulations entered into by the lessee, in accordance with the general rule applicable in favor of undisclosed principals.⁶⁴⁴

§ 35. Lease made on Sunday.

The fact that a lease was made on Sunday has been regarded as rendering the whole transaction invalid,⁶⁴⁵ and the fact that the lessee took possession of the land does not, it has been decided, render him liable under his express contract to pay rent,⁶⁴⁶ nor justify a reference to the lease in order to ascertain the terms of the holding.⁶⁴⁷ The lessee taking possession is, however, liable in use and occupation,⁶⁴⁸ and he may become liable as for rent by his conduct in paying instalments of rent or otherwise.⁶⁴⁹ In one case⁶⁵⁰ it is somewhat ambiguously said that the lease, though invalid, might be looked to as a circumstance, with others, to account for the after conduct of the parties in relation to the possession of the premises, and it was held, apparently, that the making of the invalid lease for a year was evidence to show that the lessee was entitled to retain possession for that time.

§ 36. Construction of the instrument.

The courts have in particular cases had occasion, in construing the language of an instrument of lease, to apply certain general rules applicable in the construction of all written instruments.⁶⁵¹

⁶⁴² *Holt v. Martin*, 51 Pa. 499; *Seyfert v. Bean*, 83 Pa. 450; *Kendall v. Carland*, 59 Mass. (5 Cush.) 74.

⁶⁴³ See post, § 78 j.

⁶⁴⁴ See post, § 56 b.

⁶⁴⁵ See authorities cited in the notes next following.

⁶⁴⁶ *McIntosh v. Lee*, 57 Iowa, 356, 10 N. W. 895. But see *Bostic Co. v. Eggleston* (Ind. T.) 104 S. W. 566, to the contrary.

⁶⁴⁷ *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787.

⁶⁴⁸ *Stebbins v. Peck*, 74 Mass. (8 Gray) 553; *McIntosh v. Lee*, 57 Iowa, 356, 10 N. W. 895.

⁶⁴⁹ See *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787.

⁶⁵⁰ *Rainey v. Capps*, 22 Ala. 288.

⁶⁵¹ These general rules are summarized by the present writer in 17 Am. & Eng. Enc. Law (2d Ed.) p. 1.

The object being to discover the intention of the parties,⁶⁵² the language of the whole instrument will be considered with this in view,⁶⁵³ and inconsistent clauses may be ignored as being the result of mistake.⁶⁵⁴ The circumstances existing at the time of the making of the lease may be considered for the purpose of arriving at the meaning of the parties.⁶⁵⁵ Likewise, the construction placed by the parties themselves on the language used may be considered⁶⁵⁶ in case of doubt as to its meaning.⁶⁵⁷

It is said that, in case of doubt,⁶⁵⁸ the lessee is to be favored rather than the lessor.⁶⁵⁹

If the instrument contains both written and printed language, and any inconsistency exists between them, effect should be given to the former rather than to the latter.⁶⁶⁰

If two or more instruments can be regarded as part of one transaction, they should be construed together.⁶⁶¹

⁶⁵² *Raymond v. Hodgson*, 55 Ill. App. 423; *Anzalone v. Paskuz*, 96 App. Div. 188, 89 N. Y. Supp. 203; *New York v. United States Trust Co.*, 116 App. Div. 349, 101 N. Y. Supp. 574.

⁶⁵³ *Union Water Power Co. v. Lewiston*, 95 Me. 171, 49 Atl. 878; *Siegel, Cooper & Co. v. Colby*, 176 Ill. 210, 52 N. E. 917; *Barrett v. Johnson*, 2 Ind. App. 25, 27 N. E. 933; *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105.

⁶⁵⁴ *Siegel, Cooper & Co. v. Colby*, 176 Ill. 210, 52 N. E. 917.

⁶⁵⁵ *Waring v. Louisville & N. R. Co.*, 19 Fed. 863; *Rubens v. Hill*, 115 Ill. App. 565; *Edwards v. McLean*, 122 N. Y. 302, 25 N. E. 483; *In re Reading Iron Works*, 150 Pa. 369, 24 Atl. 617; *Swigert v. Hartzel*, 20 Pa. Super. Ct. 656.

⁶⁵⁶ *Herscher v. Brazier*, 38 Ill. App. 654; *Wood v. Edison Elec. Illuminating Co.*, 184 Mass. 523, 69 N. E. 364; *Oglesby's Ex'r v. Hughes*, 96 Va. 115, 30 S. E. 439; *Hard v. Brown*, 18 Vt. 87; *Swigert v. Hartzell*, 20 Pa. Super. Ct. 56.

⁶⁵⁷ *Diamond Plate-Glass Co. v. Tennell*, 22 Ind. App. 132, 52 N. E. 168.

⁶⁵⁸ See *Pere Marquette R. Co. v. Wabash R. Co.*, 141 Mich. 215, 12 Det. Leg. N. 466, 104 N. W. 650.

⁶⁵⁹ *Co. Litt.* 42 a; *Doe d. Webb v. Dixon*, 9 East, 15; *Dann v. Spurrier*, 3 Bos. & P. 399; *Bryden v. Northrup*, 58 Ill. App. 233; *Broadway & S. A. R. Co. v. Metzger*, 27 Abb. N. C. 160, 15 N. Y. Supp. 662; *Windsor Hotel Co. v. Hawk*, 49 How. Pr. (N. Y.) 257; *Henderson v. Schuylkill Valley Clay Mfg. Co.*, 24 Pa. Super. Ct. 422. But see, as to leases signed by both lessor and lessee, *Sheppard's Touchstone*, 86; 2 Blackst. Comm. 380; *Beckwith v. Howard*, 6 R. I. 1; *Richardson v. Palmer*, 38 N. H. 218; *Palmer v. Evangelical Baptist Ben. & Missionary Soc.*, 166 Mass. 143, 43 N. E. 1028.

⁶⁶⁰ *Seaver v. Thompson*, 189 Ill. 158, 59 N. E. 553; *Ball v. Wyeth*, 90 Mass. (8 Allen) 275; *Wilcox v. Montour Iron & Steel Co.*, 147 Pa. 540, 23 Atl. 840.

⁶⁶¹ *New England Loan & Trust Co. v. Workman*, 71 Mo. App. 275. Com-

§ 37. Necessity of entry—*Interesse termini*.

In the case of a lease for a term of years, even though the term is limited to commence immediately, the lessee is not regarded as a tenant until he enters upon the land, and he is said to have an *interesse termini*,⁶⁶² as is one named as lessee of a term to commence *in futuro*.⁶⁶³

A release to one who has not entered under his lease cannot, at common law, operate to enlarge his interest, for the reason that "a release which enures by way of enlarging an estate cannot work without a possession."⁶⁶⁴ And it is said that the lessor "cannot grant away the reversion by the name of reversion, before entry."⁶⁶⁵ On the other hand, the lessee may, before entry, grant his interest to another.⁶⁶⁶ Although the lessor die before the lessee enters, his right of entry remains, and, if the lessee die before entry, his executors or administrators may enter.⁶⁶⁷ Until entry, the lessee cannot bring trespass, for the reason that the action of trespass is based on possession.⁶⁶⁸

Though at common law a lessee who has not entered is not capable of taking a release so as to enlarge his estate, still, by means of a lease taking effect as a bargain and sale under the statute of uses, possession sufficient for this purpose may be given to the lessee without any actual entry by him.⁶⁶⁹ It is on this principal that is based the conveyance by "lease and release," at one time in constant use in England.⁶⁷⁰ A lessee by bargain and sale under

pare *Anderson v. Winton*, 136 Ala. 422, 34 So. 962; *Clark v. Gerke*, 104 Md. 504, 65 Atl. 326.

⁶⁶² Co. Litt. 46 b; 2 Blackst. Comm. 144; *Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131; *James v. Kibler's Adm'r*, 94 Va. 165, 26 S. E. 417 (semble).

⁶⁶³ See ante § 12, b (1).

⁶⁶⁴ Co. Litt. 270 a. To the same effect, see Litt. § 459; *Sheppard's Touchstone*, 324. It will, however, extinguish the rent. *Id.*

⁶⁶⁵ Co. Litt. 46 b; *Iseham v. Morrice*, Cro. Car. 109.

⁶⁶⁶ Co. Litt. 46 b; *Wheeler v.* 213.

Thorogood, Cro. Eliz. 127. So he may make a sublease. *Doe d. Parsley v. Day*, 2 Q. B. 147; *Chung Yow v. Hoh Chong*, 11 Or. 220, 4 Pac. 326.

⁶⁶⁷ Litt. § 66; Co. Litt. 46 b.

⁶⁶⁸ *Harrison v. Blackburn*, 17 C. B. (N. S.) 678; *Ryan v. Clark*, 14 Q. B. 65; *Wallis v. Hands* [1893] 2 Ch. 75; *Heilbron v. Heinlen*, 72 Cal. 371, 14 Pac. 22.

⁶⁶⁹ *Iseham v. Morrice*, Cro. Car. 109; *Barker v. Keat*, 2 Mod. 249; *Bac. Abr.*, Leases (M.); 2 *Preston*, Conveyancing, 217.

⁶⁷⁰ See *Tiffany*, Real Prop. pp. 207,

the statute of uses has not, however, such possession that he can maintain trespass before entry.⁶⁷¹

It has been quite frequently stated that a lessee has no estate in the land until entry.⁶⁷² On this theory it has been decided that the lessee has, before entry, no interest subject to execution,⁶⁷³ and, apparently, that until he enters himself he cannot authorize an entry by another.⁶⁷⁴ In England there is even a decision, ignored by the text books, that if the lessor makes another conveyance before entry by the lessee, the grantee therein takes free from any claim on the part of the lessee.⁶⁷⁵ And there it has also been obscurely suggested that, before the lessee's entry, words of leasing must be regarded as creating merely a contract for a lease.⁶⁷⁶ There are also decisions to the effect that before entry the lessee cannot bring ejectment,⁶⁷⁷ though there are quite as many to the opposite effect.⁶⁷⁸ It has, in a modern English case, been decided that a lessee who has not entered has not a mere contractual right, but a right *in rem*, a proprietary right, justifying an action for damages against one who so injures the premises that he cannot take possession.⁶⁷⁹

The view that a lessee has no estate in the land merely because

⁶⁷¹ *Lutwich v. Mitton*, Cro. Jac. 604; *Geary v. Bearcroft*, Cart. 57; *Pollock & Wright*, Possession, 56.

⁶⁷² 2 Blackst. Comm. 144 (citing Co. Litt. 46, which does not support it); 1 Platt, Leases, 22; Williams, Real Prop. (18th Ed.) 475; 2 Preston, Conveyancing, 145; Wilcox v. Bostick, 57 S. C. 151, 35 S. E. 496; Bunch v. Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24.

⁶⁷³ *Crane v. O'Connor*, 4 Edw. Ch. (N. Y.) 409.

⁶⁷⁴ *Austin v. Huntsville Coal & Min. Co.*, 72 Mo. 535, 37 Am. Rep. 446 (case of a lease of strata of coal).

Crotty v. Collins, 13 Ill. 567, may be mentioned in this connection. It seems to say that if the lessee undertakes to enter against the wish of the lessor, although his lease gives him the right to do so,

he has no right to the crops as against the lessor retaining possession. The opinion is, however, so obscure as to be almost meaningless.

⁶⁷⁵ *Miller v. Green*, 8 Bing, 92, 2 Crompt. & J. 142.

⁶⁷⁶ See ante, § 25 d, at notes 389-393.

⁶⁷⁷ *Petroleum Co. v. Coal, Coke & Mfg. Co.*, 89 Tenn. 381; *Sennett v. Bucher*, 3 Pen. & W. (Pa.) 392; *Wilcox v. Bostick*, 57 S. C. 151, 35 S. E. 496.

⁶⁷⁸ *Doe d. Parsley v. Day*, 2 Q. B. 147; *Cleveland v. Boice*, 21 U. C. Q. B. 609; *Trull v. Granger*, 8 N. Y. (4 Seld.) 115; *Becar v. Flues*, 64 N. Y.

518; *Whitney v. Allaire*, 1 N. Y. (1 Comst.) 305. See *Adams, Ejectment*, 60; *Berrington v. Casey*, 78 Ill. 317.

⁶⁷⁹ *Gillard v. Cheshire Lines Committee*, 32 Wkly. Rep. 943. (*Brett, M. R., Bowen and Fry, L. J. J.*)

he has not entered is difficult to comprehend. His interest is referred to by Coke and others of the older writers as an "estate,"⁶⁸⁰ and the statement occasionally found, to the effect that entry is not necessary to the vesting of a "term of years" in the lessee,⁶⁸¹ seems to be in effect that an estate for years vests before entry, "term of years" and "estate for years" being equivalent expressions. That one who has not entered is not a tenant is readily comprehensible, but that one who has an immediate right of exclusive possession and control for a term of years should not have an estate for years, merely because he has not entered upon the land, seems to involve a subversion of the conception of an estate which has ordinarily prevailed since the abolition of the requirement of livery of seisin. A statutory conveyance of an estate in fee simple without doubt vests an estate in the grantee before entry, and it is difficult to see why a common-law conveyance of an estate for years should have any less effect. The interest of a lessee under a lease *in praesenti* before entry, it may be remarked, would seem on principle entirely different from that of one in favor of whom a term has been limited to commence *in futuro* only, and the fact that the same expression, *interesse termini*, is applied to the two classes of interests, does not seem a sufficient reason for regarding them as similar in character.⁶⁸²

⁶⁸⁰ Coke says (Co. Litt. 46 b): "A release to him is not good to increase his estate"; and in Saffyn's Case, 5 Coke, 125, it was said that "if a man makes a lease for years, in this case before the lessee enters, he has an estate for years in the land, which he may grant." In Sheppard's Touchstone, 324, and Bac. Abr., Leases (M), the statement is made, following Coke, that the lessee's "estate" cannot, before entry, be enlarged by a release.

⁶⁸¹ Williams v. Bosanquet, 1 Brod. & B. 238; Ryan v. Clarke, 14 Q. B. 65; Harrison v. Blackburn, 17 C. B. (N. S.) 678. So Coke says: "The interest of the term doth pass and vest in the lessee before entry." Co. Litt. 51 b.

⁶⁸² The difference is referred to in Saffyn's Case, 5 Coke, 125, where, as reported by Coke, the court said: "If a man leases tenements for years, by force of which the lessee is seised, that is, possessed, and afterwards the lessor by his deed grants the reversion to another for life, it is necessary in such case that the tenant for term of years attorn; by which it appears that before the lessee enters he has not actual possession, nor (as it seems) the lessor has not such a reversion that he can grant it over by the name of reversion, but yet such lessee has more than he who has a future interest, for he may presently enter and take the profits."

As regards the right of the lessee, before entry, to maintain ejectment for the premises, it would seem that the cases asserting that right are in accord with the modern rule that this action may be maintained by any person having a right to the possession. In former times, when it was necessary, to support ejectment, that a termor should have been actually ejected from the land,⁶⁸³ the action could evidently not be maintained by a lessee who had not entered, either by himself or his sublessee; but after the introduction of the fictions in ejectment, by which one entitled to land was enabled to maintain the action without any actual entry or ouster, a lessee, it would seem, was in as good a position for this purpose before as after entry, and the later abolition of the fictions could not well place him in a worse position in this regard.

As regards the necessity of an entry in the case of a lease at will, as distinguished from a lease for a term of years, there are but few authorities. It seems clear that until entry he does not become actually a tenant,⁶⁸⁴ and the decisions distinguish between the case of a lease at will and one for years to the extent of holding that one who has not entered under a lease at will is not liable for the rent reserved,⁶⁸⁵ while one who has not entered under a lease for years is so liable if he voluntarily refrained from entering.⁶⁸⁶ Why this difference should exist is not explained. And it would seem that one to whom the owner has made a lease expressed to be at will, or to whom mere permission to take possession has been given, might, before entry, be regarded as having rights in the land analogous to those of a lessee for years who has not entered, and, if he has agreed to pay rent from the date of the letting, he should be liable accordingly.

§ 38. Fraud in creation of the relation.

a. **Fraud on part of lessee.** A lease, like any other transfer,

⁶⁸³ Adams, Ejectment, 9.

⁶⁸⁴ In *Den d. Pollock v. Kittrell*, 4 N. C. 585 (Term 152), it was decided that a lessee at will who has not entered cannot maintain ejectment, since "before entry the lease is a bare contract."

In *Hardy v. Winter*, 38 Mo. 106, it is said that "a tenancy at will, without writing, commence only

from the day the tenant enters into possession."

⁶⁸⁵ *Bellasis v. Burbrick*, Holt, 199, 1 Salk. 209, 1 Ld. Raym. 170; Anonymous, 1 Vent. 41; *Jeakil v. Linne*, Het. 54; Anonymous, Dal. 44, pl. 30; *Williams v. Bosanquet*, 1 Brod. & B. 238, 257.

⁶⁸⁶ See post, § 182 b.

may be set aside by the person making the transfer, that is the lessor, on the ground that it was procured by fraud or undue influence.⁶⁸⁷ The mere failure by the lessee to perform his agreements is, however, generally speaking at least, insufficient for this purpose.⁶⁸⁸ The right to assert the invalidity of the lease is not affected by the lessor's acceptance of rent thereunder before he learns of the fraud.⁶⁸⁹ But he cannot have the lease set aside as against an innocent purchaser of the leasehold for value.⁶⁹⁰

b. **Fraud on part of lessor.** The question of what constitutes such fraud upon the part of the lessor as will entitle the lessee to relief from liability upon his stipulations in the lease, such as that for rent, is one to which it is practically impossible to give any satisfactory answer. It is but a phase of the general question, which may arise in the case of any contract, as to what constitutes fraud relieving a party from liability thereon, and as to this the

⁶⁸⁷ See *Gillespie v. Holland*, 40 Ark. 28, 40 Am. Rep. 1; *Dickson v. Kempinsky*, 96 Mo. 252, 9 S. W. 618; *Christie v. Blakeley* (Pa.) 15 Atl. 874; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285. Compare *Feret v. Hill*, 15 C. B. 207, which decides that the fraud does not affect the validity of the lease at law. See *Pollock, Contracts* (7th Ed.) 371, note (k).

So the landlord has been held entitled to rescind the lease on account of fraudulent misrepresentations by the lessee as to his solvency. *Martin v. Davis*, 96 Iowa, 718, 65 N. W. 1001. Compare *Olden v. Sassman*, 67 N. J. Eq. 239, 57 Atl. 1075, Id., 68 N. J. Eq. 799, 64 Atl. 1134.

In *Newcome v. Ewing*, 19 Ky. Law Rep. 821, 42 S. W. 105, it was decided that, in case the lease was procured by fraudulent representations on the part of the lessee that personal property mortgaged by him to secure the rent was unincumbered, the lessee would be enjoined from taking possession, though the lessee might have

discovered the presence of the incumbrances by an examination of the records.

⁶⁸⁸ *Love v. Teter*, 24 W. Va. 741. In *Anderson v. Hammon*, 19 Or. 446, 24 Pac. 228, 20 Am. St. Rep. 832, where one had procured a lease of an orchard by covenanting to properly prune and cultivate it, and failed to do so, it was held that equity would "cancel" the lease to prevent the waste and destruction. It does not appear whether the court considered the lessee's conduct as fraudulent, or on exactly what principle relief was granted. Even conceding that the failure to perform such covenants constitute waste, which seems doubtful, cancellation of the lease is not an ordinary mode of preventing further waste. Post, § 109 b.

⁶⁸⁹ *United Order of American Bricklayers & Stone Masons v. Fitzgerald*, 59 Ill. App. 362.

⁶⁹⁰ *Isom v. Rex Crude Oil Co.*, 147 Cal. 659, 82 Pac. 317; *Hubbard v. Cook*, 82 C. C. A. 508, 153 Fed. 554.

cases are in a state of very considerable confusion. It will here be attempted only to state the decisions actually involving the question of the existence of fraud relieving a lessee from liability.

In a number of cases misstatements by the lessor as to the character or quality of the premises have been regarded as constituting fraud on his part. Such a view has been taken of misstatements as to the number of acres on the premises which were suitable for cultivation,⁶⁹¹ the capacity of a mill on the premises,⁶⁹² the sufficiency of the strength of the building for the lessee's purposes,⁶⁹³ the income producing value of the property,⁶⁹⁴ the sufficiency of the heating appliances,^{694a} the soundness of the plumbing,⁶⁹⁵ the sufficiency of the water supply,⁶⁹⁶ the dryness of the ground.⁶⁹⁷

⁶⁹¹ *Mitchell v. Zimmerman*, 4 Tex. 75, 51 Am. Dec. 717.

⁶⁹² *Cage v. Phillips*, 38 Ala. 382.

⁶⁹³ *Barr v. Kimball*, 43 Neb. 766, 62 N. W. 196; *Myers v. Rosenback*, 13 Misc. 145, 34 N. Y. Supp. 63. See *Hinsdale v. McCune*, 135 Iowa, 329, 113 N. W. 478.

⁶⁹⁴ *Irving v. Thomas*, 18 Me. 418.

^{694a} *Bauer v. Taylor*, 4 Neb. Unoff. 710, 98 N. W. 29.

⁶⁹⁵ *Pursel v. Teller*, 10 Colo. App. 488, 51 Pac. 436. Where the owner had constructed a sewer for the premises with ordinary care, the fact that he stated to the intending lessee that there was an excellent sewer connected with the stores, which would make the premises clean, was held not to show fraud, it being merely an expression of opinion, and the sewer failing only in the case of an unusual storm. *Wilkinson v. Clauson*, 29 Minn. 91, 12 N. W. 147. In *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837, statements as to the plumbing were held not to be fraudulent and so ground for rescission. The opinion is rather obscure. And see post, at note 713, as to failure to mention sewer gas.

⁶⁹⁶ *Sisson v. Kaper*, 105 Iowa, 599,

75 N. W. 490; *Merritt v. Dufur*, 99 Iowa, 211, 68 N. W. 553; *Jamison v. Ellsworth*, 115 Iowa, 90, 87 N. W. 723. But in *Stein v. Rice*, 23 Misc. 348, 51 N. Y. Supp. 320, it was held that at times the water supply for the neighborhood was inadequate did not constitute fraud authorizing a rescission, though the supply failed during the year of the lease to an unusual degree. And see, to the effect that false representations in this regard are no defence to a claim for rent, *Bowen v. Hatch* (Tex. Civ. App.) 34 S. W. 330.

⁶⁹⁷ *Baker v. Fawcett*, 69 Ill. App. 300.

In *Dennison v. Grove*, 52 N. J. Law, 144, 19 Atl. 186, it was regarded as a question for the jury, under the circumstances, whether a misrepresentation in this regard was an expression of opinion, merely, or a misstatement of fact justifying rescission.

In *Jones v. Hathaway*, 77 Ind. 14, it was decided that a misstatement in this regard, with the result that the lessee's crop was spoilt, involved a "failure of consideration" constituting a defense to a claim for rent.

On the other hand, the courts have occasionally refused to give any effect to such statements, if made in regard to matters which were apparent on inspection.⁶⁹⁸ It was in one case regarded as a question for the jury, under the particular circumstances, whether a statement as to the character of the ground was merely an expression of opinion or was a misstatement of fact authorizing rescission,⁶⁹⁹ and in another it was left to the jury to say whether the lessee exercised reasonable care in relying on the lessor's statement.⁷⁰⁰ The fact that the lessor persisted in his statement after the lessee had told him that he would rely thereon, instead of examining the premises, appears to have been regarded as relieving the lessee from liability under the lease, when the mere false statement might not have had that effect.⁷⁰¹

As a general rule false representations, to constitute fraud, must relate to some existing fact, and the mere breach of a promise to do something cannot be treated as a fraud.⁷⁰² And so it has been decided that the breach of an agreement by the lessor to make improvements cannot be asserted as a fraud.⁷⁰³ But a decision is to be found that a false statement that the lessor would lease the adjoining premises to the lessee was a defense to a claim for rent.⁷⁰⁴ Ordinarily, statements which amount to mere expressions of opinion or expectation, as distinct from statements of

The theory of fraud seems decidedly preferable to the introduction of this much abused phrase, "failure of consideration."

⁶⁹⁸ *Merritt v. Dufur*, 99 Iowa, 211, 68 N. W. 553; *Boyer v. Commercial Bldg. Inv. Co.*, 110 Iowa, 491, 81 N. W. 720; *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899 (dictum). In *Lewis v. Clark*, 86 Md. 327, 37 Atl. 1035, it is said that "the appellant (the lessee) could have verified the correctness of the representations concerning the quality of the water, without serious inconvenience to himself, if he had thought proper to do so, and having failed to exercise this reasonable precaution, he has now no just cause of complaint."

⁶⁹⁹ *Dennison v. Grove*, 52 N. J. Law, 144, 19 Atl. 186, ante, note 697.

⁷⁰⁰ *Ladner v. Balsley*, 103 Iowa, 674, 72 N. W. 787.

⁷⁰¹ *Jackson v. Odell*, 14 Abb. N. C. (N. Y.) 42.

⁷⁰² See *Wilcox v. Palmer*, 163 Pa. 109, 29 Atl. 757.

⁷⁰³ *Lynch v. Sauer*, 16 Misc. 1, 37 N. Y. Supp. 666.

⁷⁰⁴ *Rand, McNally & Co. v. Wickham*, 60 Mo. App. 44.

In *Hill v. Rudd*, 99 Ky. 178, 35 S. W. 270, it is decided that the lessee cannot rescind on the ground that one of the lessors failed to buy groceries from the lessee as he had promised to do in order to induce the lessee to take the lease. The decision rather appears to be based on the ground that one lessor could not, by his conduct, affect the others.

fact, cannot be asserted as fraud constituting a ground for relief.⁷⁰⁵ And a misrepresentation as to the legal effect of the instrument of lease is not ordinarily ground for relief.⁷⁰⁶

A statement by the lessor that he had certain rights in adjoining land which would pass with the premises leased, when in fact he had no such rights, and without them the premises were useless for the lessee's purposes, was held to justify the lessee in abandoning the premises and refusing to pay rent.⁷⁰⁷ It has, however, been decided that a lessee of one person, who took a lease from another who falsely asserted title to the land, could not repudiate the later lease on account of such false assertion, it being said that his relation to his original lessor cast on him the duty of carefully examining the claimant's title.⁷⁰⁸ And the mere assertion of his legal right by a party to litigation concerning the land has been decided not to constitute fraud, however mistaken.⁷⁰⁹ A statement by an agent that all the premises leased were owned by one person, while in fact they were owned by two, has been regarded as a matter of which the lessee could not complain, if the lease was assented to by both owners.⁷¹⁰ In England it has been decided that if the lessor knows that he has no title to part of the land, and fails to inform the lessee, who has no means of knowing it, the lessee is entitled to be relieved from his liability for rent.⁷¹¹ Usually in this country the lessee has means of determining the state of the title.

A false statement which has no part in inducing the making of the lease is obviously no ground for relief in favor of the lessee.⁷¹²

⁷⁰⁵ *Wilkinson v. Clauson*, 29 Minn. 91, 12 N. W. 147; *Coulson v. Whiting*, 12 Daly (N. Y.) 408; *Garrett v. Finch*, 107 Va. 25, 57 S. E. 604, 14 Am. & Eng. Enc. Law, 34; 20 Cyclopaedia Law & Proc. 17.

⁷⁰⁶ *Fry v. Day*, 97 Ind. 348. See 20 Am. & Eng. Enc. Law, 56; 20 Cyclopaedia Law & Proc. 19.

⁷⁰⁷ *Morris v. Shakespeare*, 20 Wkly. Notes Cas. (Pa.) 564, 12 Atl. 414. In *Whitney v. Allaire*, 1 N. Y. (1 Comst.) 305, there are expressions to the same effect.

⁷⁰⁸ *Dunbar v. Bonesteel*, 4 Ill. (3 Scam.) 32.

⁷⁰⁹ *Pepper v. Rowley*, 73 Ill. 262. See *Chambers v. Irish*, 132 Iowa, 319, 109 N. W. 787.

⁷¹⁰ *Merritt v. Dufur*, 99 Iowa, 211, 68 N. W. 553.

⁷¹¹ *Mostyn v. West Mostyn Coal & Iron Co.*, 1 C. P. Div. 145. It was further held that the lessee might, if he pleased, reject that part only of the land to which the lessor had no title, keeping the remainder.

⁷¹² See *Bayles v. Clark*, 115 App. Div. 33, 100 N. Y. Supp. 586, where, after a valid oral lease was made, the incorporation thereof in a writ-

Occasionally a mere failure on the part of the intending lessor to volunteer information affecting the desirability or value of the premises has been regarded as ground for rescission by the lessee. Thus, the failure to inform the lessee that premises leased by him for residence purposes had formerly been used for purposes of prostitution has been held to relieve the lessee from liability for rent,⁷¹³ and the same view was taken when the lessor failed to inform the lessee of the presence of sewer gas.⁷¹⁴ In another state it has been held that the landlord is responsible as for fraud if he fails to warn the lessee of a defect not open to ordinary observation, while he is not so responsible if the defect is so open.⁷¹⁵

That the lessee was induced to surrender a previous lease which had been assigned to him and to take a second lease, by means of misrepresentations as to the rent reserved on the previous lease, has been regarded as ground for rescinding the second lease.⁷¹⁶

A rule has been quite frequently enunciated that, in an action at law on a sealed contract, the defendant cannot assert that it was obtained by false representations, though it is otherwise as to fraud in the execution of the contract,⁷¹⁷ and this rule has in one jurisdiction been applied in an action for rent reserved by an instrument of lease under seal.⁷¹⁸

A lessee does not lose his right to set up the lessor's fraud by taking and retaining possession of the premises, provided he relinquishes possession on discovering the fraud.⁷¹⁹ If, however, the lessee, after discovering the fraud, makes no attempt to rescind the lease,⁷²⁰ or continues in possession of the premises an unrea-

ten instrument was obtained by false representations.

⁷¹³ *Staples v. Anderson*, 26 N. Y. Super. Ct. (3 Rob.) 327; *Rhineland v. Seaman*, 13 Abb. N. C. (N. Y.) 455, note. See *Conklin v. White*, 17 Abb. N. C. (N. Y.) 315; *Carhart v. Ryder*, 11 Daly (N. Y.) 101.

⁷¹⁴ *Wallace v. Lent*, 1 Daly (N. Y.) 481, 29 How. Pr. 289; *Sequard v. Corse*, 9 N. Y. Wkly. Dig. 51. See *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; *Jackson v. Odell*, 14 Abb. N. C. (N. Y.) 42. *Contra*, *Blake v. Ranous*, 25 Ill. App. 486.

⁷¹⁵ *Cate v. Blodgett*, 70 N. H. 316, 48 Atl. 281.

⁷¹⁶ *Powell v. Linde Co.*, 49 App. Div. 286, 64 N. Y. Supp. 153.

⁷¹⁷ 1 *Bigelow*, Fraud, 53.

⁷¹⁸ *Johnson v. Wilson*, 33 Ill. App. 639; *McCoull v. Herzberg*, 33 Ill. App. 542; *Little v. Dyer*, 35 Ill. App. 85.

⁷¹⁹ *Milliken v. Thorndike*, 103 Mass. 382; *Irving v. Thomas*, 18 Me. 418.

⁷²⁰ *Hall v. Ryder*, 152 Mass. 528, 25 N. E. 970. He is justified in remaining on assurances that the defects will be remedied. *Hinsdale v.*

sonable time after knowing of the fraud,⁷²¹ he cannot disclaim liability for the rent. But though the fact that he retains possession with knowledge of the fraud operates to deprive him of the right to rescind, it does not affect his right to damages on account of the fraud, either in an action therefor, or by way of counterclaim in an action for rent.⁷²² And this he may do even though he has paid installments of rent with knowledge of the fraud.⁷²³

The measure of damages for fraud in misrepresenting the condition of the premises is the difference between the actual rental value and the rental value had the premises been as represented.⁷²⁴ It has been decided that the lessee cannot recover, on account of misrepresentations as to the water supply, for resulting injury to his stock, or for the cost of improvements made by him to secure water.⁷²⁵

McCune, 135 Iowa, 682, 113 N. W. Lent, 1 Daly (N. Y.) 481, 29 How. 478. Pr. 289.

⁷²¹ Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899; Bell v. Baker, 43 Minn. 86, 44 N. W. 676; Herrin v. Libbey, 36 Me. 350; Morey v. Pierce, 14 Ill. App. (14 Bradw.) 91; Resser v. Corwin, 72 Ill. App. 625; Kiernan v. Terry, 26 Or. 494, 38 Pac. 671; Barr v. New York, L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123; Rosenbaum v. Gunter, 3 E. D. Smith (N. Y.) 203; McCarty v. Ely, 4 E. D. Smith (N. Y.) 375; Conklin v. White, 17 Abb. N. C. (N. Y.) 315; Carhart v. Ryder, 11 Daly (N. Y.) 101; Lynch v. Sauer, 16 Misc. 1, 37 N. Y. Supp. 666; Campau v. Lafferty, 50 Mich. 114, 15 N. W. 40.

⁷²² Whitney v. Allaire, 1 N. Y. (1 Comst.) 305; Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123; Prince v. Jacobs, 80 App. Div. 243, 80 N. Y. Supp. 304; Herrin v. Libbey, 36 Me. 350; Barr v. Kimball, 43 Neb. 766, 62 N. W. 196; Dennison v. Grove, 52 N. J. Law, 144, 19 Atl. 186; Wolfe v. Arrott, 109 Pa. 473, 1 Atl. 333 (semble). See Hall v. Ryder, 152 Mass. 528, 25 N. E. 970. Compare Bell v. Baker, 43 Minn. 86, 44 N. W. 676.

⁷²³ Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123; Hoyt v. Dengler, 54 Kan. 309, 38 Pac. 260; Cramer v. Carlisle Bank, 2 Grant Cas. (Pa.) 267. See Irving v. Thomas, 18 Me. 418.

But merely remaining a few days after discovery of a fraudulent representation as to the condition of the premises, under a promise by the lessor to remedy the defects, does not make him liable for the month's rent. Myers v. Rosenback, 11 Misc. 116, 31 N. Y. Supp. 993; Wallace v.

⁷²⁴ Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123. The lessee is also entitled to the return of a deposit made to secure the rent. Prince v. Jacobs, 80 App. Div. 243, 80 N. Y. Supp. 304.

⁷²⁵ Jamison v. Ellsworth, 115 Iowa, 90, 87 N. W. 723.

The averments in defendant's pleadings, in an action for rent, may be insufficient to authorize the admission of evidence of fraud on plaintiff's part. An averment that the lessor fraudulently concealed defects in the premises is insufficient, it has been decided, it being said that the lessee must aver the facts constituting the fraud, such as what did the lessor know, what did he do to conceal the defects, what was his intention, and how did he mislead the lessee.^{726, 727} An allegation that the landlord falsely represented that the building was suitable has been regarded as insufficient to admit evidence that he did so fraudulently.⁷²⁸ There must be, it has been held, an averment that the lessor knew the falsity of his statements, and an averment "on information and belief" in this respect has been regarded as insufficient.⁷²⁹ And, likewise, the lessee's ignorance of the true state of the facts,⁷³⁰ or that he was deceived,⁷³¹ must be averred. It has also been decided to be necessary to aver damage from the fraud.⁷³² Evidence of fraud is obviously not admissible when there is no averment in respect thereto.⁷³³

§ 39. Mistake in creation of the relation.

The instrument of lease as prepared may, owing to mistake, differ from the actual agreement of the parties, in which case equity will ordinarily reform the lease to accord with their intention.⁷³⁴ So a lease has been reformed on account of error in the description,⁷³⁵ the omission of an intended provision as to re-

^{726, 727} *Coulson v. Whiting*, 12 Daly (N. Y.) 408, 14 Abb. N. C. 60. See *Fry v. Day*, 97 Ind. 348; *Bauer v. Taylor*, 4 Neb. Unoff. 710, 96 S. W. 268. ⁷³² *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Simmons v. Kayser*, 43 N. Y. Super. Ct. (11 Jones & S.) 131. ⁷³³ *Blackman v. Kessler*, 110 Iowa, 140, 81 N. W. 185.

⁷²⁸ *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

⁷²⁹ *Haines v. Downey*, 86 Ill. App. 373. And see *Bauer v. Taylor*, 4 Neb. Unoff. 701, 96 N. W. 268.

⁷³⁰ *Schermerhorn v. Gouge*, 13 Abb. Pr. (N. Y.) 315.

⁷³¹ *Simmons v. Kayser*, 43 N. Y. Super. Ct. (11 Jones & S.) 131.

⁷³⁴ See *Wald's Pollock, Contracts* (Williston's Ed.) 636 et seq.; 20 Am. & Eng. Enc. Law (2d Ed.) 826 et seq.; 2 *Tiffany, Real Prop.* § 385.

⁷³⁵ *Nielander v. Chicago, M. & St. P. R. Co.*, 114 Iowa, 420, 87 N. W. 285. And see *Le Comte v. Freshwater*, 56 W. Va. 336, 49 S. E. 238.

pairs,⁷³⁶ and of a provision allowing the removal of fixtures.⁷³⁷ In order to justify relief on this ground the mistake must be common to both parties, a "mutual mistake," as it is ordinarily expressed,⁷³⁸ and strong and clear evidence in this regard is necessary.⁷³⁹

A contract is regarded as invalid if made upon a mistaken assumption by both parties as to some matter of fact, in the absence of which the contract would not have been made,⁷⁴⁰ and this doctrine, or one analogous thereto, was applied to a transaction involving the leasing of a building which was mistakenly supposed to be capable of sustaining additional stories with a covenant on the part of the lessee to erect such stories, and the lease, meaning thereby both the conveyance of the leasehold interest and the covenants entered into in connection therewith, was canceled by the court.⁷⁴¹

If the lessee accepts the lease under the supposition that the instrument expresses the terms agreed on, and its failure so to do is intentional on the part of the lessor,⁷⁴² or, it seems, if the lessor merely has reason to know that it fails to express the actual agreement,⁷⁴³ the lessee is entitled to relief.

§ 40. Lease for illegal purpose.

If the lease is made with the intention that the premises shall

⁷³⁶ *Thomas v. Conrad*, 24 Ky. Law Rep. 1630, 71 S. W. 903; *Id.*, 25 Ky. Law Rep. 169, 74 S. W. 1084; *Wyman v. Sperbeck*, 66 Wis. 495, 29 N. W. 245. See *Cage v. Patton*, 41 Tex. Civ. App. 248, 14 Tex. Ct. Rep. 525, 91 S. W. 311.

⁷³⁷ *Brown v. Ward*, 119 Iowa, 604, 93 N. W. 587.

⁷³⁸ *Mortimer v. Shortall*, 2 Dru. & War. 363; *Fallon v. Robins*, 16 Ir. Ch. 422; *Grauel v. Soeller*, 52 Hun, 375, 5 N. Y. Supp. 254; *Wald's Pollock, Contracts* (Williston's Ed.) 639.

⁷³⁹ *Seitz Brew. Co. v. Ayres*, 60 N. J. Eq. 190, 46 Atl. 535; *Wood v. Gordon*, 38 N. Y. St. Rep. 455, 13 N. Y. Supp. 595; *Id.*, 44 N. Y. St. Rep. 640, 18 N. Y. Supp. 109.

⁷⁴⁰ See *Kerr, Fraud & Mistake* (3d Ed.) 472; *Hammon, Contracts*, p. 106; *Wald's Pollock, Contracts*, 582.

⁷⁴¹ *Hoops v. Fitzgerald*, 204 Ill. 325, 68 N. E. 430.

⁷⁴² *Daly v. Simonson*, 126 Iowa, 716, 102 N. W. 780. See 20 Am. & Eng. Enc. Law (2 Ed.) 823.

⁷⁴³ *Paget v. Marshall*, 28 Ch. Div. 255; *Garrard v. Frankel*, 30 Beav. 445. But, as to these cases, see *May v. Platt* [1900] 1 Ch. 616; *Kerr, Fraud & Mistake* (3d Ed.) 463.

be used for an illegal purpose,⁷⁴⁴ such as that of prostitution,⁷⁴⁵ gambling,⁷⁴⁶ or the illegal sale of liquor,⁷⁴⁷ the lessor cannot recover rent for the premises. A like decision was rendered when the lease was of a sidewalk, which by municipal ordinance could not be occupied for private purposes,⁷⁴⁸ when the lease was a mere device for carrying out a conspiracy to enhance the price of merchandise in violation of statute,⁷⁴⁹ and when the lease was made partly to induce the lessee not to have the lessor's husband prosecuted for burglary.⁷⁵⁰

Occasionally it has been held that the lessor's knowledge of the lessee's intention to use the premises for an illegal purpose will

⁷⁴⁴ *Gaslight & Coke Co. v. Turner*, 44 Atl. 346, 76 Am. St. Rep. 767. 5 Bing. N. C. 666, 6 Bing. N. C. 324. See *Zink v. Grant*, 25 Ohio St. 352; (lease for boiling oil and tar, contrary to statute); *Simpson v. Woods*, 105 Mass. 263 (unlicensed billiard room); *Holmead v. Maddox*, 2 Ohio St. 257, 46 N. E. 983, construing the Ohio statute in this regard. *Cranch, C. C.* 161, Fed. Cas No. 6, 629. There can be no recovery on a guaranty of the rent in such case.

⁷⁴⁵ *Appleton v. Campbell*, 2 Car. Riley v. Jordan, 122 Mass. 231. & P. 347; *Dougherty v. Seymour*, 16 Under an averment that the plaintiff knowingly leased the property to be used for the illegal sale of liquor, Colo. 289, 26 Pac. 823; *Berni v. Boyer*, 90 Minn. 469, 97 N. W. 121; defendant cannot ask an instruction that the plaintiff cannot recover if he permitted such use after knowing of the illegal sales. *Rice v. Enwright*, 119 Mass. 187. *Kathman v. Walters*, 22 La. Ann. 54; *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 603; *Ashbrook v. Dale*, 27 Mo. App. 649; *Burton v. Dupree*, 19 Tex. Civ. App. 275, 46 S. W. 272; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. 294. See *Ralston v. Boady*, 20 Ga. 449. But that this is not a defense to an action of forcible detainer by the landlord, see *Toby v. Schultz*, 51 Ill. App. 487.

⁷⁴⁶ *Ryan v. Potwin*, 62 Ill. App. 134; *McDonald v. Tree*, 69 Ill. App. 134; *Heidenreich v. Raggio*, 86 Ill. App. 521; *Edelmuth v. McGarren*, 4 App. 521; *Daly (N. Y.)* 467, 45 How. Pr. 191; *Gibson v. Pearsall*, 1 E. D. Smith (N. Y.) 90. *Shedlinsky v. Budweiser Brew. Co.*, 17 App. Div. 470, 45 N. Y. Supp. 174.

⁷⁴⁷ *Rice v. Enwright*, 119 Mass. 187; *Mitchell v. Scott*, 62 N. H. 596; *Sherman v. Wilder*, 106 Mass. 537; *Gorman v. Keough*, 22 R. I. 47, 46 Atl. 37; *Mound v. Barker*, 71 Vt. 253, 502.

⁷⁴⁸ *Graham v. Hiesel*, 73 Neb. 433, 102 N. W. 1010.

not affect his right to recover rent, if he himself does not actually share or further that purpose.⁷⁵¹

If the lessor is ignorant of the lessee's intention, he may no doubt recover rent,⁷⁵² but it has been held that he cannot do so if he allows the tenancy to continue after learning of the illegal use of the premises, while having the legal right to bring it to an end.⁷⁵³ In one state it has even been decided that one who purchases the interest of the lessor in ignorance that the premises were used for an illegal purpose by the lessee could not recover rent, if he might by investigation have ascertained the use made of the premises.⁷⁵⁴ The fact that a business may be carried on unlawfully and that it was so carried on in the particular case does not affect the lessor, if he was unaware of the lessee's intention to that effect.⁷⁵⁵

In one case it was decided that if a lease was illegal as made for purposes of prostitution, the lessee entering thereunder and

⁷⁵¹ *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966; *Allen v. Keilly*, 18 R. I. 197, 30 Atl. 965; *Almy v. Greene*, 13 R. I. 350; *Taylor v. Levy* (Md.) 24 Atl. 608; *Udike v. Campbell*, 4 E. D. Smith (N. Y.) 570. But see *Gorman v. Keough*, 22 R. I. 47, 46 Atl. 37. See, also, *Ralston v. Boady*, 20 Ga. 449.

In *Frank v. McDonald*, 86 Ill. App. 336, it was decided that the fact that the lessee intended to use the premises for an illegal purpose, and that the lessor knew that he "wanted" to do so, was no defense to the claim for rent.

⁷⁵² *Commagere v. Brown*, 27 La. Ann. 314; *Gibson v. Pearsall*, 1 E. D. Smith (N. Y.) 90; *Codman v. Hall*, 91 Mass. (9 Allen) 335; *Zink v. Grant*, 25 Ohio St. 352.

In *Stanley v. Chamberlain*, 39 N. J. Law, 565, it was held that the lessor was not charged with the knowledge of his agent that the premises were to be used for an illegal purpose. See, to the con-

trary, *Ashbrook v. Dale*, 27 Mo. App. 649; *Ryan v. Potwin*, 62 Ill. App. 134.

⁷⁵³ *Jennings v. Throgmorton*, Ryan & M. 251; *Mitchell v. Scott*, 62 N. H. 596. See *Kessler v. Pearson*, 126 Ga. 725, 55 S. E. 963; *Codman v. Hall*, 91 Mass. (9 Allen) 335.

⁷⁵⁴ *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 603. Even though the lessee has assigned the lease, he may set up the illegality of the purpose for which it was made. *Sherman v. Wilder*, 106 Mass. 537.

⁷⁵⁵ *Whalen v. Leisy Brew. Co.*, 106 Iowa, 548, 76 N. W. 842.

In *Schedlinsky v. Budweiser Brew. Co.*, 163 N. Y. 437, 57 N. E. 620, it was held that the fact that the premises used for the sale of liquor were within a prohibited distance of a school house did not prevent recovery by the lessor, in view of the fact that a license might lawfully be obtained to carry on the business on such premises by transfer from other premises.

paying rent could not claim to hold as a tenant from month to month or otherwise.⁷⁵⁶ This seems to involve the view that the permission to enter is nugatory, as being a permission granted for an illegal purpose, and that, consequently, so far as any right of possession as against the lessor is concerned, he is merely a trespasser, as having entered without permission. This seems a reasonable view.

Circumstantial evidence is admissible to show the lessor's knowledge and intention that the premises shall be used for illegal or immoral purposes,⁷⁵⁷ and evidence of their bad reputation in this regard,⁷⁵⁸ as well as evidence of a prior lease to the same tenant and his improper use of the premises thereunder,⁷⁵⁹ has been regarded as competent, as has evidence that the lessor had other houses in the vicinity which he himself used for such unlawful business.⁷⁶⁰

⁷⁵⁶ *Berni v. Boyer*, 90 Minn. 469, 97 N. W. 121.

⁷⁵⁷ *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 603.

⁷⁵⁸ *Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207; *Egan v. Gordon*, 65 Minn. 505, 68 N. W. 103.

⁷⁵⁹ *Plath v. Kline*, 18 App. Div. 240, 45 N. Y. Supp. 951.

⁷⁶⁰ *Plath v. Kline*, 18 App. Div. 240, 45 N. Y. Supp. 951. It is there said that such evidence is admissible upon the question of his intent "to be considered only when the facts pertinent in chief are found to have been established by other evidence."

CHAPTER IV.

THE RELATION OF TENANCY IN CONNECTION WITH OTHER RELATION.

- § 41. General considerations.
- 42. Trustee and cestui que trust.
- 43. Vendor and vendee.
 - a. Vendee let into possession.
 - b. Express stipulation for tenancy.
 - c. Tenancy on vendee's default.
 - d. Tenant becoming vendee.
- 44. Grantor and grantee.
- 45. Mortgagor and mortgagee.
 - a. Mortgagor in possession as tenant.
 - b. Mortgagee in possession as tenant.
 - c. Attornment clause.
 - d. Mortgage relation not exclusive of tenancy.
- 46. Purchaser at execution sale and former owner of land.
- 47. Purchaser at foreclosure sale and former owner of land.
- 48. Master and servant.

§ 41. General considerations.

Not infrequently the relation of landlord and tenant exists between persons who also occupy some other legal relation towards one another, and occasionally persons occupying such other relation are asserted to occupy, by reason of such relation, the further relation of landlord and tenant. We will here consider the various relations which have been considered or asserted thus to exist concurrently with that of landlord and tenant.

§ 42. Trustee and cestui que trust.

It has been said that a *cestui que trust* who is given possession of the trust property by the trustee is at law a tenant at will merely, this having reference to the right of the trustee to repossess himself of the property at pleasure, and to his right of recovery

in ejectment without reference to any equitable rights in the *cestui que trust*.¹ Since the adoption of statutes in most jurisdictions, however, allowing equitable defenses at law, the position of the *cestui que trust* cannot be regarded as necessarily that of a tenant at will, since he may, in defence to the trustee's action for possession, show any better right thereto which may exist in himself, as that it was intended by the creator of the trust that he should have the possession.

A trustee in possession is evidently not the tenant of the *cestui que trust*, since he does not hold under the latter.²

§ 43. Vendor and vendee.

a. **Vendee let into possession.** The question whether one who, having a contract for the sale to him of certain land, obtains possession thereof pending the making of a conveyance to him, is a tenant of his vendor, is a subject on which there has been much divergence of opinion. As elsewhere stated,³ by a number of decisions, a vendee so entering into possession is, if the sale fails of consummation otherwise than through the fault of the vendor, regarded as liable in an action for the value of his use and occupation. These decisions necessarily involve the view that the relation of landlord and tenant exists,⁴ and it has been quite frequently asserted that a vendee in possession is a tenant at will of the vendor.⁵ But apart from the decisions imposing liability on the

¹ Doe d. Nicholl v. McKaeg, 10 Barn. & C. 721; Perry v. Shipway, 1 Giff. 1. See Lewin, Trusts (11th Ed.) 851. So it has been said that the possession of the *cestui que trust* is not adverse to the trustee, since he is tenant at will of the latter. Marr v. Gilliam, 41 Tenn. (1 Cold.) 488. And see Garrard v. Tuck, 8 C. B. 231.

² See Hardin v. Pulley, 79 Ala. 381.

³ See post, § 304 b.

⁴ See post, § 304 b.

⁵ Patterson v. Stoddard, 47 Me. 355, 74 Am. Dec. 490; Doe d. Hiatt v. Miller, 5 Car. & P. 595; Doe d. Council v. Caperton, 9 Car. & P. 112; Howard v. Merriam, 59 Mass. (5 Cush.) 563; Hall v. Wallace, 88 Cal. 434, 26 Pac. 360 (semble); Foley v. Wyeth, 84 Mass. (2 Allen) 131, 79 Am. Dec. 771; Dunham v. Townsepd, 110 Mass. 440; Rawson v. Babcock, 40 Mich. 330; Hogsett v. Ellis, 17 Mich. 351; Den d. Love v. Edmonston, 23 N. C. (1 Ired. Law) 152; Jones v. Jones, 2 Rich. Law (S. C.) 542; Richardson v. Thornton, 52 N. C. (7 Jones Law) 458; Uhl v. Pence, 11 Neb. 316, 9 N. W. 41; Woodbury v. Woodbury, 47 N. H. 11; Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 318 (dictum); Jackson v. Miller, 7 Cow. (N. Y.) 747; Jones v. Temple, 87 Va.

vendee for use and occupation, the view that he is the vendor's tenant has been but seldom actually applied. It has, however, been applied in favor of the vendee when sued in ejectment by the vendor, it being decided that the action will not lie against him unless there has been a previous demand of possession,⁶ in accord-

210, 12 S. E. 404, 24 Am. St. Rep. 649.

In *Lyon v. Cunningham*, 136 Mass. 532, Field, C. J., after referring to the cases in that state in which one in possession under a contract of purchase is termed a tenant at will, says: "That neither the designation of licensee or tenant at will expresses all the rights and obligations of such an occupant (under a contract for a deed) is manifest," and then quotes from *Dakin v. Allen*, 62 Mass. (8 Cush.) 33, as follows: "But it is sometimes said that one who is in thus under a contract for a sale is tenant at will to the owner. In a certain sense he is a tenant at will, as a mortgagor is tenant at will to the mortgagee, because he may enter upon him and eject him, if he can do it peaceably, or maintain a real action on his title and thus gain the possession."

In *Freeman v. Headley*, 33 N. J. Law, 523, it was decided that a purchaser in possession was a tenant at will for the purpose of sustaining against him "an action on the case in the nature of waste for destruction committed while in such possession." It may be remarked that at common law the proper form of action against a tenant at will for acts of destruction was trespass and not case, and that his liability for such destruction was not as having committed waste, but as having committed a trespass. Post, § 109 b (1), note 759.

⁶ *Right v. Beard*, 13 East, 210; *Doe d. Newby v. Jackson*, 1 Barn. &

C. 448; *Lewer v. McCulloch*, 10 Nova Scotia, 315; *Doe d. Carson v. Baker*, 15 N. C. (4 Dev. Law) 220, 25 Am. Dec. 706; *Williamson v. Paxton*, 18 Grat. (Va.) 475, 505; *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. 392. In none of these cases was the vendee in default under his contract, but there is no intimation that a different view would be taken if the vendee were in default, unless this effect can be given to the occasional remark that no demand is necessary if the vendee has done some wrongful act which will determine his possession.

In *Den v. Westbrook*, 15 N. J. Law (3 J. S. Green) 371, 29 Am. Dec. 692, and *Harle v. McCoy*, 30 Ky. (7 J. J. Marsh.) 318, 23 Am. Dec. 407, it was held that a previous demand of possession was necessary, though at the same time it was stated that no relation of tenancy existed. In the first case the vendee was in default, and in the second he was not in default. In *Prentice v. Wilson*, 14 Ill. 91, it is said that a previous demand is not necessary if the vendee is in default, though otherwise it is necessary; and in *Baker v. Gittings*, 16 Ohio, 485; *Jackson v. Miller*, 7 Cow. (N. Y.) 747; *McHan v. Stansell*, 39 Ga. 197, and *Chilton v. Niblett*, 22 Tenn. (3 Humph.) 404, it was apparently decided that no demand was necessary. In these cases, however, the defendant was in default. In *Glascock v. Robards*, 14 Mo. 350, 55 Am. Dec. 108, a demand was apparently re-

ance with the rule that such demand is a prerequisite to the maintenance of ejectment against a tenant at will.⁷

While, as above stated, it has been asserted not infrequently that the vendee is the vendor's tenant, there are numerous cases to an opposite effect. Decisions that the vendee is not liable to the vendor in use and occupation are sometimes in terms based upon the theory that he is not a tenant,⁸ though he might be a tenant and still not be so liable.⁹ That he is not a tenant has also been asserted in other connections.¹⁰

It is sometimes said that a vendee is a licensee rather than a tenant.¹¹ That he is a licensee and not a tenant when he is given rights of entry or occupation merely for certain purposes pending

garded as unnecessary as against a purchaser of the vendee's interest, though there was no default. In some of these decisions the question of demand as a prerequisite to ejectment and that of notice as necessary to terminate a tenancy at will seem to be somewhat confused.

In several cases it is decided that no demand is necessary when the vendee is in default (*Gregg v. Von Phul*, 68 U. S. [1 Wall.] 274; *Prentice v. Wilson*, 14 Ill. 91; *Dean v. Comstock*, 32 Ill. 173; *Hotaling v. Hotaling*, 47 Barb. [N. Y.] 163), while in others previous demand or notice has been decided to be necessary even in such case (*Guess v. McCauley*, 61 N. C. 514; *Twyman v. Hawley*, 24 Grat. [Va.] 512, 18 Am. Rep. 661).

⁷ See ante, § 13 b, note 403.

⁸ *Carpenter v. U. S.*, 84 U. S. (17 Wall.) 489; *Smith v. Stewart*, 6 Johns. (N. Y.) 46, 5 Am. Dec. 186; *Thompson v. Bower*, 60 Barb. (N. Y.) 463; *Newby v. Vestal*, 6 Ind. 412; *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278; *Mariner v. Burton*, 4 Har. (Del.) 69; *Tucker v. Adams*, 52 Ala. 254; *Little v. Pearson*, 24 Mass. (7 Pick.) 301, 19 Am. Dec. 289; *Hop-*

kins v. Ratliff, 115 Ind. 213, 17 N. E. 288; *Coffman v. Huck*, 19 Mo. 435; *Stacy v. Vermont Cent. R. Co.*, 32 Vt. 551; *Brown v. Randolph*, 26 Tex. Civ. App. 66, 62 S. W. 981.

⁹ That is, the circumstances may show an understanding that he was not to pay for his use and occupation. See post, §§ 304 b, 315.

¹⁰ *Moen v. Lillestal*, 5 N. D. 327, 65 N. W. 694; *Richmond & Lexington Turnpike Road Co. v. Rogers*, 70 Ky. (7 Bush.) 534; *Barnes v. Shinholster*, 14 Ga. 131; *Harle v. McCoy*, 30 Ky. (7 J. J. Marsh.) 318, 23 Am. Dec. 407; *Stauffer v. Eaton*, 13 Ohio, 322; *Klopfer v. Keller*, 1 Colo. 410; *Willis v. Wozencraft*, 22 Cal. 607; *McNair v. Schwartz*, 16 Ill. 24; *Hill v. Hill*, 43 Pa. 528 (semble); *Starkey v. Starkey*, 136 Ind. 349, 36 N. E. 287; *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341; *Bemis v. Allen*, 119 Iowa, 160, 93 N. W. 50; *Cole v. Gill*, 14 Iowa, 527; *Johnson v. Pollock*, 58 Ill. 181.

¹¹ *Dolittle v. Eddy*, 7 Barb. (N. Y.) 74; *Stone v. Sprague*, 20 Barb. (N. Y.) 509; *Druse v. Wheeler*, 22 Mich. 439, 26 Mich. 189; *Gault v. Stormont*, 51 Mich. 636, 17 N. W. 214; *Burnett v. Caldwell*, 76 U. S. (9 Wall.) 290.

the consummation of the sale is no doubt true,¹² but when he is put in possession as a tenant might be, without any reservation of control in the vendor or any intention that his occupation is to be limited in character and purpose, it is difficult, if not impossible, to regard him as a licensee, and it can be done only on the theory that the existing relation of vendor and vendee renders what would otherwise be a demise effective merely as a license. The decisions that he is liable in use and occupation are necessarily inconsistent with the view that he is a licensee and not a tenant.

Even in jurisdictions in which it has been judicially asserted that the vendee in possession is the vendor's tenant, the courts have refused to regard him as a tenant for all purposes. He is not ordinarily so regarded for the purpose of enabling the vendor to maintain summary proceedings against him for possession,¹³ and there are a number of decisions to the effect that the statutes requiring a notice of a certain length of time in order to terminate a tenancy at will are not to be applied so as to render such a notice necessary before the vendor can oust a vendee who is in default.¹⁴

¹² See *Henry v. Perry*, 110 Ga. 630, 36 S. E. 87.

¹³ *Maxham v. Stewart*, 133 Wis. 525, 113 N. W. 972; *Dakin v. Allen*, 62 Mass. (8 Cush.) 33; *Kiernan v. Linnehan*, 151 Mass. 543, 24 N. E. 907; *Dunham v. Townsend*, 110 Mass. 440; *Hay's Heirs v. Connelly*, 8 Ky. (1 A. K. Marsh.) 393; *McCombs v. Wallace*, 66 N. C. 481; *People v. Bigelow*, 11 How. Pr. (N. Y.) 83; *Johnson v. Hauser*, 82 N. C. 375; *Brown v. Persons*, 48 Ga. 60; *Griffith v. Collins*, 116 Ga. 420, 42 S. E. 743; *Klopfer v. Keller*, 1 Colo. 410; *Bemis v. Allen*, 119 Iowa, 160, 93 N. W. 50; *Mason v. Delancy*, 44 Ark. 444; *Chicago, B. & Q. R. Co. v. Skupa*, 16 Neb. 341, 20 N. W. 393; *Ellsworth v. McDowell*, 44 Neb. 707, 62 N. W. 1082. *Contra*, *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360; *McKissick v. Bullington*, 37 Miss. 535; *Sullivan v. Ivey*, 34 Tenn. (2 Sneed.) 487; *Knight v. Hartman*, 81 Mich. 462, 45 N. W.

1008. In *Henry v. Perry*, 110 Ga. 630, 36 S. E. 87, it is held that one having an option of purchase, who obtains a license to enter to prospect for minerals on the property, cannot be ousted by dispossession proceedings as tenant if he retains possession after his option has expired.

In Illinois the statute (Hurd's Rev. St. c. 57, § 2 [5]) gives in express terms to the vendor the right to bring an action of forcible entry and detainer against a vendee in default. See *Jackson v. Warren*, 32 Ill. 331; *Monsen v. Stevens*, 56 Ill. 335; *Haskins v. Haskins*, 67 Ill. 446. So in Michigan (Comp. Laws 1897, § 11, 164). See *Vos v. Dykema*, 26 Mich. 399.

¹⁴ *Den v. Westbrook*, 15 N. J. Law (3 J. S. Green) 371, 29 Am. Dec. 692; *Jackson v. Kingsley*, 17 Johns (N. Y.) 747; *Powers v. Ingraham*, 3 Barb. (N. Y.) 576; *Chilton v. Nib-*

In North Carolina it has been decided that the vendee in possession is not a tenant within the statute of that state vesting the title to the tenant's crop in the landlord "where lands shall be rented or leased by agreement, written or oral, for agricultural purposes."¹⁵

X The fact that the contract of sale is oral and is therefore unenforceable under the statute of frauds has been decided not to make the relation of the parties that of landlord and tenant, the contract being regarded as admissible to show the intention with which the vendee was let into possession and to preclude any inference of a tenancy.¹⁶ And in other cases the fact that the contract of sale is invalid under that statute has been apparently ignored in connection with the question whether the vendee is a tenant of the vendor.¹⁷ Occasionally, however, it has been decided that in view of the invalidity of the contract, it cannot be considered for the purpose of showing that the permissive occupation is other than that of a tenant.¹⁸

In spite of the numerous decisions above referred to, adverse to the view that a purchaser of land who has exclusive possession by the vendor's permission is a tenant of the latter, it is somewhat difficult to see how he can have such possession otherwise than as a tenant. No right of possession exists in a vendee, either at law

lett, 22 Tenn. (3 Humph.) 404; *Venable v. McDonald*, 34 Ky. (4 Dana) 337. But in *Rawson v. Babcock*, 40 Mich. 330, and *Williams v. Hodges*, 41 Mich. 695, 3 N. W. 189, it was held that where the entry by the vendee was not under the express provisions of the contract of sale, but was under a permission separately given, the vendee was tenant at will, and as such entitled to three months' notice.

¹⁵ *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924.

¹⁶ *Mason v. Delancy*, 44 Ark. 444; *Barnes v. Shinholster*, 14 Ga. 131; *Carpenter v. U. S.*, 84 U. S. (17 Wall.) 489.

¹⁷ See *Yater v. Mullen*, 23 Ind. 562; *Hogsett v. Ellis*, 17 Mich. 351; *Pat-*

erson v. Stoddard, 47 Me. 355, 47 Am. Dec. 490; *Lapham v. Norton*, 71 Me. 83; *Gould v. Thompson*, 45 Mass. (4 Metc.) 224; *Howard v. Merriam*, 59 Mass. (5 Cush.) 563; *Kay v. Curd*, 45 Ky. (6 B. Mon.) 100; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Chilton v. Niblett*, 22 Tenn. (3 Humph.) 404; *Reddick v. Hutchinson*, 94 Ga. 675, 21 S. E. 712.

¹⁸ *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318; *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360. And see *Vick v. Ayres*, 56 Miss. 670.

In *Rogers v. Hill*, 3 Ind. T. 562, 64 S. W. 536, it was held that one who went into possession under a void contract of sale of Indian land was a tenant at will.

or in equity, by reason of the contract of sale alone, at least until the consideration has been wholly paid,¹⁹ and such right can be based, in the particular case, only upon permission given by the vendor. Such a possession by permission of the legal owner of the land would ordinarily involve the relation of landlord and tenant, and that the parties are at the time under contractual obligations as to the future conveyance of the land and payment therefor should not affect the existence of the relation. It is quite frequently stated that one so situated is in possession "not as tenant, but as purchaser," but this seems to assume that, merely as vendee (purchaser), one has a right of possession, which is not the case. One having merely a contract for the conveyance of the legal title, like any other person, can obtain the right of possession for a limited period only by a demise, either in express terms or by inference from the language or acts of the vendor. Such grant of the right of possession may be made at the same time as the contract of sale, or at another time, and in the first case it may be incorporated in the instrument which evidences that contract. It can properly, however, in either case, it is conceived, be regarded only as a lease creating a tenancy between the vendor and purchaser. It would be generally conceded, presumably,²⁰ that if the vendor, in the instrument evidencing the sale, or in a separate instrument, states that he does thereby "lease" the premises to the vendee until the time for the making of the conveyance, the latter, having entered by reason of such clause, should be regarded as the tenant of the landlord. But there is, as before stated,²¹ no distinction in principle between such a case and that in which the vendor merely gives oral permission to the vendee to take possession, or indicates such permission by acts instead of words. In either case there is a lease, by reason of which alone the vendee has a right of exclusive possession. And so there is a lease, that is, a grant of a right of possession, when the vendor in terms grants such right, or such grant can be inferred from the language of the contract considered as a whole.

When the vendee in possession is regarded as a tenant, it is ordinarily stated that he is a tenant at will.²² By several cases, how-

¹⁹ See cases cited 29 Am. & Eng. Enc. Law (2nd Ed.) 704.

²⁰ See cases cited post, notes 28-32.

²¹ See ante, § 17.

²² See cases cited ante, note 5.

ever, the vendee who is thus permitted to enter is regarded as entitled to retain possession until he makes default in the performance of his contract,²³ and ordinarily, it seems, the grant of permission to take possession would be with the intention that the right to possession should continue in the vendee until a conveyance is made to him, or until there is a default on his part, whether this permission is expressed in the instrument which evidences the contract of sale, in a separate instrument, by oral statement, or by acts rather than by words. The question whether the vendor could treat the vendee as a mere tenant at will would thus depend, it seems, in many cases, upon the construction of the written instrument, or upon the evidence bearing upon the fact of permission. In some cases, it is true, even though the intention to give the vendee the right of possession until the making of the conveyance is apparent, the vendee in possession would be merely a tenant at will, because the intention is not expressed in accordance with law, as when the permission is merely oral and yet the conveyance is not to be made until after the period for which an oral lease is valid. This would constitute a case of an entry under a lease invalid under the statute of frauds, the lessee thereby becoming in the first place a tenant at will.

If there is an intention that the vendee shall remain in possession until the time for the making of the conveyance, or until default on his part, and this intention is validly expressed, the vendee cannot, it is evident, be regarded as merely a tenant at will, but he is rather, it seems, a tenant for a term to endure until the date fixed for the conveyance, subject to a special limitation that the term shall cease upon his default.²⁴

²³ Downer v. Richardson, 9 Vt. 377; Whittier v. Stege, 61 Cal. 238; note and interest, "and in the meantime to allow the plaintiff, his heirs and assigns, the peaceable and quiet possession," the plaintiff was not a tenant at will, but the condition of the bond was a demise so long as the plaintiff should pay the interest and should not fail to pay the principle on demand. In Doe d. Cliff v. Connaway, 2 New Br. (Bert.) 382, it was decided that a purchaser let into possession to hold until default

²⁴ See Fitch v. Windram, 184 Mass. 68, 67 N. E. 965, apparently to this effect. So in White v. Livingston, 64 Mass. (10 Cush.) 259, it was decided that, where plaintiff entered under a bond to convey the premises to the

plaintiff if he should pay a certain note and interest, "and in the meantime to allow the plaintiff, his heirs and assigns, the peaceable and quiet possession," the plaintiff was not a tenant at will, but the condition of the bond was a demise so long as the plaintiff should pay the interest and should not fail to pay the principle on demand. In Doe d. Cliff v. Connaway, 2 New Br. (Bert.) 382, it was decided that a purchaser let into possession to hold until default

There have been suggestions to the effect that a vendee in possession may be a tenant at sufferance.²⁵ But if he is holding by possession he cannot, according to the common-law view of such a tenant,²⁶ be a tenant at sufferance, and if his entry is without permission he is, it is conceived, a trespasser. If, however, being given a right of possession until default or for a definite time, he thereafter holds over without permission, he is properly described as a tenant at sufferance.²⁷ If his holding, even after default, is by permission, then he is at least a tenant at will and is not a tenant at sufferance.

b. **Express stipulation for tenancy.** There are a considerable number of cases recognizing the possibility of the creation of the relation of tenancy between the vendor and the vendee by an express stipulation to that effect. Such a stipulation may be contemporaneous with the contract of sale, whether contained in the same instrument or not,²⁸ or it may be made subsequently to such

in the purchase price was tenant for years until the time for payment of the price.

²⁵ See *Knight v. Hartman*, 81 Mich. 462, 45 N. W. 1008. In *Smith v. Singleton*, 71 Ga. 68, it was decided that one who entered by reason of a contract of sale made by an agent of the owner who had charge of the land, and authority "perhaps to rent," but not to make such a contract, was a tenant at sufferance and liable to the statutory process applicable to tenants holding over. This is somewhat difficult to understand. If the agent had authority to give him possession, he would seem to be a tenant at will at least, while if the agent had no such authority, the purchaser could not well be other than a trespasser, unless perhaps he could be regarded as a mere licensee. The court evidently has a conception of a tenant at sufferance different from that which obtained at common law. See, also, *Brown v. Persons*, 48 Ga. 60.

²⁶ See ante, § 15 a.

²⁷ *Moore v. Smith*, 56 N. J. Law, 446, 29 Atl. 159.

In *Sanders v. Richardson*, 31 Mass. (14 Pick.) 522, it was decided that, where a bond for title provided that the obligee was to have and keep possession and was to pay a certain sum in one year, whereupon he was to receive a conveyance, the obligee, retaining possession after the year without having paid such sum, was a tenant at sufferance.

²⁸ *Yeoman v. Ellison*, 36 Law J. C. P. 326; *Saunders v. Musgrave*, 6 Barn. & C. 524. So where the vendor orally agreed that the vendee should have possession till delivery of the conveyance, paying therefor a sum named, it was held that the relation of landlord and tenant existed, and that an action of use and occupation would lie. *Nestal v. Schmid*, 39 N. J. Law, 686. And one entering under an oral agreement by the owner to devise the land to him, he in the meantime to pay rent, was regarded

contract,²⁹ or even after default.³⁰ And when subsequent in time it may be made with the intent and effect of terminating the operation of the contract of sale and the relation of vendor and purchaser,³¹ though it does not necessarily have that effect.³²

The fact that, in a contract for sale, the installments of the price to be paid or the interest thereon are spoken of as "rent," does not of itself, it has been held, evidence the relation of landlord and tenant,³³ though an agreement to pay "rent" as compensation for the right of occupation does, it would seem, have that effect.³⁴

c. **Tenancy on vendee's default.** It is sometimes provided, at the time of the contract of sale or subsequently, that if the vendee does not comply with the conditions of sale as to payment of the price or otherwise, the vendee shall occupy the position of tenant and pay rent accordingly for the time of his occupation, and such a provision, in effect making the vendee liable as such or as tenant at his election, has been upheld in a number of cases.³⁵

as a tenant. *Hopkins v. Ratliff*, 115 Ind. 213, 17 N. E. 288.

²⁹ See post, note 31, 32.

³⁰ See *McCrillis v. Benoit*, 26 R. I. 421, 58 Atl. 108.

³¹ *Powell v. Hadden's Exr's*, 21 Ala. 745; *Thornton v. Strauss*, 79 Ala. 164; *Wilkinson v. Roper*, 74 Ala. 140; *Riley v. Jordan*, 75 N. C. 180; *Dunn v. Tillery*, 79 N. C. 497; *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924; *Smith v. Fouche*, 55 Ga. 120; *Barton v. Smith*, 66 Iowa, 75, 23 N. W. 271; *Chambers v. Irish*, 132 Iowa, 319, 109 N. W. 787; *Locke v. Frasher's Adm'r*, 79 Va. 409; *Barrett v. Johnson*, 2 Ind. App. 25, 27 N. E. 983; *Spears v. Robinson*, 71 Miss. 774, 15 So. 111.

Intervening rights cannot be affected by such a contract. For instance, if a third person has obtained an interest in the crop, a lien cannot be enforced for rent by the vendor, on becoming lessor, as against such person. *Wilczinski v. Lick*, 68 Miss. 596, 10 So. 73.

³² See *Nestal v. Schmidt*, 39 N. J. Law, 666; *Moore v. Smith*, 56 N. J. Law, 446, 29 Atl. 159; *Jones v. Jones*, 117 N. C. 254, 23 S. E. 214.

³³ *Walters v. Meyer*, 39 Ark. 560; *Quertermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096; *Watson v. Pugh*, 51 Ark. 218, 10 S. W. 493. See *Scofield v. McNaught*, 52 Ga. 69; *Sackett v. Barnum*, 22 Wend. (N. Y.) 605; *Blitch v. Edwards*, 96 Ga. 606, 24 S. E. 147.

³⁴ *Jackson v. Niven*, 10 Johns (N. Y.) 335; *Nobles v. McCarty*, 61 Miss. 456.

³⁵ *Collins v. Whigham*, 58 Ala. 438; *Foster v. Goodwin*, 82 Ala. 384, 2 So. 895; *Quertermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096; *Block v. Smith*, 61 Ark. 26, 32 S. W. 1070; *Drum v. Harrison*, 83 Ala. 384, 3 So. 715; *Smith v. Fouche*, 55 Ga. 120; *Reddick v. Hutchinson*, 94 Ga. 675, 21 S. E. 712; *Bacon v. Howell*, 60 Miss. 362; *Williamson v. Paxton*, 18 Grat. (Va.) 475. So, where the purchase-money note provided that if

Likewise, a contract of sale providing that the vendee shall occupy the position of tenant in case the vendor fails to make title has been upheld,³⁶ as has a provision giving to the vendor the option to elect to regard the vendee as tenant instead of vendee, on default in payment of the purchase price.³⁷ The existence of such a provision or agreement giving either the vendor or vendee the right, by election, to create the relation of landlord and tenant in place of that of vendor and vendee, does not, it has been decided, until the time for election has arrived, create the former relation,³⁸ but when it has arrived and the relation is created, the election relates back to the time of the making of the original agreement, and the rights incident to the relation take precedence of rights acquired before such election by third persons who took with notice, actual or constructive, of the terms of the agreement.³⁹ The Mississippi cases are to the effect that a third person

the vendee failed to pay it at maturity he should pay the "customary rent," he was held to become a tenant upon such nonpayment. *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440.

In *Vick v. Ayres*, 56 Miss. 670, it was decided that where the contract of sale providing that the vendee, if he failed to pay the purchase money at the end of the year, should pay a certain rent, was oral, though it was void under the statute of frauds as a contract of sale, it was valid as a lease for one year, and that the vendor might distrain, after having unsuccessfully demanded the purchase money, although he had not tendered a deed.

In *Collins v. Whigham*, 58 Ala. 438, it was held that where the contract conferred on A the right to become the purchaser by delivering a certain amount of cotton annually, or to become tenant by delivering a less amount, the right of election was in A, since he was the first one to act, but if he failed to make election at the time named for delivery of the cotton, the other might elect,

and that the election once made was conclusive as to the relations of the parties from the time of the contract.

³⁶ *Eaton v. Hunt*, 20 Ky. Law Rep. 860, 47 S. W. 763; *Cross v. Freeman*, 19 Tex. Civ. App. 428, 47 S. W. 473.

³⁷ *Stinson v. Dousman*, 61 U. S. (20 How.) 461; *Dunn v. Tillery*, 79 N. C. 497; *Austin v. Wilson*, 46 Iowa, 362.

³⁸ *Cross v. Freeman*, 19 Tex. Civ. App. 428, 47 S. W. 473; *Oxford v. Ford*, 67 Ga. 362; *Killebrew v. Hines*, 104 N. C. 182, 10 S. E. 159, 17 Am. St. Rep. 672; *Green v. Dietrich*, 114 Ill. 636, 3 N. E. 800 (semble). And in *Moore v. Smith*, 24 Ill. 512, it is in effect decided that a manifestation of the election is necessary in order to change the relation.

³⁹ *Collins v. Whigham*, 58 Ala. 438; *Thornton v. Strauss*, 79 Ala. 164; *Foster v. Goodwin*, 82 Ala. 384, 2 So. 895; *Bacon v. Howell*, 60 Miss. 362; *Abernethy v. Green* (Miss.) 11 So. 186. In these cases the rights of the vendor as landlord against the crops were regarded as superior to

is under the duty of seeking information of the vendor, in whom the legal title is vested, before he can claim to be without notice of such an agreement, even though it be oral.⁴⁰

Under a contract of this character, providing that the relation of landlord and tenant shall arise upon the vendee's default, with a liability upon the part of the latter to rent at a sum named, the vendor has been allowed, after such default, to recover rent as against the vendee,⁴¹ to assert a lien therefor,⁴² and to enforce his claim by distress.⁴³ It has, however, been decided in one case that the fact that the contract of sale provides that in case of the vendee's default he should hold the premises as "tenant" of the vendor did not entitle the vendor to recover against the vendee as for use and occupation, since the vendee, having paid part of the price, had "rights and equities under his contract of purchase which would defeat an action at law against him as a tenant."⁴⁴ And though there are decisions to the effect that such a provision gives the vendor a right, after the vendee's default, to bring summary proceedings for possession against him as a tenant,⁴⁵ there are others in which a contrary view has been adopted.⁴⁶

As before suggested, it is difficult to see why a mere informal permission to the vendee to take possession, or a clause to that

those of a third person who had acquired an interest in the crops. sufferance" was used in the contract, but the words "at sufferance" were

⁴⁰ See cases cited in next preceding note.

⁴¹ *Stinson v. Dousman*, 61 U. S. (20 How.) 461; *Block v. Smith*, 61 Ark. 266, 32 S. W. 1070; *Thornton v. Strauss*, 79 Ala. 164; *Dunn v. Tillery*, 79 N. C. 497.

⁴² *Foster v. Goodwin*, 82 Ala. 384, 2 So. 895; *Quertermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096.

⁴³ *Oxford v. Ford*, 67 Ga. 362; *Reddick v. Hutchinson*, 94 Ga. 675, 21 S. E. 712; *Vick v. Ayres*, 56 Miss. 670.

⁴⁴ *Hill v. Sidle*, 116 Wis. 602, 93 N. W. 446, 96 Am. St. Rep. 1011, approving *Diggle v. Boulden*, 48 Wis. 477, 4 N. W. 678, and disapproving *Wright v. Roberts*, 22 Wis. 161. In this case the expression "tenant at

sufferance" was used in the contract, but the words "at sufferance" were in effect ignored by the court, the question being whether the vendee was a tenant at all.

⁴⁵ *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440; *Barrett v. Johnson*, 2 Ind. App. 25, 27 N. E. 983. This seems to be assumed in *Griffith v. Collins*, 116 Ga. 420, 42 S. E. 743, where, however, it was decided that there was no default by the vendee so as to create a tenancy, although he tendered the wrong amount of purchase money, it appearing that a tender of the right amount would have been refused.

⁴⁶ *Chicago, B. & Q. R. Co. v. Skupa*, 16 Neb. 341, 20 N. W. 393; *Burkhart v. Tucker*, 27 Misc. 724, 59 N. Y. Supp. 711.

effect in the written contract of sale, should not be as effective to make the vendee a tenant as is either a distinct formal lease to him or a clause in the contract of sale explicitly creating the relation of tenancy. The cases above referred to, recognizing the validity of a provision that upon the vendee's default he shall be regarded as tenant and liable for rent as such, generally assume that, apart from such a stipulation, the vendee, though in possession, is not a tenant. Upon the view that he is a tenant even before default, by reason merely of his permissive possession, it would seem that the effect of such a provision is, upon default, to substitute a new tenancy, subject to a prescribed rent, for the former tenancy, which would ordinarily not be subject to a rent or charge for use and occupation, in other words, that there would be a surrender by operation of law.⁴⁷

d. **Tenant becoming vendee.** As the relation of vendor and purchaser may be changed into that of landlord and tenant, so, conversely, an instrument which operates primarily as a lease may, it appears, subsequently take effect as a contract of sale by virtue of a provision therein that upon the payment of rent as agreed to an aggregate amount named the lessor shall make an absolute conveyance to the lessee. But until the amount named is paid, the relation of landlord and tenant, with its incidental rights, will exist between the parties.⁴⁸

There is at least one case apparently to the effect that the presence of an option of purchase in an instrument which would otherwise take effect as a lease may prevent the landlord from having the benefit of the ordinary landlord's proceeding to recover possession.⁴⁹ However this may be, as based on the construction of

⁴⁷ See post, § 190 b.

⁴⁸ *Davis v. Robert*, 89 Ala. 402, 8 So. 114, 18 Am. St. Rep. 126; *Blanchard v. Raines' Ex'x*, 20 Fla. 467; *Crinkley v. Egerton*, 113 N. C. 444, 18 S. E. 669; *Quertermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096; *Nobles v. McCarty*, 61 Miss. 456; *Thomas v. Johnston*, 78 Ark. 574, 95 S. W. 468; *Croskill v. Wortman*, 10 New Br. (5 Allen) 648.

⁴⁹ *Nightingale v. Barens*, 47 Wis. 389, 2 N. W. 767. The opinion of

the court seems to be to a great extent based on the theory that the purpose of the transaction was to secure the payment of a debt. But this is not a reason for excluding the relation of landlord and tenant. See post, § 45 d.

In *Reeder v. Bell*, 70 Ky. (7 Bush) 255, it was decided that one entering under an agreement to occupy and care for the land for six years, with the right to purchase when able, was not a tenant within the

the local statute in reference to such proceeding, the fact that there is such an option in the lessee can certainly not, for most purposes, change a lease into a contract of sale.⁵⁰

§ 44. Grantor and grantee.

If one who has made a conveyance of land retains possession, he may or may not do so as the tenant of his grantee. According to the decisions in one state, a grantor so retaining possession is presumed to do so as the grantee's tenant, that is, by the latter's permission,⁵¹ while by other decisions he is *prima facie* not a tenant of the grantee and his possession is wrongful.⁵² But whatever may be the presumption in the absence of evidence bearing on the question, the true state of the case may be shown.⁵³ And evidence that he retains the exclusive possession by the grantee's permission establishes the relation of landlord and tenant.⁵⁴

summary proceeding statute. The (N. Y.) 106; *Greenup v. Vernon*, 16 ground of the decision is not stated, Ill. 26.

and it may have been on the theory 53 *Preston v. Hawley*, 101 N. Y. 586, 5 N. E. 770; *Id.*, 129 N. Y. 296, 34 N. E. 906; *Larrabee v. Lumbert*, 34 Me. 79.

merely. Compare *Colored Homestead & Bldg. Ass'n v. Harvey*, 23 Ky. Law Rep. 1009, 64 S. W. 676, to the effect that the presence of such an option does not exclude the relation of tenancy. 54 *Preston v. Hawley*, 101 N. Y. 586, 5 N. E. 770; *Id.*, 129 N. Y. 296, 34 N. E. 906; *Hunt v. Comstock*, 15 Wend. (N. Y.) 665; *Prichard v. Tabor*, 104 Ga. 64, 30 S. E. 415; *Butler v. Nelson*, 72 Iowa, 732, 32 N. W. 399; *Cadwallader v. Lovece*, 10 Tex. Civ. App. 1, 29 S. W. 666, 917; *Hodges v. Gates*, 9 Vt. 178.

⁵⁰ See *Smith v. Brannan*, 13 Cal. 107; *Colored Homestead & Bldg. Ass'n v. Harvey*, 23 Ky. Law Rep. 1009, 64 S. W. 676; *Clifford v. Gressinger*, 96 Ga. 789, 22 S. E. 399; *Granger v. Riggs*, 118 Ga. 164, 44 S. E. 983; *Hand v. Williamsburgh City Fire Ins. Co.*, 57 N. Y. 41; *Gilbert v. Port*, 28 Ohio St. 26; and other cases cited post, chapter XXVI.

⁵¹ *Currier v. Earl*, 13 Me. 216; *Sherburne v. Jones*, 20 Me. 70; *Larrabee v. Lumbert*, 34 Me. 79.

⁵² *Tew v. Jones*, 13 Mees. & W. 12; *Preston v. Hawley* 101 N. Y. 586 5 N. E. 770; *Id.*, 129 N. Y. 296, 34 N. E. 906; *Jackson v. Aldrich*, 13 Johns.

Sims v. Humphrey, 4 Denio (N. Y.) 185, is contra. And in *Goldsberry v. Bishop*, 63 Ky. (2 Duv.) 114, it was held that one who, having an equitable title under a bond to convey, transferred his equity to another, retaining the right of possession for a fixed time, was not the tenant of his transferee. The decision is based on the ground that there was no "reservation of rent" or "allegiance to the title." The

It is occasionally asserted that a grantor retaining possession is a "tenant at sufferance."⁵⁵ This presumably refers to the case in which he retains possession without permission of his grantee, since one in possession by permission is not tenant at sufferance.⁵⁶ There seems no objection to calling a grantor who retains possession without permission tenant at sufferance, using this expression as a term broadly descriptive of a person wrongfully retaining possession after the expiration of a rightful possession, and, in the earlier authorities the expression was occasionally applied to persons in analogous positions, that is to a feoffor to uses who retained possession,⁵⁷ and to a tenant for years continuing in possession after making a surrender.⁵⁸ But a tenant at sufferance is, as we have before undertaken to show,⁵⁹ not properly a tenant of the person entitled to possession, and it appears to be beyond question that a grantor, holding over against his grantee's consent, is not a tenant "of" his grantee.

§ 45. Mortgagor and mortgagee.

a. **Mortgagor in possession as tenant.** In those jurisdictions in which the legal title to the premises does not pass by a mortgage, the right of possession remains in the mortgagor, and no question can arise, by reason of the making of the mortgage, as to whether he is in possession as tenant or otherwise. But in juris-

failure to reserve rent however, the tenant should have entered into does not affect the existence of a possession lawfully and should tenancy, and there was, it seems, continue to hold after the termination allegiance to the title to the same of his right." But, as to this, see extent as in other cases of a ten- ante, § 15 a.

⁵⁵ *Bennett v. Robinson*, 27 Mich. 26; *Stevens v. Hulin*, 53 Mich. 93, 18 N. W. 569; *Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; *Wolcott v. Hamilton*, 61 Vt. 79, 17 Atl. 39. In *Taylor v. O'Brien*, 19 R. I. 429, 34 Atl. 739, it was even held that a wife of the owner who retained possession after a conveyance by the latter was a tenant at sufferance as to the grantee, it being said that "to constitute a tenancy by sufferance, all that is necessary is that

⁵⁶ See ante, § 15 a.

⁵⁷ See ante, § 15 a, at note 584.

⁵⁸ "Tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election." Co. Litt. 57 b, note from Lord Hale's Ms. 5. But in *Bellingham v. Alsopp*, Noy, 106, it is said that a bargainor continuing possession after enrollment, is a disseisor for the statute transfers the freehold to the bargainee.

⁵⁹ See ante, § 15a, at notes 568-573.

dictions in which the legal title is vested in the mortgagee, the question whether the mortgagor is to be regarded as a tenant has been the subject of a number of discordant *dicta*. Lord Mansfield in one case spoke of a mortgagor in such a position as a "tenant at will,"⁶⁰ and in another as a "tenant at will *quodam modo*,"⁶¹ and there are other cases in which the mortgagor is spoken of as a tenant at will,⁶² or as in some respects in the position of a tenant at will.⁶³ On the other hand he is occasionally spoken of as a tenant at sufferance.⁶⁴ Sometimes it is said that he is not a tenant at all.⁶⁵ To some extent, in accordance with this latter view, are a number of decisions in this country that the mortgagee has no right to bring summary proceedings to recover possession of the premises from the mortgagor on default.⁶⁶

Considering this question of the legal relation of a mortgagor in possession to the mortgagee, as it may arise in that class of states in which the legal title is transferred to the mortgagee by

⁶⁰ *Keech v. Hall*, 1 Doug. 21.

⁶¹ *Moss v. Gallimore*, 1 Doug. 279.

⁶² *Ex parte Isherwood*, 22 Ch. Div. 391, per Jessel, M. R.; *Dickenson v. Jackson*, 6 Cow. (N. Y.) 147; *Judd v. Woodruff*, 2 Root (Conn.) 298.

⁶³ *Jamieson v. Bruce*, 6 Gill. & J. (Md.) 72, 26 Am. Dec. 557; *Washington Bank v. Hupp*, 10 Grat. (Va.) 23. In *Vance's Heirs v. Johnson*, 29 Tenn. (10 Humph.) 215, it is said that the mortgagor is not strictly a tenant at will.

⁶⁴ See *Thunder v. Belcher*, 3 East, 450; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; *Scobie v. Collins* [1895] 1 Q. B. 375; *American Mortg. Co. v. Simmons*, 95 Ala. 272, 11 So. 211. Contra, per *Patteson, J.*, in *Wilton v. Dunn*, 17 Q. B. 294.

In *Smartle v. Williams*, 1 Salk. 246, 3 Lev. 387, it was said by Holt, C. J., that a mortgagor who remained in possession by agreement was a tenant at will, and that even after the mortgagee had assigned his mortgage, thereby determining the

will, the mortgagor was at all events a tenant at sufferance.

In *Mason v. Gray*, 36 Vt. 308, it is said that the mortgagor is a tenant at sufferance after default to the extent that ejectment will lie against him without notice to quit. And to the same effect, see *Wilson v. Hooper*, 13 Vt. 653; *Stedman v. Gassett*, 18 Vt. 346.

⁶⁵ *Wilton v. Dunn*, 17 Q. B. 294; *Hickman v. Machin*, 4 Hurl. & N. 716; *Litchfield v. Ready*, 20 Law J. Exch. 51; *Jones v. Hill*, 64 N. C. 198; *Doe d. Brown v. Mace*, 7 Blackf. (Ind.) 2; *Ray v. Boyd*, 96 Ga. 808, 22 S. E. 916.

⁶⁶ *Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295; *Hastings v. Pratt*, 62 Mass. (8 Cush.) 121; *Evertson v. Sutton*, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; *Roach v. Cosine*, 9 Wend. (N. Y.) 227; *McCombs v. Wallace*, 66 N. C. 481; *Hunter v. Manum*, 78 Wis. 656, 48 N. W. 51; *Ballow v. Motheral*, 64 Tenn. (5 Baxt.) 602; *Kuhn v. Feiser*, 40 Tenn. (3 Head) 82.

the making of the mortgage, it seems a matter of primary importance to distinguish between the case in which the mortgagor remains in possession by permission of the mortgagee, either oral or in writing, and that in which he remains in possession merely because the mortgagee does not care to take possession and thereby incur responsibility for rents and profits. In the former case the mortgagor is, it seems, a tenant of the mortgagee as having permissive possession under him.⁶⁷ In the latter case he is not a tenant of the mortgagee, it is submitted, since he does not hold under him. He is, technically speaking, from the standpoint of a court of law, wrongfully in possession, as appears from the fact that ejectment will lie against him at the suit of the mortgagee without any previous demand of possession.⁶⁸ The mortgagor so retaining the possession without permission is in the same position as a grantor who retains possession without permission.⁶⁹ He may properly be called "tenant at sufferance," provided this is not regarded as meaning that he is a tenant "of" the mortgagee.⁷⁰

It has been decided that a proviso or agreement in the mortgage instrument to the effect that the mortgagor shall possess or enjoy the land until default in payment of principal or interest takes effect as a "redemise," that is a "lease back," until such default.⁷¹ And such would seem the reasonable and satisfactory view. His right of possession is based on the fact, not that he is a mortgagor, but that the right of possession is granted to him, and apart from such grant or redemise he has no right to possession.⁷² There are, however, cases to the effect that a mortgagor thus in possession by

⁶⁷ So a mortgagee in possession may, subsequently to the mortgage, lease to the mortgagor. *Baum v. Gaffy*, 45 Ill. App. 138.

⁶⁸ *Doe d. Roby v. Malsey*, 8 Barn. & C. 767; *Doe d. Parsley v. Day*, 2 Q. B. 147; *Rockwell v. Bradley*, 2 Conn. 1; *Mason v. Gray*, 36 Vt. 308. In a court of equity, however, his retention of possession being in accordance with usage, and the mortgage being regarded as a security only, his possession is not regarded as wrongful, and he is not bound to account for rents and profits.

⁶⁹ See ante, § 44.

⁷⁰ See ante, § 15 a, at notes 568-573.

⁷¹ *Wilkinson v. Hall*, 3 Bing. N. C. 508; *Wheeler v. Montefiore*, 2 Q. B. 133; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143; *Powsely v. Blackman*, Cro. Jac. 659 (dictum); *George's Creek Coal & Iron Co.'s Lessee v. Detmold*, 1 Md. 225; *Richardson v. Baltimore & D. B. R. Co.*, 89 Md. 126, 42 Atl. 938. See *Marden v. Jordan*, 65 Me. 9; *Mayo v. Fletcher*, 31 Mass. (14 Pick.) 525; *Black v. Allan*, 17 U. C. C. P. 240.

⁷² See ante, at note 68.

the permission of the mortgagee is not his tenant.⁷³ Looking closely at the character of such redemise, it would seem to be in effect a demise to run until the time for payment of the principal, or of the last instalment of the principal, subject ordinarily to a collateral limitation, or limitations, terminating the mortgagor's right of possession at the option of the mortgagee upon an earlier default by him in the payment of interest or in such other matters as may be specified. For instance, if the mortgage is to secure a debt payable in five years, a provision that the mortgagor shall have possession until default in principal or interest would be in effect a redemise to the mortgagor for five years, subject to a limitation terminating the demise upon any default. One difficulty which might arise in this connection, but which is perhaps of little practical importance, in view of the general tendency of courts of law to recognize equitable defenses, as well as of the fact that the rights of mortgagor and mortgagee are ordinarily adjusted in equity, is that, from a strictly legal point of view, the term of years thus vested in the mortgagor by the redemise would pass to his personal representative, and not, with his "equity of redemption,"

⁷³ *Sadler v. Jefferson*, 143 Ala. 669, 39 So. 380; *Roach v. Cosine*, 9 Wend. (N. Y.) 227; *Ragan v. Simpson*, 27 Wis. 355; *Nightingale v. Barends*, 47 Wis. 389, 2 N. W. 767; *Davis v. Hemmaway*, 27 Vt. 589.

In *Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295, where it was decided that the presence of such a provision for possession did not make the mortgagor tenant of the mortgagee for the purpose of a statutory proceeding to obtain possession, Mr. Justice Gray, in delivering the opinion of the court, says: "An express stipulation in the mortgage that the mortgagor may remain in possession until breach of condition is intended merely to put in definite and binding form the understanding of the parties as to the exercise of their rights as mortgagor and mortgagee, and not to create between them a distinct relation of tenant and landlord." Citing *Anderson v. Strauss*, 98 Ill. 485. But this statement does not meet the question. When a mortgagee having the legal title in fee and the consequent right of possession grants to another the right of exclusive possession for a limited period, and the latter holds possession under such grant, if his possession is not in the capacity of tenant of his grantor, in what capacity is it? It is not in the capacity of mortgagor, because a mortgagor, as such, has, in the jurisdictions under consideration, no right of possession. The Illinois case referred to gives no aid in the solution of the question.

In *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151; *Constant v. Barrett*, 13 Misc. 249, 34 N. Y. Supp. 163, it is held that a lessee cannot, by the

to his heir or devisee,⁷⁴ though such personal representative would, in equity, be compelled to hold the possession in trust for the heir or devisee.

It has been stated in an English case that a provision for the retention of possession by the mortgagor, even though he failed to pay the sum secured when due, until possession was demanded by the mortgagee, did not operate as a redemise for lack of certainty as to time.⁷⁵ This statement is hard to comprehend, since the validity of a demise not for a certain time, such as one for life or at will, has always been recognized. Even if the mortgagor, thus given the right to possession until default, is not a tenant for years until the time for payment of principal, as we have before suggested him to be, he is at least, it seems, a tenant at will. It was said many years ago, by a great judge,⁷⁶ that "upon executing the deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will," and such, it is submitted, must be the status of the mortgagor when given the right of possession, but not until default or for any other fixed time, unless perhaps in some cases in which the provision for the retention of possession by the mortgagor might be construed as a limitation of a life estate or a fee to the mortgagor until default.⁷⁷ The possibility of the creation of a tenancy at will in favor of the mortgagor is fully recognized in the later English cases.⁷⁸ To render the mortgagor a tenant at will, however, as distinct from a mere wrongdoer, there must, it seems, be language, or at least affirmative acts, on the part of the mortgagee, showing his assent to the mortgagor's continuance in possession,⁷⁹ and his mere failure to oust him cannot show such an assent.⁸⁰

purchase of a past due mortgage on the premises, obtain a right to hold as mortgagee in possession.

⁷⁴ See 1 Powell, Mortgages, 157 b, note; 3 Man. & R. 109, note to Doe d. Roby v. Maisey.

⁷⁵ Doe d. Parsley v. Day, 2 Q. B. 147.

⁷⁶ Holt, C. J., in Smartle v. Williams, 1 Salk. 246, 3 Lev. 387.

⁷⁷ See Sergeant Manning's note in 3 Man. & R., at p. 109.

⁷⁸ Doe d. Bastow v. Cox, 11 Q. B.

122; Morton v. Woods, L. R. 3 Q. B. 658, L. R. 4 Q. B. 293; Scobie v. Collins [1895] 1 Q. B. 375; Doe d. Dixie v. Davies, 7 Exch. 89. See Ashford v. McNaughten, 11 U. C. Q. B. 171; Pegg v. Independent Order of Foresters, 1 Ont. Law Rep. 97.

⁷⁹ See ante, § 13 a (5).

⁸⁰ "Whether the mortgagor in possession is to be considered as a tenant at will, or as a tenant at sufferance, seems to depend upon

The redemise, or lease back from the mortgagee to the mortgagor, need not, it seems evident, be incorporated in the same instrument as the mortgage, nor need it be in writing. But in order that a provision for possession in the mortgagor may take effect as a redemise creating a term of years in him, if the time to elapse before payment of the principal is greater than that for which an oral lease is valid under the statute of frauds, the provision must, it seems, be in writing signed by the mortgagee, and, on the same principle, it would seem that such a provision in a written mortgage instrument could so take effect only when the instrument is signed by the mortgagee as well as the mortgagor. If not sufficient to satisfy the statute of frauds, the provision for possession by the mortgagor would make him merely a tenant at will of the mortgagee.⁸¹ There are, however, decisions, in which the failure of the mortgagee to execute the instrument has been regarded as immaterial.⁸²

the proof, or absence of proof, of assent to such possession on the part of the mortgagee." Sergeant Manning's note to *Doe d. Roby v. Maissey*, 3 Man. & R. 107. So it is said in a late edition of *Smith's Leading Cases* (11th Ed., at p. 542): "It is believed that no decision (as distinguished from dictum) exists in which a mortgagor remaining in possession, after an absolute conveyance away of his estate by way of mortgage, without any consent on the part of the mortgagee, express or to be implied otherwise than from his silence, has been considered in any other light than as tenant at sufferance, to the definition of whom he seems strictly to answer, being a person who comes in by right and holds over without right."

⁸¹ *Morton v. Woods*, L. R. 4 Q. B. 293.

⁸² In *Flagg v. Flagg*, 28 Mass. (11 Pick.) 475, it was held that a provision that the mortgagor should retain possession during his life gave

the mortgagor the exclusive possession, though the instrument was executed only by the mortgagor, it being said that such a provision operated either "by estoppel or reservation," the mortgagee having accepted it. No express reference is made to the statute of frauds, but presumably this was in the mind of the court. The case is not properly one of "reservation" (see 2 *Tiffany, Real Prop.*, § 383), and if a mere assent to an unsigned instrument is sufficient to estop one to assert the statute, the statute becomes nugatory. The above decision is adopted, without discussion, in *Georges Creek Coal & Iron Co.'s Lessee v. Detmold*, 1 Md. 225, and in *Loring v. Bartlett*, 4 App. D. C. 1. See, also, the discordant opinions in *Hobbs v. Ontario Loan & Trust Co.*, 18 Can. Sup. Ct. 483, as to the effect of the mortgagee's failure to execute the instrument, and *Linstead v. Hamilton Provident & Loan Soc.*, 11 Man. Rep. 199, adopting the view

There are English authorities to the effect that while a proviso in the mortgage instrument that the mortgagor shall take the profits until default in payment at a certain day will be effective as a redemise, words of a negative character, as that the mortgagee shall not enter or shall not take the profits till such day, cannot have such an effect but operate merely as a covenant.⁸³ The grounds for such a distinction do not appear, and it would rather seem that in each case it is properly a question of construction of the words used, whether positive or negative in form, as to the intention to vest the possession for a limited period in the mortgagor. In accordance with this view are decisions in this country in which a right in the mortgagor to retain possession has been inferred from expressions merely indicative of such an understanding, without any provision in terms referring to the possession or profits of the land.⁸⁴

b. **Mortgagee in possession as tenant.** In those states in which the legal title, with the right of possession, ordinarily remains, by statute, in the mortgagor, an express provision in the mortgage instrument that the mortgagee shall have the possession, if effective to give the mortgagee the exclusive possession, as it is generally conceded to be,⁸⁵ must, it seems, be regarded as a lease or demise.⁸⁶ It is unfortunate that, in construing provisions of

taken by the majority of the judges in that case that such failure was immaterial.

⁸³ *Powseley v. Blackman*, Cro. Jac. 659; *Doe d. Parsley v. Day*, 2 Q. B. 147, citing *Sheppard's Touchstone* (Preston's Ed.) 272. See *Georges' Creek Coal & Iron Co.'s Lessee v. Detmold*, 1 Md. 225, apparently approving the distinction.

⁸⁴ In *Lamb v. Foss*, 21 Me. 240; *Clay v. Wren*, 34 Me. 187; *Hartshorn v. Hubbard*, 2 N. H. 453, the mortgagor's right of possession was inferred from a provision that he should furnish produce from the mortgaged premises to the mortgagee, and it was held that the mortgagee could not recover possession from the mortgagor. A like decision

was made when the mortgagor's right of possession was inferred from the fact that the mortgage was one for support. See *Flanders v. Lamphear*, 9 N. H. 201; *Wales v. Mellen*, 67 Mass. (1 Gray) 512; *Soper v. Guernsey*, 71 Pa. 219; *Kransz v. Uedelhofen*, 193 Ill. 477, 62 N. E. 239.

⁸⁵ See *Edwards v. Wray*, 12 Fed. 42; *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; *Dutton v. Warchauer*, 21 Cal. 609, 82 Am. Dec. 765; *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; *Brundage v. Home Sav. & Loan Ass'n*, 11 Wash. 277, 39 Pac. 666.

⁸⁶ But in *People v. Culver*, 21 How. Pr. (N. Y.) 108, a mortgagee

this character, as well as provisions giving the mortgagor the right of possession, the courts have ordinarily refrained from consideration of the principles on which such provisions are to be regarded as operating.

In those jurisdictions in which the legal title is vested in the mortgagee, he is entitled to possession as having such title, in the absence of a provision giving possession to the mortgagor. If the mortgagor is tenant under another person, the mortgagee will ordinarily, as his assignee, become tenant in his stead,⁸⁷ and if the mortgage is in the form of a lease,⁸⁸ the mortgagee will be in, it seems, as the mortgagor's tenant. Ordinarily, however, the possession of the mortgagee, being the result of the transfer to him of the legal title in fee, involves no relation of tenancy between him and the mortgagor.

c. **Attornment clause.** In England a mortgage instrument quite frequently contains what is known as an "attornment clause," by which the mortgagor acknowledges that he holds as tenant of the mortgagee, usually at a certain named annual rent, equal to the annual interest, the object being to secure to the mortgagee a right of distress for the interest, and to give him the right to bring the statutory proceedings to obtain possession on default.⁸⁹ The nature of the tenancy created depends on the language of the attornment clause,⁹⁰ but even though the language is such as to create a tenancy for years or from year to year, a provision that the mortgagee may at any time, without previous notice, before or after default, enter upon the premises, has been held to give him the option to terminate the tenancy.⁹¹ An attornment clause does not, ordinarily, it seems, provide in express terms that the mortgagor shall retain possession, but this is necessarily involved therein, and there is in effect a lease, a "redemise," by

let into possession by the mortgagor is said to be in as mortgagee, and not as tenant.

⁸⁷ See post, § 155.

⁸⁸ See post, § 45 d.

⁸⁹ See *Jolly v. Arbuthnot*, 4 De Gex & J. 224; *Kearsley v. Philips*, 11 Q. B. Div. 621; *Daubuz v. Lavington*, 13 Q. B. Div. 347. The cases are fully discussed in 1 Smith's

Leading Cases (11th Ed.) 514 et seq., note to *Moss v. Gallimore*.

⁹⁰ *Doe d. Garrod v. Olley*, 12 Adol. & E. 481; *Doe d. Snell v. Tom*, 4 Q. B. 615; *Metropolitan Counties & General Life Assur., Annuity, Loan & Inv. Soc. v. Brown*, 4 Hurl. & N. 428; *Morton v. Woods*, L. R. 4 Q. B. 293.

⁹¹ See *Morton v. Woods*, L. R. 3, Q. B. 658; 8 L. R. 4, Q. B. 293.

the mortgagee to the mortgagor, as if the ordinary language of leasing were used.

d. **Mortgage relation not exclusive of tenancy.** It clearly appears from the decisions above referred to that the relation of landlord and tenant may exist concurrently with that of mortgagor and mortgagee, and, it is submitted, it almost invariably exists if the party otherwise entitled to possession, whether the mortgagor or the mortgagee, grants the right of possession to the other. Likewise, the relation of landlord and tenant may exist between the mortgagor and mortgagee in states in which a mortgage conveys the legal title, by reason of the fact that the mortgage is in the form of a lease subject to a condition subsequent, instead of in the form of a conveyance in fee so subject. The recognized method of giving a mortgage on a term of years is, in England, by means of a sublease rather than an assignment, since thereby the mortgagee does not become subject to a possible liability on the covenants of the original lease. In at least one state in this country, likewise, it may be remarked, it has been a usual practice to secure the repayment of a loan by a conveyance in fee to the lender from the borrower, and a lease back to the latter, with a provision for the payment of a rent equal to the interest on the loan, and a right in the borrower to a conveyance of the fee upon the repayment of the amount of the loan, the courts applying to such a transaction the principles applicable to mortgages, but recognizing, at the same time, that there is a lease.⁹² The mortgage may also provide that the mortgagee shall become tenant of the mortgagor from and after default,⁹³ or, after a default has taken

⁹² See *Montague v. Sewell*, 57 Md. 407; *Posner v. Bayless*, 59 Md. 56; *Grand United Order of Odd Fellows v. Merklin*, 65 Md. 579, 5 Atl. 544. The validity of such a transaction for the purpose of securing a debt is recognized in *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 1047.

⁹³ *Clowes v. Hughes*, L. R. 5 Exch. 160. In this case it was decided that under a provision that, in the event of a default by the mortgagor, he should "immediately or at any time after such default" hold the premises as tenant to the mortgagee, the mortgagor did not become a tenant, subject to distress, upon default, but a notice from the mortgagee of the change in the terms of his holding was necessary. In *Equity Bldg. & Loan Ass'n v. Murphy*, 75 Mo. App. 57, it was held that a provision in a deed of trust to secure a debt that, upon default, the maker should become the tenant of the creditor, entitled the latter to bring unlawful detainer against him.

place, the mortgagor may accept a lease from the mortgagee.⁹⁴ In view of these various cases in which the concurrent existence of the relation of landlord and tenant and that of mortgagor and mortgagee have been recognized, it is somewhat singular that occasionally the view has been taken, apparently, that these two relations are irreconcilable.^{94a} No court would allow the relation of landlord and tenant to be created as a cloak for the extortion of usurious interest, nor to deprive the borrower of the right of redemption, or of any other rights incident to the position of mortgagor, but, apart from these considerations, the possibility of the simultaneous existence of the two relations would seem unquestionable.

§ 46. Purchaser at execution sale and former owner of land.

In a few cases it is asserted that an execution defendant who remains in possession after the sale is a "tenant at sufferance."⁹⁵ As in the case of a grantor who remains in possession after his conveyance, without the permission of his grantee,⁹⁶ there is no objection to calling the execution debtor so retaining possession a tenant at sufferance, provided this is not regarded as meaning that he is a tenant holding "of" or "under" the execution purchaser, since, as a matter of fact, his possession is not derived from such purchaser and he has in no way recognized the latter as his landlord. He may no doubt enter into a relation of tenancy with such purchaser, as by accepting a lease from him, or attorning to him. Otherwise he is not the tenant of the purchaser, as has been several times decided,⁹⁷ and, if he does enter in to the relation, he is thereafter not a tenant at sufferance.

⁹⁴ Ford v. Green, 121 N. C. 70, 28 S. E. 132; Murray v. Riley, 140 Mass. 490, 6 N. E. 512.

^{94a} See Roach v. Cosine, 9 Wend. (N. Y.) 227; Greer v. Wilbar, 72 N. C. 592; Davis v. Hemenway, 27 Vt. 589; Ragan v. Simpson, 27 Wis. 355; Nightingale v. Barens, 47 Wis. 389.

⁹⁵ Dobbins v. Lusch, 53 Iowa, 304; Currier v. Earl, 13 Me. 216; Brigant v. Tucker, 19 Me. 383.

⁹⁶ See ante, § 44.

⁹⁷ Tucker v. Byers, 57 Ark. 215; Powell v. DeHart, 55 Ind. 94; Griffin v. Rochester, 96 Ind. 545; Keaton v. Thomasson's Lessee, 32 Tenn. (2 Swan) 138, 58 Am. Dec. 55; Chalfin v. Malone, 48 Ky. (9 B. Mon.) 496, 50 Am. Dec. 525; Cook v. Norton, 48 Ill. 20; Wyman v. Hook, 2 Me. (2 Greenl.) 337; O'Donnell v. McMurdie, 25 Tenn. (6 Humph.) 134.

In Meyer v. Beyer, 43 Wash. 368, 86 Pac. 661, it was decided that one whose property was sold under a mechanic's lien and who continued

§ 47. Purchaser at foreclosure sale and former owner of land.

A mortgagor, or his transferee, retaining possession after a sale under the mortgage, has been said to be a tenant at sufferance.⁹⁸ Assuming that his possession after the sale is wrongful,⁹⁹ he may, like a debtor retaining possession after execution sale, be termed a tenant at sufferance, it being borne in mind that this does not mean a tenant "of" or "under" the purchaser.¹⁰⁰ Furthermore, if a lease is made to the mortgagor by such purchaser after the sale, or, which is the same thing, there is an acceptance by the latter of an attornment by him, the mortgagor evidently becomes not a tenant at sufferance, but at least a tenant at will.¹⁰¹ The important and difficult question, however, is whether, in the

in possession claiming as owner relation of tenancy or *quasi* tenancy, could not be regarded as the tenant but is properly to be based on a rule of the purchaser for the purpose of of public policy that a defendant in a summary proceeding. execution should not be allowed to

The New York statute authorizing a summary proceeding in favor of the purchaser at execution against the debtor speaks of the former as landlord and the latter as tenant. In reference to this, Demio, J., well says: "A person thus holding over is not, it is true, in any ordinary sense a tenant, though he may be called such for some technical purpose; nor is the person who purchased on the execution, or a party who has acquired his title, in any proper sense a landlord." Spraker

v. Cook, 16 N. Y. 567. And to the same effect, see the remarks of Folger, C. J., in *People v. McAdam*, 84 N. Y. 287.

In *Siglar v. Malone*, 22 Tenn. (3 Humph.) 16; *Wood v. Turner*, 26 Tenn. (7 Humph.) 517, it is said that an execution defendant is a *quasi* tenant of the purchaser, and as such precluded from denying the validity of the title which passed by the sale. It is submitted that his preclusion to deny the title in such case is entirely independent of any

render a sale under execution an inadequate means of obtaining satisfaction of the judgment by requiring the purchaser, before he can obtain possession, to prove the validity of the defendant's title.

⁹⁸ *Allen v. Carpenter*, 15 Mich. 25; *Ramsdell v. Maxwell*, 32 Mich. 285; *Kinsley v. Ames*, 43 Mass. (2 Metc.) 29; *Johnson v. Donaldson*, 17 R. I. 107, 20 Atl. 242; *Taylor v. O'Brien*, 19 R. I. 429, 34 Atl. 739; *Tucker v. Keeler*, 4 Vt. 161.

⁹⁹ See ante, § 46.

¹⁰⁰ In *Luchs v. Jones*, 8 D. C. (1 McArthur) 345, it was considered that, in view of the language of the local statute providing that all occupation or possession without express contract or lease should be deemed a tenancy at sufferance, the mortgagor was tenant at sufferance to the purchaser at foreclosure sale, and so liable to a summary proceeding for his expulsion. This view is disapproved in *Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295.

¹⁰¹ See *Granger v. Parker*, 137

absence of such creation of the relation by some legal act subsequent to the sale, the mortgagor can in any case be regarded as the tenant of such purchaser, that is, as rightfully in possession under him. We will first consider this question on the theory that by the mortgage a legal title is vested in the mortgagee, or in a trustee for sale to satisfy the debt, and will subsequently consider the question on the theory that the mortgage creates a lien only.

Assuming that in the particular case there is no grant by the mortgagee to the mortgagor of the right of possession, no "redemise,"¹⁰² the possession of the latter must be wrongful, the legal title being in the mortgagee, and so it must be wrongful as against the purchaser at the sale, unless the latter grants such right. In case there is a redemise to the mortgagor, giving him a right of possession until the sale, or giving him the rights of a tenant at will, the tenancy would, it seems, come to an end upon the sale. There might, however, be a redemise in such form that the tenancy thereby created would not terminate upon the sale, as, for instance, in case the mortgage instrument provided, although the principal was to become due in five years, that the mortgagor should remain in possession for ten years from the date of the mortgage. In such case the mortgagor would be the tenant of the mortgagee or his assignee until foreclosure, and upon foreclosure by sale, either in equity or under a power contained in the mortgage instrument, the mortgagor would become tenant of the purchaser, the person to whom the reversionary estate has passed.¹⁰³

Such a provision, in terms redemising the premises to the mortgagor for a period longer than that for which the mortgage is to run, is no doubt unusual, but the observations just made may have a bearing upon the question of the validity of a provision occasionally found, that the mortgagor shall become the tenant of the purchaser at the sale. Such a provision, in connection with a

Mass. 228; *Ramsdell v. Maxwell*, 32 trustee to the mortgagor, the mort-
Mich. 285; *Eldridge v. Hoefer*, 45 gator agreeing "to surrender peace-
Or. 239, 77 Pac. 874. able possession" with ten days

¹⁰² See ante, § 45 a.

¹⁰³ In *Sexton v. Hull*, 45 Mo. App. 339, this theory was apparently applied, the mortgage instrument containing a redemise by the mortgage
chaser was regarded as succeeding to the rights of the trustee as landlord.

mortgage or deed of trust containing a power of sale on default, has been decided to be effective for the purpose of giving the purchaser the remedies of a landlord to recover possession from the mortgagor,¹⁰⁴ and also to recover rent to the amount named in the mortgage instrument.¹⁰⁵ These decisions, which contain no discussion of the matter on principle, can, it is conceived, be supported only by regarding the tenancy under the purchaser as the same tenancy as that created by the redemise, and the purchaser as a transferee of the mortgagee or trustee, taking subject to the mortgagor's tenancy, thus applying the view above suggested, that the redemise may create a tenancy to continue until after sale on default. One possible difficulty with the explanation just given of the mode of operation of such a clause is that the decisions recognizing its validity appear to regard the mortgagor, in the particular case, as a tenant at will of the purchaser, but there is, it is conceived, no objection to a demise which creates both a tenancy for years to endure until a certain event, the time named for the payment of a debt for instance, and also a tenancy at will, to arise upon the termination of the tenancy for years, they constituting in the view of the law but a single tenancy.

The explanation, above suggested, of the possible operation of such a clause making the mortgagor tenant of the purchaser, cannot possibly apply in jurisdictions where the mortgagee has not the legal title, and, consequently, the mortgagor cannot, before the sale, be regarded as a tenant of the mortgagee or trustee. And in order, in those jurisdictions, to give validity and effectiveness to such a clause, it would be necessary to assume that one person (here the mortgagor) may, by a declaration to that effect, make himself the tenant, from and after the future sale of the land, of the person unknown who may purchase at such sale, an assumption which, on principle, is somewhat difficult to support.

§ 48. Master and servant.

One may at the same time be seryant of another person and also his tenant. "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay

¹⁰⁴ Griffith v. Brackman, 97 Tenn. App. 12; Brewster v. McNab, 36 S. 387, 37 S. W. 273, 49 L. R. A. 435. C. 274, 15 S. E. 233; Parsons v. Palmer, 124 Mo. App. 50, 101 S. W. 609.

¹⁰⁵ Wade v. McCormack, 68 Mo. mer, 124 Mo. App. 50, 101 S. W. 609.

his servant by conferring on him an interest in real property, either in fee, for years, or at will, or for any other estate or interest, and if he do so, the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration."¹⁰⁶ So one who is already a tenant may enter the service of his landlord, or a servant may take a lease from his master, without affecting the existing relation or his right to the stipulated remuneration for his services. Frequently, however, it is a question of very considerable difficulty whether a servant, who is in occupation of a house or other premises belonging to the master, and who went in as a result of the contract of employment, is to be regarded as a tenant or as merely occupying in his ministerial capacity on behalf of his master, the latter retaining the legal possession.

The English cases are to the effect that the servant is in occupation as a tenant if he is permitted to occupy for his own convenience by way of partial remuneration for his services,¹⁰⁷ while if his occupation is necessary for the better discharge of his duties,¹⁰⁸ or if he is required by his master to reside on particular premises,¹⁰⁹ his occupation is regarded as that of a servant and not of a tenant. The fact that the wages are lower owing to the fact that the employee is allowed to occupy a house belonging to his employer has been held not to show that he is a tenant,¹¹⁰ and the same view has been taken of the presence of an express stipulation that, in case of the termination of the contract, possession shall be relinquished upon the giving of a specified notice,¹¹¹ as

¹⁰⁶ Per Tindall, C. J., in *Hughes v. 285*. And see *Rex v. Stock*, 2 Taunt. Overseers of Chatham, 5 Man. & G. 329; *Rex v. Inhabitants of Chestnut*, 54, quoted with approval in *Kerrains* 1 Barn. & Ald. 473. *Smith v. Overseers of Seghill*, L. R. 10 Q. B. 422, 158, and *Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782. See, also, *Higginbotham v. Higginbotham*, 41 Ky. (10 B. Mon.) 371.

¹⁰⁷ *Hughes v. Overseers of Chatham*, 5 Man. & G. 55; *Marsh v. Estcourt*, 24 Q. B. Div. 147.

¹⁰⁸ *Clark v. Overseers of St. Mary*, 1 C. B. (N. S.) 23; *Fox v. Dalby*, L. R. 10 C. P. 285.

¹⁰⁹ *Dobson v. Jones*, 5 Man. & G. 112; *Fox v. Dalby*, L. R. 10 C. P. 347, *afid.* 24 Law J. Q. B. 54.

¹¹⁰ *Hughes v. Chatham*, 5 Man. & G. 54, 79; *Bertie v. Beaumont*, 16 East, 33.

¹¹¹ *Mayhew v. Suttle*, 4 El. & Bl. 347, *afid.* 24 Law J. Q. B. 54.

well as of the fact that the employee is permitted to carry on his own business on the premises.¹¹² The English cases do not clearly state whether, in any case, the occupation would be regarded as that of a servant because necessary to the better discharge of the servant's duties, when it is not required by the master but is left to the servant's option, though there are suggestions to the effect that it would be so regarded in such a case.¹¹³ One who is required to occupy a vacant house of the employer at a stipulated rent, to be deducted from his wages, not because this is necessary to the better discharge of his duties, but because the employer wishes to get rent for the house, or merely because the employer arbitrarily so elects, has been decided to occupy not as servant but as tenant.¹¹⁴

In this country the decisions have not ordinarily followed any fixed rule in this regard. Sometimes it is asserted, as in England, that the occupation is that of a servant if it is incidental to the employment or connected with the service,¹¹⁵ and there is at least one decision to the effect that such is the case if the occupation is required by the master for the better performance of the service.¹¹⁶ And, as in England, the fact that the right to occupy the house has the effect of lowering the wages paid does not necessarily render the occupation that of a tenant,¹¹⁷ though it has been said that this tends to show the existence of a tenancy.¹¹⁸

¹¹² *White v. Bayley*, 10 C. B. (N. S.) 227. See *Cass County Sup'rs v. Cowgill*, 97 Mich. 448, 56 N. W. 849.

¹¹³ See *Fox v. Dalby*, L. R. 10 C. P. 285, opinions of Coleridge, C. J., and Brett, J.

¹¹⁴ *Smith v. Overseers of Seghill*, L. R. 10 Q. B. 422. But there seems some conflict between this case and others. See ante, note 109.

¹¹⁵ *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Bowman v. Bradley*, 151 Pa. 351, 24 Atl. 1062, 17 L. R. A. 213; *Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782; *Lightbody v. Truelsen*, 39 Minn. 310, 40 N. W. 67; *Mead v. Pollock*, 99 Ill. App. 151; *Womach v. Jenkins*, 128 Mo. App. 408, 107 S. W. 423; *Mead v. Owen*,

80 Vt. 273, 67 Atl. 722, 12 L. R. A. (N. S.) 655. That the janitor of an apartment house occupying a room therein is not a tenant, see *Tucker v. Burt*, 152 Mich. 68, 115 N. W. 722, 17 L. R. A. (N. S.) 510.

¹¹⁶ *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158.

¹¹⁷ *Bowman v. Bradley*, 151 Pa. 351, 24 Atl. 1062, 17 L. R. A. 213; *Heffelfinger v. Fulton*, 25 Ind. App. 33, 56 N. E. 688. See *Massachusetts General Hospital v. Inhabitants of Somerville*, 101 Mass. 319.

¹¹⁸ *McGee v. Gibson*, 40 Ky. (1 B. Mon.) 105; *Ofschlager v. Surbeck*, 22 Misc. 595, 50 N. Y. Supp. 862; *Overseers of Poor of Milton v. Overseers of Poor of West Chillis-*

The decisions rather tend, however, to determine each case upon its own circumstances, by a consideration of whether the master retains control of the premises occupied by the servant, and in the majority of the cases the occupation is regarded as that of a servant and not of a tenant. There seems, indeed, according to a number of cases, to be a presumption that the occupation by a servant is in that capacity, in the absence of any showing of a distinct demise,¹¹⁹ and that seems to be a logical view of the matter so far as he has any duties in connection with the particular premises in reference to which the question arises, or in connection with land of which such premises form a part.

It has ordinarily been decided that a farm laborer occupying a house on the farm does so as servant and not as tenant,¹²⁰ and the same view has been taken of a teacher occupying part of the school building,¹²¹ and a domestic servant occupying rooms in or near

quaque, 9 Pa. Super. Ct. 204, 43 Wkly. Notes Cas. 452.

¹¹⁹ *Davis v. Williams*, 130 Ala. 530, 30 So. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55; *State v. Curtis*, 20 N. C. (4 Dev. & B. Law) 363; *Higginbotham v. Higginbotham*, 49 Ky. (10 B. Mon.) 371; *School Dist. No. 11 v. Batsche*, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576; *McQuade v. Emmons*, 38 N. J. Law, 397.

"To create the relation of landlord and tenant, no particular words are necessary, but it is indispensable that it should appear to have been the intention of one party to dispossess himself of the premises, and of the other to enter and occupy as the former himself had the right to do, pursuant to the agreement between them." Per Stites, J., in *Walker v. Morgan*, 57 Ky. (18 B. Mon.) 136.

In *Grosvenor v. Henry*, 27 Iowa, 269, it is assumed that the local statutory provision that any person in possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the con-

trary is shown, makes the occupation of a servant that of a tenant at will. This assumption seems to be based on another assumption, which is incorrect, that a servant is ordinarily in possession of land which he is occupying in his ministerial character. See ante, § 9.

¹²⁰ *Haywood v. Miller*, 3 Hill (N. Y.) 90; *People v. Annis*, 45 Barb. (N. Y.) 304; *Bowman v. Bradley*, 151 Pa. 351, 24 Atl. 1062, 17 L. R. A. 213; *Heffelfinger v. Fulton*, 25 Ind. App. 33, 56 N. E. 688; *Edgar v. Jewell*, 34 N. J. Law, 259; *Mead v. Owen*, 80 Vt. 273, 67 Atl. 722, 17 L. R. A. (N. S.) 510. But in *State v. Smith*, 100 N. C. 466, 6 S. E. 84, and *Ofschlager v. Surbeck*, 22 Misc. 595, 50 N. Y. Supp. 862, it was held that a farm laborer was the tenant of the house which he was allowed to occupy. And see *Gould v. Eagle Creek School Dist.*, 8 Minn. 427 (Gil. 382).

¹²¹ *Walker v. Morgan*, 57 Ky. (18 B. Mon.) 136; *School Dist. No. 11 v. Batsche*, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576.

the house.¹²² It would seem clear that a person who is put in possession of premises merely for the purpose of looking after them on behalf of another is there as his servant and not as a tenant.¹²³

There are occasional decisions to the effect that a clergyman occupying a parsonage is a servant rather than a tenant.¹²⁴ But the circumstances may no doubt be such as to render him a tenant.¹²⁵

¹²² *State v. Curtis*, 20 N. C. (4 Dev. & B. Law) 363; *Watson v. McEachin*, 47 N. C. (2 Jones Law) 207. See dicta in *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782; *McQuade v. Emmons*, 38 N. J. Law, 397.

¹²³ It is so decided in *Mitchell v. Davis*, 20 Cal. 45; *Todhunter v. Armstrong* (Cal.) 53 Pac. 446; *Zinnel v. Bergdoll*, 9 Pa. Super. Ct. 522, 44 Wkly. Notes Cas. 54; *Seymour v. Warren*, 86 App. Div. 403, 83 N. Y. Supp. 871; *Reeder v. Bell*, 70 Ky. (7 Bush) 255.

In *Farrow's Heirs v. Edmundson*, 43 Ky. (4 B. Mon.) 605, 41 Am. Dec. 250, it is said that if one takes possession of land as agent, the relation of landlord and tenant is thereby established. This, however, was merely for the purpose of asserting the preclusion of the agent to deny the title of the principal, and that preclusion exists in any case of an agent who is given possession as such. See *Clark & Skyles, Agency*, § 430 et seq.

¹²⁴ *East Norway Lake Church v. Froislie*, 37 Minn. 447, 35 N. W. 260. So in *Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782, it was decided that where a Roman Catholic priest occupied a parsonage belonging to the diocese and standing in the name of the bishop, his occupation

was analogous to that of a servant and not that of a tenant.

¹²⁵ In *Bristor v. Burr*, 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 710, it was decided that one occupying a parsonage attached to a church of which he was placed in charge by the general conference of that denomination was in possession as tenant and not as a servant, the court saying that, since he was not hired by that particular church association but by the conference, he could not be in as a servant. The opinion proceeds: "There appears to have been nothing, so far as appears in the circumstances under which he went into the house or in his relation to the church or its trustees, which so qualified his occupancy as to render it otherwise than possession by him. This is presumptively the relation assumed to premises by a party who lawfully enters upon them as a place of abode and occupies them as such; and any less right than that which possession furnishes is dependent upon some understanding, express or implied, denying such relation," and then it is said that no such understanding appeared in that case.

In *Doe d. Jones v. Jones*, 10 Barn. & C. 718; *Doe d. Nicholl v. McKaeg*, 10 Barn. & C. 721; *Perry v. Shipway*, 1 Giff. 1, it is said that a dissenting minister is "merely a ten-

The question whether the employee is upon the premises as such or as a tenant has sometimes arisen in connection with the right of the master to repossess himself of the premises occupied by the servant immediately upon the termination of the service, without notice to quit, and that he may do so when the occupation is merely that of a servant has been recognized.¹²⁶ There are occasional statements to the effect that if the servant does not relinquish possession upon the termination of his service, he thereupon becomes a tenant at will or at sufferance,¹²⁷ but it is not perceived how this can be the case, since a tenancy at will arises only when the holding is by consent of the owner, and a tenancy at sufferance arises only when one who is in rightful and exclusive possession retains possession after his right to do so has come to an end,¹²⁸ a state of facts which does not occur in the case of a mere servant who wrongly refuses to withdraw, since he had at no time the legal possession but was merely on the premises as representative of his master. A servant who thus excludes his master from the possession is, it is submitted, a disseisor, to the same extent as if he had originally gone on the land without permission and excluded the owner therefrom. That he is not a ten-

ant at will" under the trustees of the chapel and parsonage. There was no contention that he was in occupation as servant only.

¹²⁶ *Bowman v. Bradley*, 151 Pa. 351, 24 Atl. 1062, 17 L. R. A. 213; *Clark v. Vannort*, 78 Md. 216, 27 Atl. 982; *Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782.

¹²⁷ *People v. Annis*, 45 Barb. (N. Y.) 304; *School Dist. No. 11 v. Batsche*, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576. And see *Huggins v. Bridges*, 29 Pa. Super. Ct. 82. But, in regard to this, it may be said that, even conceding that one may be in possession of land without being a tenant thereof (ante, § 2), it does not seem to be applicable to the case of a servant, since he has not the legal possession. See ante, § 9.

In *Snedaker v. Powell*, 32 Kan.

396, 4 Pac. 869, it was held that where a contract provided for the rendition of services for eight months, and that during such eight months, and for four months after such eight months the employee should occupy a house belonging to the employer, the employee was, during such four months, in possession as tenant and not as servant.

¹²⁸ See ante, § 15 a. In *School Dist. v. Batsche*, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576, supra, it is said that "a person in possession of land lawfully, who holds over without right, becomes a tenant at sufferance, if the owner suffers him to remain in possession a sufficient length of time to imply an intentional acquiescence in the occupancy, and it is not necessary that the previous holding be that of a tenant."

ant because he holds over after the termination of his employment is recognized in several cases,¹²⁹ it being said, however, that, if he is permitted to remain in occupation without disturbance for some considerable time, the owner's consent to his occupancy may be presumed and that he may then be regarded as a tenant at will. It does not seem, however, that such a presumption should be recognized, since ordinarily the failure to eject a trespasser cannot be regarded as creating a tenancy, and a servant so holding over without right is in no better position than a trespasser.¹³⁰

¹²⁹ East Norway Lake Church v. was fixed by the agreement. The Froislie, 37 Minn. 447, 35 N. W. 260; court, however, speaks of him as Kerrains v. People, 60 N. Y. 221, 19 tenant and supports summary proceedings against him. But compare Am. Rep. 158; Doyle v. Gibbs, 6 McQuade v. Emmons, 38 N. J. Lans. (N. Y.) 180; Jennings v. McCarthy, 40 N. Y. St. Rep. 678, 16 Law, 397, according to which such N. Y. Supp. 161. occupant would seem *prima facie*

In Morris Canal & Banking Co. v. not to be a tenant.
Mitchell, 31 N. J. Law, 99, it was ¹³⁰ It is so decided in Doyle v. Gibbs, 6 Lans. (N. Y.) 180. In given, as part compensation for his services, the right to occupy a dwelling house with its garden until discharge, and no longer, was not entitled to notice, since the time of the termination of his occupancy Jennings v. McCarthy, 40 N. Y. St. Rep. 678, 16 N. Y. Supp. 161, it was regarded as a question for the jury whether such delay in expelling the employe showed a tenancy.

CHAPTER V.

COVENANTS AND OTHER CONTRACTS.

- § 49. General considerations.
- 50. Express and implied covenants.
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 - a. Execution by lessor.
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 - a. Under seal.
 - b. Not under seal.
 - c. With unauthorized agent.
- 57. Covenants by agent.
 - a. Under seal.
 - b. Not under seal.
- 58. Construction of covenants.
 - a. General rules.
 - b. Aider by oral evidence.
- 59. Discharge of liability.
- 60. Remedy for breach of covenant.
- 61. Oral contracts in connection with written lease.

§ 49. General considerations.

The legal act by which the relation of landlord and tenant is created, the demise or lease, is, as we have before stated,¹ a conveyance vesting an estate in the tenant, and not a contract imposing a personal obligation on either party. Almost invariably,

¹ See ante, § 16.

however, the making of the conveyance is accompanied by the making of one or more contractual stipulations by one or both of the parties to the conveyance.^{1a} If the conveyance is incorporated in a written instrument, as it must be, by reason of the statute of frauds, if the estate conveyed is above a certain *quantum* as regards duration,² the accompanying contractual stipulations are ordinarily inserted in the same instrument, and, as we have before remarked,³ the instrument as a whole is referred to as a "lease," an expression which is also applied to the whole transaction considered as a legal act, or aggregate of legal acts, apart from their incorporation in any written instrument. Contractual stipulations entered into by the lessor or lessee, or both, thus evidenced by a written "lease," are ordinarily termed the "covenants of the lease," though the word "covenant" is, at common law, properly applicable to such stipulations only if the writing is under the seal of the person bound thereby. It is, no doubt, in part owing to the fact that these contractual stipulations are thus ordinarily incorporated in the same instrument as the demise itself, that courts so frequently use the expression "contract of lease," losing sight of the fact that the relation of tenancy is created, not by a contract, but by the conveyance, by one person to another, of an estate less in *quantum* than that of grantor. If the conveyance by which the tenancy is created is oral, the accompanying contractual stipulations would ordinarily be oral.⁴

The possible subjects of such contractual stipulations, entered into at the time of the creation of a tenancy, are innumerable. Various examples of such stipulations will be found in subsequent chapters in which is discussed the effect, on such stipulations, of a transfer of the reversion or of the leasehold.⁵ A contract by the lessee to pay rent is, in this country, almost universal,⁶ and among other contracts of frequent occurrence are those in regard

^{1a} A cestui que trust to whose trustee a lease has been made is not liable upon the covenants to be performed by the lessee, there being no privity between him and the lessor. *Ramage v. Womach* [1900] 1 Q. B. 116; *Cox v. Bishop*, 8 De Gex, M. & G. 815.

² See ante, § 25.

³ See ante, § 16.

⁴ That an oral demise may thus be accompanied by contractual stipulations, see *Bolton v. Tomlin*, 5 Adol. & E. 856.

⁵ See post, chapters XIV, XV.

⁶ See post, § 171.

to the mode of using the premises,⁷ to make improvements,⁸ to insure,⁹ to pay taxes,¹⁰ and to renew the lease.¹¹

We will, in this chapter, consider various questions which may arise in connection with such contracts entered into by the parties to a demise, at the time of and as incident to the making of the demise. We will ordinarily use the word "covenant" as descriptive of such a contract, if incorporated in a written instrument, without reference to whether such instrument is or is not under seal, this according with ordinary usage in this country.

§ 50. Express and implied covenants.

We not infrequently meet with the expression "implied covenants" as distinguished from "express covenants." "Implied covenant" may mean one of two things. It may, firstly, mean the same as "covenant in law," which latter expression has been defined as follows: "A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created; as, if a man by deed demise land for years, covenant lies upon the word 'demise,' which imports, or makes, a covenant in law for quiet enjoyment; or, if he grant land by feoffment, covenant will lie upon the word 'dedi'."¹²

As we shall see later,¹³ a covenant in law for quiet enjoyment arises, in most jurisdictions, as a result of the relation of landlord and tenant, without reference to the use of the word "demise" or any other particular words of leasing, and it seems that there is also implied from the relation, in the case of agricultural land, a covenant by the lessee that he will manage and cultivate the land in a husbandlike manner.¹⁴

The second sense in which the expression "implied covenant" is used is that of a covenant not clearly expressed on the face of

⁷ See post, § 123.

⁸ See post, § 87 e.

⁹ See post, § 145.

¹⁰ See post, § 143.

¹¹ See post, chapter XXII.

¹² *Williams v. Burrell*, 1 C. B. 402, per Tindal, C. J.

¹³ See post, § 79 a.

¹⁴ See post, § 119 a (1).

the instrument, but inferred from language used therein, ordinarily in connection with other covenants. A covenant thus inferred from the language used is, however, properly speaking, an express covenant, however obscurely the parties may have expressed their intention in this regard. As remarked in the case from which we have quoted above, "in every case, it is always matter of construction to discover what is the sense and meaning of the words employed by the parties in the deed. In some cases, that meaning is more clearly expressed, and therefore more easily discovered; in others, it is expressed with more obscurity, and discovered with greater difficulty. In some cases it is discovered from one single clause; in others, it is only to be made out by the comparison of different and perhaps distant parts of the same instrument. But, after the intention and meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning is to be entirely disregarded." Examples of covenants thus existing by way of inference rather than by explicit statement may be given as follows: A lessee having covenanted that he would, at all seasons of burning lime, supply the lessor with lime at a stipulated price, a covenant was "implied" or rather "inferred" that he would burn lime at such seasons.¹⁵ And a covenant by the lessee to "pen or fold his flock of sheep, which he shall keep upon the said demised premises, upon such parts where the same have been usually folded," was held to require him to keep a flock of sheep.¹⁶ So a recital¹⁷ or an exception¹⁸ may constitute a covenant, provided there can be "implied" from it an agreement that a thing shall be done or not done. But from a stipulation that the lessee shall enjoy "all privileges" enjoyed by the outgoing tenant, covenants by the lessee similar to those in the lease to the outgoing tenant are not to be inferred.¹⁹

There are authorities to the effect that the words "yielding and rendering" a certain rent are to be regarded as giving rise to an "implied covenant" on the part of the lessee to pay such rent.

¹⁵ *Shrewsbury v. Gould*, 2 Barn. & C. 505; *Farrall v. Hilditch*, 5 C. B. Ald. 487. (N. S.) 840.

¹⁶ *Webb v. Plummer*, 2 Barn. & Ald. 746. ¹⁸ *St. Albans v. Ellis*, 16 East, 352.

¹⁹ *Ombony v. Jones*, 19 N. Y. 234.

¹⁷ *Sampson v. Easterby*, 9 Barn. &

If by this is meant that such words give rise to a covenant "in law" rather than an express covenant, a covenant "in fact," the correctness of the statement is open to question. The matter is discussed in a subsequent chapter.²⁰

§ 51. Dependent and independent covenants.

Covenants and other contracts entered into on the part of the lessor and lessee may be dependent or independent. If one party may assert the nonperformance by the other of some covenant entered into by the latter, without having himself performed a covenant on his own part to be performed, the covenants are independent, while if he cannot assert such nonperformance by the other unless he has himself performed, the covenants are dependent. The question whether covenants, or any contractual stipulations, are dependent or independent is, as between a lessor and lessee, as in any other connection, a question of the intention of the parties as collected from the language used by them.²¹ The modern tendency, it is said, in reference to contracts generally, is to construe promises as dependent on each other when they form the whole consideration for each other,²² but this criterion would seem to be inapplicable to covenants in leases, since the making of the demise itself, that is, the grant of an estate in the land, ordinarily enters into the consideration.²³ Such covenants call rather for the application of the rule that where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant.²⁴ Such covenants might also call for the application of the asserted rule that covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor.²⁵

In accordance, it would seem, with the rules just referred to, the

²⁰ See post, § 171 b.

²¹ See *Porter v. Shephard*, 6 Term. R. 668, per Kenyon, C. J.; *Roberts v. Brett*, 11 H. L. Cas. 354, per Chelmsford.

²² *Hammon*, *Contracts*, p. 905.

²³ See *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247.

²⁴ *Boone v. Eyre*, 1 H. Bl. 273, note

a; notes to *Pordage v. Cole*, 1 Wms.

Saund. 320 b; *Carpenter v. Creswell*, 4 Bing. 409. See *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247; *Butler v. Manny*, 52 Mo. 497; *Lewis v. Chisholm*, 68 Ga. 40.

²⁵ *Newson v. Smythies*, 3 Hurl. & N. 840.

covenants of a lease have not usually been regarded as dependent. Thus a covenant by the lessee to pay rent and one by the lessor to make repairs are, it has been decided, independent, and consequently the lessor's failure to repair as agreed is no defense to a claim for the rent,²⁶ and the failure of the lessor to perform his covenant to make a particular improvement is no defense to an action by him for the lessee's breach of his covenant to make improvements or to pay taxes.²⁷ It has also been decided that the covenant for rent and that for quiet enjoyment are not so dependent that the lessee cannot sue for breach of the latter covenant unless he has complied with the former,²⁸ and a like view has been taken as regards the covenant for quiet enjoyment and the lessee's covenant to repair.²⁹ The fact that a covenant by the lessor is phrased "the covenants by the lessee being performed, the lessor covenants," or similar language is used, does not make the covenants dependent.³⁰ The decisions upon the question whether the covenant to pay rent and various covenants on the part of the landlord are so interdependent as to enable the tenant to assert a breach of the latter in defense to an action for rent are considered in a subsequent part of this work.^{30a}

Even though covenants are dependent, the performance of one, as a condition precedent to the assertion of the nonperformance of the other, may, it seems, be dispensed with by any action of the person entitled to the prior performance of the covenant in his favor which renders such performance impossible,³¹ and it has been asserted that one party may waive the right to prior performance of the covenant in his favor by previous repudiation of the covenant on his part to be performed,³² as he may by acceptance of the performance of a substantial part of the covenant by

²⁶ See post, § 182 n (2).

²⁷ *Handschy v. Sutton*, 28 Ind. 159.

²⁸ *Dawson v. Dyer*, 5 Barn. & Adol. 584; *Edge v. Boileau*, 16 Q. B. Div. 117.

²⁹ *Edge v. Boileau*, 16 Q. B. Div. 117.

³⁰ *Butler v. Manny*, 52 Mo. 497; *Edge v. Boileau*, 16 Q. B. Div. 117.

^{30a} See post, § 182 r.

³¹ See *Indianapolis Natural Gas*

Co. v. Spaugh, 17 Ind. App. 673, 46 N. E. 691, where the lessor was to locate the boundaries of a tract excepted from the lease, and it was held that the lessee's refusal to permit him to locate them excused him from so doing.

³² *Warner v. Cochrane*, 63 C. C. A. 207, 128 Fed. 553.

the other party,³³ or by any course of action indicating an intention not to insist upon the prior performance of such covenant.³⁴

§ 52. Joint and several covenants.

A covenant in a lease may, in case there is more than one lessor or more than one lessee, be either (1) joint, (2) several, or (3) joint and several. A covenant is joint as to the covenantors if the various covenantors are jointly bound, and in such case they must be sued jointly. A covenant is joint as to the covenantees if the various covenantees are jointly entitled to enforce performance, and in such case they must sue jointly. A covenant is several as to the covenantors if they are separately liable, and in such case they must be sued separately. A covenant is several as to the covenantees if they are separately entitled to demand performance, and in such case each may sue separately. A covenant is joint and several if the promisors are both jointly and severally liable, and in such case they may be sued jointly or separately. A covenant is never joint and several as to the covenantees. It must be either joint or several as regards them.³⁵

The question whether two or more covenantors are jointly liable, or severally liable, or jointly and severally liable, is determined by a construction of the covenant as showing the intention. In the absence of anything to show a contrary intention, as when the parties merely covenant, without more, the liability is joint,^{35a} and accordingly it was decided that the liability of the lessees on their covenants was joint when the lease was to them as tenants in common^{35b} as well as when to them as joint tenants.^{35c} It was even held that a covenant by the lessee and a surety that they would pay the rent and further that the lessee would repair was

³³ *Palmer v. Meriden Britannia Co.*, seq.; *Leake, Contracts*, (3d Ed.) 371 188 Ill. 508, 59 N. E. 247; *Wiley v. et seq.*; *Hammon, Contracts*, 756 et *Inhabitants of Athol*, 150 Mass. 426, seq.

23 N. E. 311, 6 L. R. A. 342. See ^{35a} *White v. Tyndall*, 13 App. Cas. *Leake, Contracts*, (3d Ed.) 578; 263; *Hammon, Contracts*, 769, n. 185; *Clark, Contracts*, 677; *Hammon, Platt, Covenants*, 117. *Contracts*, 923.

^{35b} *White v. Tyndall*, 13 App. Cas.

³⁴ See cases referred to in 9 Cyclo- 263. *pedia Law & Proc.* p. 646.

^{35c} *Levy v. Sale*, 37 Law T. (N. S.)

³⁵ See *Platt, Covenants*, 115 et 709.

joint as to the repair as well as to the rent.^{35d} So it has been held that where the lessee and his sureties covenant to pay the rent, the sureties cannot be sued alone.^{35e} On the other hand, if the language used purports to bind the covenantors "severally," the liability is several only, while if it purports to bind them jointly and severally, or to bind them and each of them, the liability is both joint and several.^{35f}

The question whether two or more covenantees are jointly or severally entitled to sue for nonperformance is ordinarily to be determined by the consideration whether the interest of the parties is joint or several, provided such construction is not inconsistent with the language used.^{35g} Accordingly, if tenants in common join in making a lease, reserving an entire rent, they must join in suing on the covenant for rent, while if they lease their respective shares with separate reservations of rent, they must sue separately.^{35h} Upon a covenant to repair or to make improvements, the lessors who joined in the lease must, it seems, sue jointly, since the covenant is such as to give the covenantees a joint interest in the performance.³⁵ⁱ The interest of the covenantees is joint, it is said, if a breach as to one is necessarily a breach as to all, and several, if a breach as to one is not necessarily a breach as to all.^{35j}

§ 53. Execution of instrument containing covenant.

a. **Execution by lessor.** A paper purporting to be an instrument of lease, which the proposed lessor fails to sign, is, even apart from any statutory requirement of a signed writing for the

^{35d} Copland v. Laporte, 3 Adol. & E. Ald. 850; Wilkinson v. Hall, 1 Bing. 517. N. C. 717; Lahy v. Holland, 8 Gill

^{35e} City of Philadelphia v. Reeves, (Md.) 445, 50 Am. Dec. 705. But 48 Pa. 472. That they *may* be sued in Catlin v. Barnard, 1 Aiken (Vt.) jointly with the lessee, see Elkin v. 9, it was held that words of severality, as well as separate interests Moore, 45 Ky. (6 B. Mon.) 462.

^{35f} Mathewson's Case, 5 Coke, 22 in the rent, were necessary to give b; Robinson v. Walker, 7 Mod. 154, a several right of action. 1 Salk. 393; Northumberland v. Er-
rington, 5 Term R. 522.

^{35g} Leake, Contracts (3d Ed.) 380; (N. S.) 713; Calvert v. Bradley, 57 Hammon, Contracts, 770; Sorsbie v. U. S. (16 How.) 580. See Brad-
burne v. Botfield, 14 Mees. & W. 573. Park, 12 Mees. & W. 146.

^{35h} Powis v. Smith, 5 Barn. & ^{35j} Dicey, Parties, 114.

purpose, a legal nullity, for the purpose either of transferring an estate or creating a contractual obligation on the lessor, it being available only as an admission or to refresh the recollection of a witness as to the terms of an oral letting.³⁶ It may happen, however, that in such a paper are included stipulations to be performed by the lessee, and that, though not executed by the lessor, it is executed by the lessee, and the question then arises whether the lessee is in such case liable upon his stipulations. It has in England been decided that while ordinarily a covenantee, who is a party to what purports to be an indenture, may sue the covenantor who executed it, though he himself did not execute, a different rule applies in the case of indenture of lease, and that the covenants therein which depend on the interest created by the lease and are made because it is intended to give the covenantor that interest, such as those to pay rent or repair, are not obligatory if the lessor does not execute, not because the lessor is not a party, but because that interest has not been created to which such covenants are annexed, and during which only they operate.³⁷ "The foundation of the covenant failing, the covenant fails also. Unless there be a term, a covenant to repair during it is void."³⁸ But this principle was not applied where there was a demise purporting to be by tenant for life and remainderman, "according to their respective estates and interests," and the tenant for life alone executed, it being held that the lessee, having entered into possession, was liable on his covenant to repair.³⁹

The view asserted in England, as above stated, that the lessee is not liable on certain classes of covenants if the lessor fails to execute, has been applied in this country as regards the covenant for rent,⁴⁰ as well as a covenant to improve.⁴¹ Occasionally the

³⁶ See ante, § 26.

³⁷ *Soprani v. Skurro*, Yel. 19; *Pitman v. Woodbury*, 3 Exch. 4; *Swatman v. Ambler*, 8 Exch. 72.

³⁸ *Pitman v. Woodbury*, 3 Exch. 4.

³⁹ *How v. Greek*, 3 Hurl. & C. 391.

⁴⁰ *Chesebrough v. Pingree*, 72 Mich. 438, 40 N. W. 747, 1 L. R. A. 529; *Nickolls v. Barnes*, 32 Neb. 195, 49 N. W. 342; *Jennings v. McComb*, 112 Pa. 518, 4 Atl. 812. The latter case is distinguished in *Schultz v. Bur-*

lock, 6 Pa. Super. Ct. 573, but the ground of distinction is expressed with considerable obscurity. In *Duffee v. Mansfield*, 141 Pa. 507, 21 Atl. 675, the omission of the lessor to sign the lease was held not to relieve one who had under taken to be responsible for the performance of the lessee's covenants, the court saying: "We need not discuss the legal effect of the omission of the lessor to sign the paper. It has no bear-

lessor's failure to execute has been regarded as not affecting the lessee's liability on his covenants, the latter having taken possession.⁴² It would seem that if the lessee does take possession in such a case, he would become a tenant at will or periodic tenant,⁴³ and as such might be liable upon the stipulations contained in the instrument of lease so far as they may be applicable to that character of tenancy.⁴⁴ And he would be liable for use and occupation *prima facie* at the rent named in the lease.⁴⁵

b. **Execution by lessee.** It has been asserted in a number of books of high authority that, by accepting the benefit of a conveyance which was executed under seal by the grantor, one becomes bound by the covenants therein contained to the same extent as if he had actually signed and sealed it,⁴⁶ and this doctrine has been adopted in a few states.⁴⁷ It has, however, been vigorously questioned, and the old cases cited in its support shown to be insufficient for the purpose,⁴⁸ and there are occasional decisions in this country to the effect that one merely accepting a lease or other conveyance under the seal of the grantor does not become liable on the stipulations contained therein as if he had signed and sealed it.⁴⁹ It is difficult, apart from authority, to see why the

ing upon the case." As remarked in *Kaier v. Leahy*, 15 Pa. Co. Ct. R. 243, "if such lease is sufficient to bind the surety, it should seem to need no argument to show that its provisions would bind a tenant who has enjoyed the term it creates." In view of this later case it might, it seems, be questioned whether *Jennings v. McComb*, *supra*, is still law in that state.

⁴¹ *Sigmund v. Newspaper Co.*, 82 Ill. App. 178.

⁴² *Codman v. Hall*, 91 Mass. (9 Allen) 335 (dictum); *Evans v. Conklin*, 71 Hun, 536, 24 N. Y. Supp. 1081; *Browning v. Walbrun*, 45 Mo. 477; *Oliver v. Alabama Gold Life Ins. Co.*, 82 Ala. 417, 2 So. 445; *Bowman v. Powell*, 127 Ill. App. 114. In *Rice v. Brown*, 81 Me. 56, 16 Atl. 334, it is decided that the fact that the lessor merely signed the instru-

ment, while the lessee sealed it, does not involve such lack of "mutuality" as to relieve the lessee from liability on his covenants.

⁴³ See ante, § 25 g (1).

⁴⁴ See ante, § 25 g (2).

⁴⁵ See *Nickolls v. Barnes*, 32 Neb. 195, 49 N. W. 342; *Jennings v. McComb*, 112 Pa. 518, 4 Atl. 812.

⁴⁶ *Sheppard's Touchstone*, 177; *Com. Dig., Covenant, A 1*; *Butler's note to Co. Litt. 230 b.* See, also, *Burnett v. Lynch*, 5 Barn. & C. 596.

⁴⁷ *Midland R. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 1 Am. St. Rep. 189; *Finley v. Simpson*, 22 N. J. Law (2 Zab.) 311, 53 Am. Dec. 252; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124.

⁴⁸ See *Platt, Covenants*, 10-15; 2 *Platt, Leases*, 6.

⁴⁹ *Hinsdale v. Humphrey*, 15 Conn.

sealing of an instrument by A should give it the effect of an instrument sealed by B. It has never been suggested that the signing of an instrument by A would give it the effect of an instrument signed by B, and the distinction in principle between the two cases is not plainly apparent.

However questionable may be the view that one accepting the benefit of a lease under the seal of the lessor alone becomes liable on stipulations in the instrument as if it were under his seal, that is, in covenant, it seems clear that he thereby subjects himself to a liability in *assumpsit*,⁵⁰ provided at least this is not precluded by any statutory requirement of a signed writing. That a lessee merely accepting a lease becomes liable upon a stipulation for the payment of rent has been several times decided,⁵¹ and the same view has been occasionally asserted in connection with other stipulations.⁵² The acceptance of the lease which, by indicating the lessee's assent to the stipulations therein on his part to be performed, makes them binding on him, is ordinarily shown by the taking of possession of the premises by the lessee,⁵³ but it can be

431; *Martin v. Drinan*, 128 Mass. Co., 51 Ohio St. 40, 36 N. E. 672, 23 515; *Newell v. Hill*, 43 Mass. (2 L. R. A. 396, 46 Am. St. Rep. 545. Metc.) 180; *Burkhardt v. Yates*, 161 51 *Trapnall v. Merrick*, 21 Ark. Mass. 591, 37 N. E. 759 (dictum); 503; *McFarlane v. Williams*, 107 Ill. Maule v. Weaver, 7 Pa. 329; *Stabler v. Cowman*, 7 Gill. & J. (Md.) 33; *Doxey's Estate v. Service*, 30 284; *Western Maryland R. Co. v. Ind. App. 174, 65 N. E. 757; Ehrmantraut v. Robinson*, 52 Minn. 333, Orendorff, 37 Md. 335; *First Congregational Meeting-House Soc. v. Town of Rochester*, 66 Vt. 501, 29 Atl. 810; *Trustees of Hocking County v. Spencer*, 7 Ohio (pt. 2) 149.

⁵⁰ See *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492; *Newell v. Hill*, 43 Mass. (2 Metc.) 180; *Maine v. Cumston*, 98 Mass. 317; *Maynard v. Moore*, 76 N. C. 158; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Hagerty v. Lee*, 54 N. J. Law, 580, 25 Atl. 319, 20 L. R. A. 631; *Natural Gas Co. v. Philadelphia Co.*, 158 Pa. 317, 27 Atl. 951; *First Congregational Meeting House Soc. v. Town of Rochester*, 66 Vt. 501, 29 Atl. 810; *Hickey v. Lake Shore & M. S. R.*

Co., 31 Or. 14, 48 Pac. 167. See *Hinsdale v. Humphrey*, 15 Conn. 431.

⁵² *Henderson v. Virden Coal Co.*, 78 Ill. App. 437; *West Virginia C. & P. R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696; *First Congregational Meeting-House Soc. v. Town of Rochester*, 66 Vt. 501, 29 Atl. 810.

⁵³ See *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496; *Burkhardt v. Yates*, 161 Mass. 591, 37 N. E. 759; *Carroll v. St. John's Catholic Total Abstinence & Mut. Relief Soc.*, 125 Mass.

shown in other ways, either by express language or by acts.⁵⁴

It has been decided that if a lease is signed by one only of the two lessees, and the other's acceptance thereof is in no way indicated, the lessees cannot sue on a covenant for quiet enjoyment contained in the instrument.⁵⁵ Presumably this means that the covenant, until accepted, constitutes an offer merely, and consequently gives no right of action as for a breach by reason of matters occurring before the acceptance.

The question might be raised, in the case of a lease for over a year, whether a stipulation binding the lessee to do something at any time during the term, as for instance, to make repairs, is not an agreement not to be performed within a year, within the fourth section of the statute of frauds, so as not to bind the lessee if not evidenced by writing signed by him. This provision of the statute would seem to be particularly applicable if the covenant is to do something at the end of such a term of over a year, as to return the premises in good condition.⁵⁶ It is possible, however, that the fact that the lessor has executed the lease might be regarded as bringing the case within the English doctrine, which, through the subject of severe and well considered criticism,⁵⁷ has

565; *Goldberg v. Wood*, 45 Misc. 327, 90 N. Y. Supp. 427.

⁵⁴ In *Adams v. Doelger*, 15 Misc. 140, 36 N. Y. Supp. 801, it was held that an acceptance was not shown even by the giving of a check for one month's rent, the intention being that the lessee should sign in order to be bound.

⁵⁵ *Castro v. Gaffey*, 96 Cal. 421, 31 Pac. 363.

⁵⁶ In *Brown v. Throop*, 59 Conn. 596, 22 Atl. 436, 13 L. R. A. 646, it was held that a promise made by the lessee prior to the commencement of the one year term to refill the ice house and leave it full at the end of the year was not within the statutory provision, since the season for filling ice houses would fall within the year.

In *Higgins v. Gager*, 65 Ark. 604, 47 S. W. 848, it was held that a

contract by the lessor not to sell in competition with the lessee during the term of one year created by the parol leasing was invalid within the section of the statute referred to, and furthermore that its invalidity invalidated the "entire lease." It does not seem that a conveyance should be regarded as invalid merely because a contract made by the lessor at the time of the conveyance is invalid or unenforceable. The court falls to recognize that the lease is primarily a conveyance.

In *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218, it was held that a contract not to engage in a competing business was not within the statute, although made in connection with a conveyance in fee, the theory being that it might be performed within a year.

⁵⁷ See 1 *Smith's Leading Cases*

been adopted in many states, that the performance of a contract within a year by one party thereto is sufficient to take it out of this provision of the statute, although performance by the other is not to take place till after a year; though, on the other hand, it may well be doubted whether the doing of an act at the time of the contract, in this case, the making of the lease, is performance within the year by the lessor, so as to validate the contract made by the other party, in this case the lessee. In England it has been held that if the lease is for a short term, and is consequently valid, though not in writing, by force of the second section of the statute, any oral stipulations made in connection therewith must be regarded as valid without reference to the fourth section.^{57a} This view has obviously no bearing upon the case of a lease not within the second section, and as the first section involves no requirement of signature by the lessee, the applicability of the second section, even in the case of a short time lease, to relieve the lessee from the obligations of the fourth section, might, it is conceived, apart from the above decision, be open to question. Any statements to the effect that a liability on the part of the lessee arising by reason of the acceptance of a lease is not within the statute of frauds because it is "implied by law"⁵⁸ are, it is submitted, erroneous. The liability is, it is conceived, on an express contract to the same extent as if the lessee had orally agreed to perform the stipulations enumerated in the lease, and the nature of the contract is not changed by the fact that his assent to the stipulations is shown by his act in accepting the lease and not by words.^{58a} The view that a stipulation on the part of the lessee, performance of which within a year is not contemplated, is within this clause of the statute, would not interfere with the recovery of rent, since the stipulation for its payment may be construed as a reservation,⁵⁹ rendering the lessee liable therefor by reason of privity of estate as distinct from privity of contract.

The peculiar statutory provision which exists in some states,

(8th Am. Ed.) 614, 624, notes to 319; *Burkhardt v. Yates*, 161 Mass. Peter v. Compton; *Browne*, Stat. of 591, 37 N. E. 759; *Providence Christian Union v. Elliott*, 13 R. I. 74. Frauds, § 166.

^{57a} *Bolton v. Tomlin*, 5 Adol. & E. 58a See *Keener*, *Quasi Contracts*, 856, followed in *Clarke v. Serricks*, 4; *Pollock*, *Contracts* (7th Ed.) 12.

2 U. C. Q. B. 535.

⁵⁹ See post, § 170, at note 100.

⁵⁸ See *Maine v. Cumston*, 98 Mass.

that no action shall be brought on a lease not signed by the party to be charged,⁶⁰ might, it seems, have the effect of preventing recovery on any stipulations on the part of the lessee if he has failed to sign the instrument,⁶¹ though, on the other hand, it might be considered that the word "lease" in such a statute was intended to apply only to the conveyance by way of lease, and not to the contractual stipulations of the parties.⁶² In one state it appears to have been decided that one who has leased property orally cannot sue on the lessee's oral agreement to pay rent, for the reason that the case is within the provision of the statute of frauds requiring a contract for the sale of lands, tenements or hereditaments to be in writing.⁶³

c. **Execution in duplicate.** There is in effect an instrument of lease signed by both the lessor and the lessee, if it is prepared in duplicate, and one duplicate is signed and delivered by the lessor and the other by the lessee.⁶⁴

§ 54. Invalidity of lease.

Reference has been previously made⁶⁵ to decisions that a covenant by the lessee is not valid if the instrument of lease is not

⁶⁰ See ante, § 25 b, note 349.

⁶¹ In *Wade v. City of New Bern*, 77 N. C. 460, it was decided that a lessee was not liable under stipulations in an instrument of lease not signed by him, in view of the statute making void leases and contracts for leasing lands "unless put in writing and signed by the party to be charged therewith." The character of the stipulation with which the lessee had failed to comply does not appear from the report, the action being merely said to be one for "breach of contract."

⁶² See ante, § 49.

⁶³ *Mathews v. Carlton*, 189 Mass. 285, 75 N. E. 637. As before stated, it would seem that this section of the statute is properly applicable to an executory contract for a lease rather than to a lease (ante, § 25 b,

at notes 354-358). The opinion makes the briefest possible reference to the point.

⁶⁴ *Fields v. Brown*, 188 Ill. 111, 58 N. E. 977; *Campau v. Lafferty*, 43 Mich. 429, 5 N. W. 648; *Welsh v. Ferd. Heim Brew. Co.*, 47 Mo. App. 608; *Nicoll v. Burke*, 78 N. Y. 580; *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. 1082; *Hughes v. Clark*, 10 C. B. 905; *Houghton v. Koenig*, 18 C. B. 235; 2 Blackst. Comm. 296. This is the usual method of executing leases in England. See *Fawcett, Landl. & Ten.* (3d Ed.) 180. If the copy which was signed by the lessor was not delivered, its existence being unknown to the lessee, there is no valid lease. *Chesebrough v. Pingree*, 72 Mich. 438, 40 N. W. 747, 1 L. R. A. 529.

⁶⁵ See ante, § 53 a.

executed by the lessor, for the reason that the covenant is, as it were, conditioned on the passing of the interest with reference to which it is made. So it has been decided that if a conveyance by way of lease is void, as made for an illegal purpose, a covenant by the lessee to pay rent is void.⁶⁶ There are, moreover, occasional decisions apparently to the effect that a covenant for rent is not binding on the lessee until the lessor has delivered the lease, and the lessee has accepted it, although the instrument has been executed by the lessee.⁶⁷ And in one state it was decided that, if the instrument was not recorded, there could be no recovery on the covenant for rent, but assumpsit alone would lie.⁶⁸ On the other hand, the fact that, in the case of a lease by a husband and wife, the latter failed to acknowledge the lease under the statute so as to make it binding on her after the husband's death, was regarded as no defense to an action on the covenant for rent.⁶⁹

§ 55. Effect of death.

a. **Of covenantor.** In accordance with the general rule that the executor or administrator is, to the extent of the assets of the estate, liable upon contracts entered into by his testator or intestate,⁷⁰ the executor or administrator of a lessee is liable upon the covenants entered into by the lessee with the lessor to the extent of the assets.⁷¹ He may, moreover, in the case of covenants run-

⁶⁶ *Jevons v. Harridge*, 1 Sid. 308, 1 Daly (N. Y.) 226; *Kelsey v. Tourtesaund*, 6; *May v. Trye*, Freem. 447. *lotte*, 59 Pa. 184. In neither of these

In *Knipe v. Palmer*, 2 Wills. 130, it cases is there a clear statement of was apparently decided to be a good the grounds of the decision.

defense to an action on a covenant ⁶⁸ *Anderson v. Critcher*, 11 Gill & by the lessee that the lessor plain- J. (Md.) 450, 37 Am. Dec. 72. See tiff was the committee of a lunatic, ante, § 32.

without authority to lease, and a ⁶⁹ *Toler v. Slater*, L. R. 3 Q. B. 42. plea of *nil habuit in tenementis* was ⁷⁰ 2 Williams, Executors (9th Ed.) sustained. It does not seem, accord- 1593; *Woerner*, Administration, § 328.

ing to the authorities generally, that ⁷¹ *Brett v. Cumberland*, Cro. Jac. such lack of title in the lessor should 521; *Hellier v. Casbard*, 1 Sid. 266; have constituted a sufficient defense, Anonymous, 3 Dyer, 324 a, pl. 34; the lessee having entered and retained possession under the lease. *Buckley v. Pirk*, 1 Salk. 316; *Wilson v. Wigg*, 10 East, 313; *Wollaston* See post, § 78 a, note 179.

⁶⁷ *Stetson v. Briggs*, 114 Cal. 511, v. *Hakewill*, 3 Man. & G. 297; *Green- 46 Pac. 603*; *Witthaus v. Starin*, 12 leaf v. Allen, 127 Mass. 248; *Alsop*

ning with the land, be subjected to liability as regards his own property, but that possible liability will be considered in another place.⁷² The executor or administrator of the deceased lessor is also liable upon the covenants entered into by the latter to the extent of the assets received by him,⁷³ and may, in case the reversion passes to him, be further liable on such covenants as run with the land.⁷⁴

The rule that the liability survives to the executor or administrator is on principle applicable in the case of a covenant made by a grantee in fee to the same extent as in other cases, and it has accordingly been decided that he is so liable under a covenant for rent contained in a conveyance in fee, a "perpetual lease" as it is sometimes called.⁷⁵ In Pennsylvania, however, it has been decided that the executor or administrator is not in such case bound to perform the covenant, on the ground that this would prevent any distribution of the decedent's estate, and, as all the lands of the decedent are assets for the payment of debts, would constructively

v. Banks, 68 Miss. 664, 9 So. 895, 13 L. R. A. 598, 24 Am. St. Rep. 294; Knotts v. McGregor, 47 W. Va. 566, 35 S. E. 899.

⁷² See post, § 158 a (2) (h).

⁷³ 2 Platt, Leases, 359; Fitzherbert's Natura Brevium, 145 (e), note (a); Macartney v. Blundell, 2 Ridg. P. C. 113; Chamberlain v. Dunlop, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807.

In Kershaw v. Supplee, 1 Rawle (Pa.) 131, it was decided that a covenant by a lessor with the lessee "for himself and his heirs" to keep in repair a dam on an adjoining tract owned by him did not bind the lessor's executor to repair the dam, or render him liable to an action for nonrepair, the theory being that the words of the covenant, and also the fact that the land containing the dam would pass to the heirs and not the executor, showed an intention to bind the heirs and not the executor. In reference to this it may be said

that the liability of an executor is apart from any question of intention, he being liable because he is the personal representative of the testator. "In every case, where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by the death of the testator." 2 Williams, Executors (9th Ed.) 1629, citing Bro. Covenant, pl. 12; Com. Dig., Covenant (C 1). The cases stated in Williams' work on page 1630. (Thurrsden v. Warthen, 2 Bulst. 158; Macartney v. Blundell, 2 Ridg. P. C. 113) are not in accord with the Pennsylvania case. See, also, the discussion in Chamberlain v. Dunlop, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807.

⁷⁴ See post, § 149 b.

⁷⁵ Scott v. Lunt's Adm'r, 32 U. S. (7 Pet.) 596; Van Rensselaer's Ex'rs v. Platner's Ex'rs, 2 Johns. Cas. (N. Y.) 17.

charge the rent of a single lot upon all his lands.⁷⁶ The reason thus stated in one jurisdiction for relieving the estate of the deceased lessee from liability upon a perpetual ground rent covenant might as well be asserted, it would seem, in the case of a lease for a limited term, especially when the term is of considerable length. In the case, for instance, of a term for ninety-nine years, or even for a much shorter period, as for twenty years, the inconvenience of deferring the settlement of the lessee's estate until the removal of all possible liability on account of the breach of his covenants is perfectly evident, and yet the executor or administrator cannot, so long as he may possibly be held liable on the covenants to the extent of the assets, be safe in undertaking to settle the estate by the payment of legacies. That such payment is no defense to an action on the covenant of the lease has been clearly decided.⁷⁷ The difficulty suggested is not indeed peculiar to covenants in connection with leases, but may exist as well in the case of any contract calling for performance at some distant time or throughout a period of considerable duration, or under which liability is dependent on some future contingency.

To protect the executor or administrator in such cases, the English courts of equity established the rule that he would not be compelled to distribute the estate of a decedent to legatees or next of kin unless indemnified by them against any possible future liability, or unless a sufficient part of the residuary estate was impounded for the purpose of meeting any such liability.⁷⁸ It was also settled that if an executor, giving the court all the information possessed by him, acts under the order of the court in making distribution, he will be protected from liability.⁷⁹ The executor or administrator of a lessee is now in England protected by a statute,⁸⁰ providing in effect that if he has sold the leasehold and has assigned the lease to the purchaser, and has set apart a fund

⁷⁶ Quain's Appeal, 22 Pa. 510; Williams' Appeal, 47 Pa. 283.

⁷⁷ See Davis v. Blackwell, 9 Bing. 5; Pearson v. Archdeaken, Alc. & N. 23; Curtis v. Hunt, 1 Car. & P. 180.

⁷⁸ Simmons v. Bolland, 3 Mer. 547; Vernon v. Egmont, 1 Bligh (N. R.) 554; Cochrane v. Robinson, 11 Sim. 378; Fletcher v. Stevenson, 3 Hare, 360, 370.

⁷⁹ Dean v. Allen, 20 Beav. 1; Knatchbull v. Fearnhead, 3 Mylne & C. 122; Smith v. Smith, 1 Drew. & S. 384; England v. Tredegar, L. R. 1 Eq. 344; Bennett v. Lytton, 2 Johns. & H. 155; 2 Williams, Executors (9th Ed.) 1204.

⁸⁰ 22 & 23 Vict. c. 35, § 27 (Lord St. Leonard's Act).

sufficient to answer any future claim that may be made in respect of any fixed and ascertained sum agreed by the lessee to be laid out on the property, he may, without any order of court, distribute the assets without making any provision for future breaches of covenant, and shall not be subjected to any liability in respect thereof.⁸¹

In this country there are in a number of states statutory provisions as to the presentation of "contingent claims" against the estate of a decedent, and the retention by the personal representative of sufficient assets to meet such claims. A claim based on a covenant by the lessee to keep in repair during the term, or to perform other acts involving expenditures of an uncertain amount, would seem to be contingent within such a statute, and a covenant to pay rent might perhaps be so regarded, when the lessee or the lessee's executor has assigned the leasehold, the liability of the lessee's estate being in such case contingent upon the assignee's failure to perform the covenant.⁸²

In the case of a covenant by two or more persons, either lessors, or lessees, the question whether upon the death of one of them his representative is bound thereby is determined, in the absence of statute, by the consideration whether the covenant is joint or several as to the covenantors.⁸³ If the covenant is joint, the estate of a deceased covenantor is not liable, but the burden rests upon the survivor or survivors alone.⁸⁴ In a number of jurisdictions, however, it is provided by statute that the estate of a deceased joint obligor shall be liable. If the covenant is several,⁸⁵ or joint and several,⁸⁶ as regards the covenantors, the representative of any one of them succeeds to his liability in case of his death, and this is the case even though the covenant is by lessees holding as joint tenants, and the entire interest in the leasehold is vested in the survivor.⁸⁷

A covenant "in law"⁸⁸ by the lessor, as for instance the cove-

⁸¹ See *Dodson v. Sammell*, 1 Drew. & S. 575.

⁸² See 2 *Woerner, Administration*, § 394.

⁸³ See ante, § 52.

⁸⁴ *Leake, Contracts* (3d Ed.) 374; *Hammon, Contracts*, 761; *White v. Tyndall*, 13 App. Cas. 263.

⁸⁵ See *White v. Tyndall*, 13 App. Cas. 263.

⁸⁶ *Enys v. Donnithorne*, 2 Burrow, 1190; *Burns v. Bryan*, 12 App. Cas. 184.

⁸⁷ See cases cited in last preceding note.

⁸⁸ See ante, § 50.

nant for quiet enjoyment implied from words of demise,⁸⁹ will not, it is said, extend beyond the estate in respect of which it is made, and it has on this theory been decided that if a tenant for life makes a lease and dies, his executor is not liable on the covenant, although the lessee is evicted by the remainderman.⁹⁰

b. **Of covenantee.** Upon the death of the person in favor of whom the covenant is made, whether the lessor or the lessee, the right of action on account of any breach of the covenant which occurred in the lifetime of such covenantee passes to his personal representative.⁹¹ For any breach subsequent to the death of the covenantee, the right of action is in the person in whom the covenantee's interest in the land is vested at the time of such breach, that is, if the breach is of a covenant in favor of the lessee, his executor or administrator may sue on account of any breach committed before the term has passed out of him into a legatee or purchaser, and, if the covenant was in favor of the lessor, his heir or devisee, or, in case the reversion is a chattel interest, his personal representative, is the person entitled to sue for a breach as having succeeded to the reversionary interest of the decedent, provided the covenant was one which runs with the land.⁹² If not such a covenant, the personal representative of the deceased covenantee could alone sue thereon.

In case the covenant is in favor of two or more persons, whether lessors or lessees, the question whether the personal representative of a deceased covenantee may sue thereon is ordinarily dependent on whether the covenant is joint or several. If it is joint as regards the covenantees, only the survivor or survivors or the personal representative of the last survivor can sue.⁹³ On the other hand, if the covenant is several, the personal representative of any deceased covenantee is entitled to sue in respect of his separate interest.⁹⁴ In the case of covenants which run with the

⁸⁹ See post, § 79 a.

⁹⁰ *Swann v. Scarles*, Moore, 74, 3 Dyer, 257 a; *Bragg v. Wiseman*, 1 Brownl. & G. 22; *Netherton v. Jessop*, Holt, 412; *Adams v. Gibney*, 6 Bing. 656; *Penfold v. Abbott*, 32 Law J. Q. B. 67.

⁹¹ *Lucy v. Levington*, 2 Lev. 26, 1 Vent. 175; *Raymond v. Fitch*, 2

Crompt. M. & R. 588; *Ricketts v. Weaver*, 12 Mees. & W. 718.

⁹² See post, §§ 149 b (2), 158 a (2) (a).

⁹³ *Williams, Executors* (9th Ed.) 1773; *Hammon, Contracts*, 764. See *Foley v. Ardenbrooke*, 4 Q. B. 197; *Bradburne v. Botfield*, 14 Mees. & W. 559.

⁹⁴ *Williams, Executors*, 1774.

land, neither the surviving covenantee nor the personal representative of a deceased covenantee may properly, it seems, sue on account of a breach which occurs after the estate, whether reversionary or leasehold, which was originally vested in the covenantee, has been entirely transferred to a stranger or strangers, since in such case the right of action is in the person in whom the reversion or leasehold may at the time be vested, the case being analogous to that of a transfer of his entire interest by a single lessor or lessee.⁹⁵ In case the interest in the land of one of two or more joint covenantees is still retained by him at the time of the breach, though the interests of the others have been transferred, presumably the survivors of the original covenantees should join with the transferee in a suit on the covenant.⁹⁶

§ 56. Covenants with agent.

a. **Under seal.** In accordance with the common law rule that those persons only can sue upon a sealed instrument who are parties thereto, it is ordinarily held that where a contract under seal is made with an agent in his own name, the principal cannot sue thereon.⁹⁷ And this view has occasionally been asserted with reference to the right of the principal to sue on covenants on the part of the lessee, contained in an instrument of lease, which is made and executed by an agent as lessor without naming the principal, or with only incidental reference to the principal, the principal being, in such cases, precluded from suing thereon.⁹⁸

b. **Not under seal.** In the case of stipulations contained in an instrument of lease not under seal, the undisclosed principal

⁹⁵ See post, § 148.

⁹⁶ See *Foley v. Addenbrooke*, 4 Q. B. 197; *Thompson v. Hakewill*, 19 C. B. (N. S.) 713.

⁹⁷ *Clarke & Skyles, Agency*, §§ 463, 535; *Tiffany, Agency*, pp. 243, 308.

⁹⁸ *Loeb v. Barris*, 50 N. J. Law, 382, 13 Atl. 602; *Schaefer v. Henkel*, 75 N. Y. 378; *McColgan v. Katz*, 29 Misc. 136, 60 N. Y. Supp. 291. But the principal's right to sue is not excluded merely because the instrument is signed "A. B. for C. D." and

not "C. D. by A. B." *Mussey v. Scott*, 61 Mass. (7 Cush.) 215, 54 Am. Dec. 719.

In *Harms v. McCormick*, 132 Ill. 105, 22 N. E. 511, it was decided that if one joint owner of land made a lease "for himself and as agent of" the other owners, he alone signing and sealing it in his own name, he could sue on the covenant for rent, the rule above referred to not applying because the agent had himself an interest in the land.

of the person with whom the stipulations were made, whether the ostensible lessor or lessee, would, it seems clear, have the right to enforce such stipulations,⁹⁹ in accordance with the rules usually governing as to the rights of an undisclosed principal,¹⁰⁰ though he would not have this right, presumably, if the agent represented himself as the real and only principal.¹⁰¹ The right of the undisclosed principal to enforce the contract made with his agent does not exclude the right of the agent himself to sue thereon.¹⁰²

c. **With unauthorized agent.** The question might arise whether, when a lease is made in behalf of one person by another, acting without authority, the person in behalf of whom it purports to be made may sue on the covenants which may be entered into by the lessee. The question does not appear to have been the subject of adjudication, but applying the principles ordinarily controlling in the case of unauthorized acts in behalf of another, it seems that the person named as lessor would have the right to accept the benefit of the lessee's covenants, provided at least the lessee does not recede therefrom before they are accepted by the intended lessor.¹⁰³ And, presumably, any acts sufficient to ratify the lease, regarded as a conveyance, would be considered an acceptance of the lessor's covenants.¹⁰⁴ It does not seem that the lessor named should be allowed thus to accept the benefit of the lessee's covenants unless the lease is validly ratified by him, as, for instance, by writing in case a prior authority to the agent to make the lease would necessarily have taken that form.

§ 57. Covenants by agent.

a. **Under seal.** In accordance with the common-law rule that

⁹⁹ In *Nicoll v. Burke*, 78 N. Y. 580, it was decided that the principal could enforce the contract to pay rent, although the lease purported to be made by "W. & E., agents, as landlords."

In *Nolen v. Royston*, 36 Ark. 561, though a note for the rent was payable to the landlord's agent, the landlord was regarded as entitled to enforce a lien therefor in his own name.

¹⁰⁰ *Clark & Skyles, Agency*, §§ 526, 528; *Tiffany, Agency*, p. 303.

¹⁰¹ *Huffcutt, Agency* (2d Ed.) § 133.

¹⁰² *Hunter v. Adoue*, 38 Tex. Civ. App. 542, 86 S. W. 622. See *Huffcutt, Agency* (2d Ed.) 208.

¹⁰³ See *Huffcutt, Agency* (2d Ed.) § 38 (5); *Tiffany, Agency*, § 18 (b).

¹⁰⁴ See ante, § 34 c.

one not a party to a sealed instrument cannot ordinarily be held liable thereunder,¹⁰⁵ a person is not liable on the covenants in a sealed instrument of lease merely because it is executed by his agent, unless it appears from the instrument as a whole that the instrument was intended to bind the principal, and unless this appears the agent will himself ordinarily be liable on the covenants.¹⁰⁶

b. **Not under seal.** In the case of stipulations contained in an instrument of lease not under seal, the undisclosed principal is, it seems, liable thereon, although the party by whom the liability is asserted supposed that he was contracting with the agent only, acting in his own behalf.¹⁰⁷

One executing a lease in his own name, or, it seems, accepting a lease which purports to bind him personally, cannot relieve himself from liability on the stipulations thereof by showing that he was acting as agent for another.^{108, 109}

A disclosed principal is always liable upon contracts made in his behalf which are within the scope of the agent's actual or ostensible authority, and this rule would apply as against a lessor or lessee acting through an agent.

¹⁰⁵ *Huffcut, Agency* (2d Ed.) 170, 237; *Tiffany, Agency*, § 83.

¹⁰⁶ *Kiersted v. Orange & A. R. Co.*, 69 N. Y. 345, 25 Am. Rep. 199; *Soule v. Palmer*, 49 N. Y. Supp. 475; *Lenney v. Finley*, 118 Ga. 718, 45 S. E. 592. See *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631; *Haley v. Boston Belting Co.*, 140 Mass. 73, 2 N. E. 785.

In *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131, a lease was made to certain individuals, naming them and describing them as officials of an association named, and to their successors in office, and such individuals, "parties of the second part," covenanted on behalf of "themselves and their successors in office" to pay the rent. It was held that such individuals were not liable for the rent, the court saying that "no case has been cited, and we have

discovered none, holding that, in the absence of a personal promise or covenant, one signing a contract, who therein represents himself to be the agent of a disclosed and known principal, and who assumes to contract for such principal only, has been held personally liable upon the covenants contained in such contract." This seems to assume the question at issue, whether the individual signers did appear to be acting in a merely representative capacity.

¹⁰⁷ *Tiffany, Agency*, p. 231; *Clark & Skyles, Agency*, § 457 et seq. In *Woolsey v. Henke*, 125 Wis. 134, 103 N. W. 267, it was decided that the presence of a seal was immaterial in this regard, if not being necessary to the validity of the instrument.

^{108, 109} See *Stobie v. Dills*, 62 Ill.

§ 58. Construction of covenants.

a. **General rules.** We have before referred to certain general rules of construction which are applicable to instruments of lease as well as to other written instruments, and these rules ordinarily apply to the covenants in the instrument of lease as to other parts thereof.¹¹⁰ Every covenant is to be expounded with regard to its context and such exposition must be upon the whole instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words.¹¹¹ If the words of a covenant are of doubtful meaning, they will, it is said, be construed most strongly against the covenantor.¹¹² The construction which has been placed upon particular covenants in connection with leases will be considered in different parts of this work in connection with the discussion of the various matters which may have been the subject of such covenants.¹¹³

b. **Aider by oral evidence.** In order to aid in the construction of an instrument of lease, as of any other writing, oral evidence is admissible, provided there is any ambiguity on the face

432; *Seaver v. Coburn*, 64 Mass. (10 Cush.) 324.

¹¹⁰ See ante, § 36.

¹¹¹ *Iggulden v. May*, 7 East, 241, per *Ellenborough, C. J.* See cases cited 11 *Cyclopedia Law & Proc.* p. 1051.

¹¹² *Bac. Abr.*, Covenant (F); *Love v. Pares*, 13 East, 80. See *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 131, 61 N. E. 816, and cases cited 11 *Cyclopedia Law & Proc.* p. 1052.

In *Butt v. Maier & Zobelein Brewery*, 6 Cal. App. 581, 92 Pac. 652, it is said that the lessor is always to be regarded as the promisor within a statutory provision that in case of uncertainty the construction of a contract is to be against the promisor.

¹¹³ In *Malick v. Kellogg*, 118 Wis. 405, 95 N. W. 372, it was decided that where, upon leasing a farm for dairy purposes at a rental to be determined by the number of cattle to

be kept on the farm, the lessor agreed to provide pasture for 100 head of cattle and cleared land enough to provide feed enough for that number, not less than 100 acres, the lessor was not bound to provide 100 acres in addition to that described in the lease. It may perhaps be questioned whether there was a technical lease in this case giving the lessee exclusive possession.

In *Hume v. Hendrickson*, 79 N. Y. 117, it was decided that a lessee covenanting to pay a mortgage on the leasehold was liable to the lessor covenantee immediately upon the mortgage becoming due and remaining unpaid. In *Ardesco Oil Co. v. North American Oil & Min. Co.*, 66 Pa. 375, it was decided that such a covenant by the lessee to pay certain overdue claims on the property was broken by a refusal to pay at once or within a reasonable time.

of the instrument, to show the sense in which the language was used.¹¹⁴

§ 59. Discharge of liability.

The liability of a lessor or lessee under a contract entered into by him in connection with the lease, for the purpose of defining the rights of the parties with reference to the holding thereunder, ordinarily terminates, as regards breaches which have not yet occurred, upon the termination of the tenancy. In other words such a contract, entered into in view of the creation of an estate in the lessee, is *prima facie* intended to operate only so long as an estate remains in him. Certain classes of contractual stipulations entered into by the lessor or lessee in connection with the making of the demise might, no doubt, by express provision, continue after the termination of the tenancy, and that one may thus agree to pay "rent," so-called, even after the termination of the tenancy by forfeiture, has been judicially recognized.¹¹⁵ Some stipulations, moreover, are in their nature such as to call for perform-

¹¹⁴ Bell's Adm'x v. Golding, 27 Ind. 173; Ingram v. Dailey, 123 Iowa, 188, 98 N. W. 627; American Sav. Bank v. Shaver Carriage Co., 111 Iowa, 137, 82 N. W. 484; Bellinger v. Kitts, 6 Barb. (N. Y.) 273; Equator Min. & Smelting Co. v. Guanella, 18 Colo. 548, 33 Pac. 613; Hartsell v. Myers, 57 Miss. 135; Cumming v. Barber, 99 N. C. 332, 5 S. E. 903; Bartley v. Phillips, 165 Pa. 325, 30 Atl. 842; O'Neill v. Ogden Aerie No. 118, 32 Utah, 162, 89 Pac. 464; Pine Beach Inv. Corp. v. Columbia Amusement Co., 106 Va. 810, 56 S. E. 822. But see Castleman v. Du Val, 89 Md. 657, 43 Atl. 821, where it was decided that evidence was not admissible to show whether, in the case of a tenancy commencing on the twentieth day of one month, a provision for the payment of rent on the twentieth day of each month meant the first or the last day of the current month. And in Calhoun v. Wilson, 27 Grat. (Va.) 639, it was decided that, the lessee having covenanted to make repairs, without naming any time for performance, evidence was not admissible to show the intention in this respect.

That such evidence is not admissible in the absence of any ambiguity, see Rhodes v. Purvis, 74 Ark. 227, 85 S. W. 235; Carter v. Williamson, 106 Ga. 280, 31 S. E. 651; Rector v. Hartford Deposit Co., 190 Ill. 380, 60 N. E. 528; Tallmadge v. Hooper, 37 Or. 503, 61 Pac. 349; Beadle v. Monroe, 68 Hun, 323, 22 N. Y. Supp. 981; Gerry v. Siebrecht, 88 N. Y. Supp. 1034; Hall v. Phillips, 164 Pa. 494, 30 Atl. 353; Easterby v. Hellbron, 1 McM. (S. C.) 462. For a discussion and criticism of this limitation on the general rule, see 4 Wigmore, Evidence, § 2462 et seq.

¹¹⁵ See post, § 182 j.

ance after rather than during the term. In the absence of a clear showing of intention otherwise, however, the "covenants of a lease" will, it is conceived, usually be construed to endure only so long as the leasehold interest endures.

It may happen that, even before the termination of a tenancy, a contractual stipulation entered into in connection with the creation of the tenancy may cease to be operative, that is, may be discharged, by the act of the parties. The principles applicable to such a discharge are no doubt the same in the case of a contract entered into by the lessor or lessee at the time of a demise, "a covenant of the lease," as in the case of any other contract.

At common law the liability under a technical covenant, that is, a contract under seal, can be discharged by agreement only if this is under seal, that is, there must be a technical release,¹¹⁶ while if not under seal it may be discharged by an oral agreement based on a sufficient consideration.¹¹⁷ In many of the states the rules as to the discharge of contracts under seal have been modified to the extent that if the parties have acted on a parol agreement looking to the discharge of such a contract, the contract is discharged.¹¹⁸ And this view has been applied in the case of an oral agreement by the lessor to reduce the rent covenanted to be paid, such reduced amount having been accepted in satisfaction of the lessor's claim.¹¹⁹

¹¹⁶ Platt, Covenants, 590; Shepard's Touchstone, 181; White v. Parkin, 12 East, 578; Delacroix v. Bulkley, 13 Wend. (N. Y.) 71.

¹¹⁷ Hammon, Contracts, 853, 861.

¹¹⁸ Hammon, Contracts, 860; Page, Contracts, 1345.

¹¹⁹ McKenzie v. Harrison, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638; Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110. In Jones v. Daly, 73 App. Div. 220, 76 N. Y. Supp. 725, *afid.* without opinion in 175 N. Y. 520, 67 N. E. 1083, it was assumed that an oral agreement not to enforce the lessee's covenant was binding on the lessor. It does not appear whether the covenant was under seal. In Illinois the rule seems to be that a contract under seal may be released or discharged by oral agreement, but that it cannot be modified thereby, and the courts there have applied this theory in the case of leases by regarding an instrument of lease as a single contract, and a discharge or modification of any covenant thereof as a *modification* of this contract, and as consequently invalid and nugatory, while they regard an oral surrender of the leasehold as a *release or discharge*, and as consequently valid. Alschuler v.

Apart from any difficulties arising from the presence of a seal, a subsequent oral contract discharging a prior contract is, if based on a valid consideration, unquestionably effective for this purpose,¹²⁰ and, consequently, no doubt, by such an agreement any covenant of a lease, not under seal, may be discharged. If, on the other hand, there is no consideration for the agreement of the covenantee to discharge the covenantor, it does not seem that such agreement should be given any effect.¹²¹ Such is the rule ordinarily prevailing in this country with reference to contracts generally,¹²² but there are occasional decisions and *dicta* to the effect that an agreement to discharge a unilateral contract is valid though not supported by a consideration,¹²³ and there are cases which, with out any discussion of the matter, seem to assume the effectiveness of a discharge or "waiver" of a covenant in a lease, though not based on any consideration,¹²⁴ a view which is difficult to support on principle, in the absence of an estoppel upon the covenantee to assert the covenant by

Schiff, 164 Ill. 298, 45 N. E. 424; Brown, 81 Me. 56, 16 Atl. 334, the Leavitt v. Stern, 159 Ill. 526, 42 N. E. 869; Knefel v. Daly, 91 Ill. App. 321.

¹²⁰ Hammon, Contracts, § 425; Clark, Contracts, 608.

¹²¹ That a consideration is necessary to support an agreement to discharge a covenant in a lease, see Loach v. Farnum, 90 Ill. 368; Post v. Vetter, 2 E. D. Smith (N. Y.) 248; Spota v. Hayes, 36 Misc. 532, 73 N. Y. Supp. 959; Jones v. Daly, 73 App. Div. 220, 76 N. Y. Supp. 725, *affd.* without opinion 175 N. Y. 520, 67 N. E. 1083.

¹²² See Hammon, Contracts, § 425; Clark, Contracts, 609; Harri-man, Contracts, § 505.

¹²³ See Professor Williston's admirable chapter on "Discharge of Contracts" in his edition of Wald's Pollock on Contracts.

¹²⁴ Dauchy Iron Works v. Toles, 76 Ill. App. 669; Boos v. Dulin, 103 Iowa, 331, 72 N. W. 533. In Rice v.

the court regarded the question whether there was "a waiver of the contract of lease" by the lessor as one for the jury. The action was one of covenant by the lessor, and the question must really have been whether there was a "waiver" of the lessee's covenant. The court assumes, apparently, that there is a waiver, relieving the lessee from liability, in case the lessor explicitly indicates an intention not to enforce such liability.

In Thomson-Houston Elec. Co. v. Durant Land Imp. Co., 144 N. Y. 34, it was decided that the right to sue on the lessor's covenant to repair was not lost by the lessee's continuance in possession with knowledge of the breach; and in Stearns v. Lichtenstein, 48 App. Div. 498, 62 N. Y. Supp. 949, a like decision was made with reference to a breach of a covenant to change the tenants of adjoining premises.

reason of his having induced the covenantor to act on the theory that performance will not be required. The fact that the lessor fails to exercise a right of re-entry for breach of covenant does not affect his right to recover damages for the breach.¹²⁵

§ 60. Remedy for breach of covenant.

The remedy for breach of a covenant or other contract entered into in connection with a conveyance by way of lease is ordinarily by an action for damages. Occasionally the character of the covenant, or the circumstances of the parties, may be such as to justify a decree of specific performance,¹²⁶ or an injunction to prevent a breach.¹²⁷

The damages recoverable must be restricted to compensation for the injury actually caused by the breach, and loss which may or may not have been caused by the breach cannot be considered.¹²⁸

§ 61. Oral contracts in connection with written lease.

The "parol evidence rule," excluding evidence of oral agreements to vary or contradict the terms of a written instrument, has been frequently applied in connection with instruments of lease, with the result of excluding evidence of oral agreements, or statements made either before the execution of the written instrument or contemporaneously therewith.¹²⁹ Thus it has

¹²⁵ *McKildoe's Ex'r v. Darracott*, was an express stipulation for their recovery in case the covenantee was under the necessity of employing an attorney by reason of the breach. 13 Grat. (Va.) 278; *Spencer v. Dougherty*, 23 Ill. App. 399.

¹²⁶ See e. g., § 233.

¹²⁷ See e. g., §§ 116 g, 123 l, 152 k. See *Richards v. Bestor*, 90 Ala. 352.

¹²⁸ In *United States Trust Co. v. O'Brien*, 46 N. Y. St. Rep. 238, 18 N. Y. Supp. 798, it was held that for breach of covenant by the lessee to allow the lessor to show the premises and to post a notice thereon, damages could not be recovered on the theory that this caused the premises to remain unlet for five months. 8 So. 30. ¹²⁹ See *Henderson v. Arthur* [1907] 1 K. B. 10; *Kelley v. Chicago, M. & St. P. R. Co.*, 93 Iowa, 436, 61 N. W. 957; *Naumberg v. Young*, 44 N. J. Law, 331, 43 Am. Rep. 380; *Howard v. Thomas*, 12 Ohio St. 201; *Ninman v. Suhr*, 91 Wis. 392, 64 N. W. 1035; *Grashaw v. Wilson*, 123

The covenantee has been allowed to recover attorney's fees when there *Mich. 364*, 82 N. W. 73; *Hallenbeck v. Chapman*, 72 N. J. Law, 201, 63 Atl.

been decided that evidence cannot be given of oral agreements by the lessor to make repairs or improvements upon the premises,¹³⁰ to place furniture thereon,¹³¹ not to carry on business in competition with the lessee,¹³² to use the adjoining premises only in a particular way,¹³³ to put the lessee in possession,¹³⁴ to allow the lessee to remove fixtures.¹³⁵ So evidence of an oral agreement by the lessee not to assign the leasehold,¹³⁶ to use the premises for a particular purpose only,¹³⁷ to leave hay and fodder on the premises at the end of the term,¹³⁸ has been excluded. Likewise, statements, in the nature of warranties, by the lessor, as to the physical condition of the premises or a part thereof at the time of the lease, have been excluded,¹³⁹ as have agreements varying

- 498; *Cleves v. Willoughby*, 7 Hill 117 Ind. 512, 20 N. E. 428, 3 L. R. A. (N. Y.) 83; *Hall v. Beston*, 26 App. 308; *Lerch v. Sioux City Times Co.*, Div. 105, 49 N. Y. Supp. 811, *aff'd*. 91 Iowa, 750, 60 N. W. 611; *Tracy v.* 165 N. Y. 632, 59 N. E. 1123; *Smith Union Iron Works Co.*, 104 Mo. 193, *v. Smull*, 69 App. Div. 452, 74 N. 16 S. W. 203; *Hightower v. Henry*, Y. Supp. 1061; *Van Derhoef v. Hartmann*, 63 App. Div. 419, 71 N. Y. 85 Miss. 476, 37 So. 745. ¹³¹ *Angell v. Duke*, 32 Law T. (N. Supp. 552; *Thomas v. Dingleman*, 45 S.) 320; *Wilson v. Deen*, 74 N. Y. Misc. 379, 90 N. Y. Supp. 436; *Daly* 531. ¹³² *Doyle v. Dixon*, 94 Mass. (12 v. Piza, 105 App. Div. 496, 94 N. Y. Allen) 576; *Scholz v. Dankert*, 69 Supp. 154; *Greene v. Ker*, 48 Misc. Wis. 416, 34 N. W. 394. 609, 95 N. Y. Supp. 569; *Howard v.* ¹³³ *Haycock v. Johnston*, 81 Minn. *Thomas*, 12 Ohio St. 201; *Hartford* 49, 83 N. W. 494; *Gray v. Gaff*, 8 Mo. & N. Y. Steamboat Co. v. City of App. 329; *Johnson v. Oppenheim*, New York, 78 N. Y. 1; *Gandy v.* 55 N. Y. 280. *Wiltse* (Neb.) 112 N. W. 569; *Moore-* ¹³⁴ *Cozens v. Stevenson*, 5 Serg. & Cortes Canal Co. v. Gyle, 36 Tex. Civ. R. (Pa.) 421. App. 442, 82 S. W. 350; *Wodock v.* ¹³⁵ *Jungerman v. Bovee*, 19 Cal. Robinson, 148 Pa. 503, 24 Atl. 73; 354. Compare *Ryder v. Faxon*, 171 Kline v. McLain, 33 W. Va. 32, 10 Mass. 206, 50 N. E. 631, 68 Am. St. S. E. 11, 5 L. R. A. 400; *Stoddard v.* Rep. 417. Nelson, 17 Or. 417, 21 Pac. 456; *York* ¹³⁶ *Nave v. Berry*, 22 Ala. 382. v. Steward, 21 Mont. 515, 55 Pac. 29, ¹³⁷ *Burr v. Spencer*, 26 Conn. 159, 43 L. R. A. 125; *Hunter v. Hathaway*, 108 Wis. 620, 84 N. W. 996. 68 Am. Dec. 379; *Harrison v. Howe*, ¹³⁸ *Morningstar v. Querens*, 142 109 Mich. 476, 67 N. W. 527; *Rickard* Ala. 186, 37 Sd. 825; *Averill v. Sawyer*, 62 Conn. 560, 27 Atl. 73; *Gul-* v. Dana, 74 Vt. 74, 52 Atl. 113. *liver v. Fowler*, 64 Conn. 556, 30 Atl. ¹³⁹ *In re Luckenbill*, 127 Fed. 984. 852; *McLean v. Nicol*, 43 Minn. 169, *Carter v. Williamson*, 106 Ga. 45 N. W. 15; *Welshbillig v. Dient-* 280, 31 S. E. 651; *Brigham v. Rog-* hart, 65 Ind. 94; *Diven v. Johnson*, 63 Mass. (9 Cush.) 89, 55 Am. Dec.

the amount of rent to be paid,¹⁴⁰ or the mode of its payment,¹⁴¹ as well as provisions that payments of rent should cease on a certain contingency, such as the destruction of the building on the premises,¹⁴² or that the term should come to an end on a contingency named.¹⁴³

It has been decided that, by reason of the "parol evidence rule," it cannot be shown, as against the lessor, that one named as a lessee was a surety only for the performance of his covenants by the other lessee named.¹⁴⁴ This view has, however, been questioned.¹⁴⁵

As shown by the investigations of the recent scientific students of the law of evidence, the so-called "parol evidence rule" is properly not a rule of evidence, but one of substantive law, the principle involved being that, after the whole of a transaction has been embodied in writing, the writing alone determines what the transaction is, and any other utterances of the parties are legally immaterial for this purpose.¹⁴⁶ On the other hand, if not the whole, but a part only, of the transaction has been embodied in writing, then the part or parts not so embodied may be proven orally. Such parts of the transaction, not embodied in the writing and as to which, therefore, the writing is not conclusive, are ordinarily referred to as "collateral" agreements.¹⁴⁷

45; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006; *Naumberg v. Young*, 44 N. J. Law, 331, 43 Am. Rep. 380; *Carey v. Kreizer*, 26 Misc. 755, 57 N. Y. Supp. 79; *Wilcox v. Cate*, 65 Vt. 478, 26 Atl. 1105; *Wilkinson v. Clauson*, 29 Minn. 91, 12 N. W. 147; *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

¹⁴⁰ *Preston v. Merceau*, 2 W. Bl. 1249; *Henson v. Cope*, 3 Scott N. R. 48; *Lord v. Haufe*, 77 Ill. App. 91; *Williams v. Kent*, 67 Md. 350, 10 Atl. 228; *Merchants' State Bank v. Ruettell*, 12 N. D. 519, 97 N. W. 853; *Liebeskind v. Moore Co.*, 84 N. Y. Supp. 850. See *Stevens v. Haskell*, 70 Me. 202.

¹⁴¹ *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545; *Collamer v. Farrington*, 61 Hun, 620, 15 N. Y. Supp. 452; *Stull v. Thompson*, 154 Pa. 43, 25 Atl. 890; *Henderson v. Arthur* [1907] 1 K. B. 10.

¹⁴² *Martin v. Berens*, 67 Pa. 459; *Pierce v. Tidwell*, 81 Ala. 299, 2 So. 15; *Stafford v. Staunton*, 88 Ga. 298, 14 S. E. 479.

¹⁴³ *Randolph v. Helps*, 9 Colo. 29, 10 Pac. 245; *Taylor v. Hunt*, 118 N. C. 168, 24 S. E. 359; *Charles v. Byrd*, 29 S. C. 544, 8 S. E. 1.

¹⁴⁴ *Hobbs v. Batory*, 86 Md. 68, 37 Atl. 713.

¹⁴⁵ See 4 Wigmore, Evidence, § 2438.

¹⁴⁶ *Thayer*, Evidence, c. 10; 4 Wigmore, Evidence, c. 85.

¹⁴⁷ See 1 Greenleaf, Evidence

Whether, in any case, any oral agreement can thus be regarded as "collateral," so as to be admissible in evidence, is a question of the intention of the parties. If they intended the writing to state the whole transaction, as finally agreed on and determined, then no oral agreement in reference to any details thereof can be introduced, while if they intended the writing to cover only a part of the details of the transaction, a separate oral agreement as to details not intended to be covered by the writing is admissible.¹⁴⁸ The intention in this respect is, it is said, "to be sought in the conduct and language of the parties and the surrounding circumstances," the most satisfactory criterion in this respect being whether the "particular element of the alleged extrinsic negotiation is dealt with at all in the writing."¹⁴⁹

The distinction, above referred to, between collateral agreements and agreements not collateral, has been occasionally applied in the case of leases, with the effect of admitting evidence of prior or contemporaneous oral agreements between the lessor and lessee as being collateral to the matters embodied in the written instrument of lease. Thus it has been decided that, in the particular case, an oral agreement by the lessor to make alterations or repairs was collateral, and so admissible in evidence,¹⁵⁰ and the same view has been asserted as to a warranty by him in regard to the condition of the premises,¹⁵¹ an agreement by him to keep down the game on the premises,¹⁵² an agreement that the lessee should make repairs and be credited therefor on the rent,¹⁵³ an agreement by the lessee to pay to the landlord part of the price received by him in case of a sale of his rights under the lease,¹⁵⁴ and an agreement by the lessor not to engage in a competing business.¹⁵⁵ It has even been decided that, although

(16th Ed.) § 284 a; 2 Taylor, Evidence (9th Ed.) § 1135. ¹⁴⁸ 4 Wigmore, Evidence, § 2430. ¹⁴⁹ 4 Wigmore, Evidence, § 2430. ¹⁵⁰ Vandegrift v. Abbott, 75 Ala. 487; Kenyon v. Berghel, 13 La. 133; Graffam v. Pierce, 143 Mass. 386, 9 N. E. 819; Taylor v. Finnigan, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973; Williams v. Salmond, 79 S. C. 459, 61 S. E. 79; Hines v. Willcox, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 54 Am. St. Rep. 823. ¹⁵¹ De Lassalle v. Guildford [1901] 2 K. B. 215; Hines v. Willcox, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 54 Am. St. Rep. 823. ¹⁵² Erskine v. Adeane, 8 Ch. App. 70. ¹⁵³ Johnson v. Blair, 126 Pa. 426, 17 Atl. 663. ¹⁵⁴ Raub v. Barbour, 17 D. C. (6 Mackey) 245. ¹⁵⁵ Welz v. Rhodius, 87 Ind. 1, 44 Am. Rep. 747.

the instrument of lease provided that the lessee should make all necessary improvements and repairs and should leave them at the end of the term, an oral agreement by the lessor on a separate consideration that the lessee should have the use of fixtures placed thereon by a former tenant was admissible, as well as the lessor's agreement to replace them, after their removal by the former tenant.¹⁵⁶

The fact that an agreement in reference to a particular matter has been regarded as collateral in one case is obviously no reason for regarding it as necessarily such in another case, the question being, as before indicated, one of the intention of the parties. If the particular detail of the transaction which is the subject of such agreement is specifically referred to in the written instrument, the agreement cannot ordinarily be regarded as collateral, while if that detail is not there referred to, the agreement may possibly, in view of this and other circumstances, be so regarded. But though the question whether the agreement is collateral is properly to be determined by the consideration of the circumstances of the particular case, the tendency of the decisions, in this country at least, is, as appears by the numerous cases first above cited, to regard an oral agreement by a lessor or lessee as not collateral, and consequently to exclude it from consideration, even though the specific subject of that agreement is not specifically referred to in the written instrument; and it may be questioned whether the decisions last referred to, that the agreement in the particular case was collateral, would have been the same had the cases arisen in other jurisdictions, where the tendency of the courts might be to apply the general rule of exclusion with the utmost strictness. The tendency of the majority of the courts seem to be to assume that the instrument of lease embodies the whole transaction, leaving nothing to be the subject of collateral agreement, unless the face of the instrument shows that it is not intended to be complete, and this assumption is perhaps in accordance with the ordinary practice, to insert in the instrument of lease all the details of the transaction as finally agreed upon, and not to leave some of such details *in pais*.

¹⁵⁶ Lewis v. Seabury, 74 N. Y. 409, 30 Am. Rep. 311.

It is generally recognized that, even though the parties to a transaction have incorporated their agreement in a writing, it may be shown that the writing is not to be effective until the happening of a certain contingency.¹⁵⁷ This principle has been occasionally applied in connection with an instrument of lease. Thus, it has been held allowable to show that no obligation was to arise under such a lease as against the lessee until repairs or improvements had been completed by the lessor,¹⁵⁸ or unless possession was given by a certain date,¹⁵⁹ or unless the lessor obtained a liquor license for the lessee,¹⁶⁰ or even unless the premises were suitable for the lessee's purposes.^{160a} So it may be shown that the lease was not to be effective to vest an estate in the lessee until he fulfilled a certain condition, such as furnishing security for the payment of the rent.¹⁶¹ That there is no conflict between the principle involved in these cases and the "parol evidence rule" is sufficiently obvious, but it may be a matter of difficulty, in the particular case, to apply the distinction,¹⁶² for instance, to determine whether, in the particular case, there is an operative instrument of lease, such as to exclude evidence of an agreement to make certain repairs, or merely a writing which is to become an operative instrument upon completion of repairs. The majority of the agreements which may be entered into by a lessor or lessee are such as, in their nature, it seems, could not be regarded as creating a condition precedent to the operative effect of the writing, they not calling for the performance of things of a preliminary nature.

In Pennsylvania the rule excluding evidence of an oral agreement to vary or contradict a writing has, in many cases, been rendered practically nugatory by the introduction of the doctrine that an attempt to make use of the writing in disregard of the

¹⁵⁷ See 4 Wigmore, Evidence, § 2410. ¹⁶⁰ Cavanagh v. Iowa Beer Co. (Iowa) 113 N. W. 856.

¹⁵⁸ Davis v. Jones, 17 C. B. 625; Hinsdale v. McCune, 135 Iowa, 682, 113 N. W. 478.

¹⁵⁹ Donaldson v. Uhlfelder, 21 App. D. C. 489; Cartledge v. Crespo, 5 Misc. 349, 25 N. Y. Supp. 515. See Greene v. Ker, 48 Misc. 609, 95 N. Y. Supp. 569. ^{160a} Hinsdale v. McCune, 135 Iowa, 682, 113 N. W. 478. ¹⁶¹ See Pattle v. Hornibrook [1897] 1 Ch. 25. It does not clearly appear whether the instrument was a lease or a contract for a lease.

¹⁶² See 4 Wigmore, Evidence, §§ 2410, 2435. ¹⁵⁹ Schweig v. Manhattan Leasing Co., 54 Misc. 233, 104 N. Y. Supp. 371.

oral agreement constitutes a fraud,¹⁶³ and this doctrine has occasionally been applied in connection with instruments of lease.¹⁶⁴

The "parol evidence rule" has no application to an agreement entered into by the parties after the execution of the written instrument, this necessarily involving a transaction distinct from that incorporated in the writing.¹⁶⁵ That such is the case has been recognized with reference to subsequent agreements between the parties to a lease, provided such agreement is supported by a valid consideration. So it may be shown that, subsequently to the execution of the lease, the lessor agreed to make repairs or alterations,¹⁶⁶ or that the rent should be reduced,¹⁶⁷ or that the parties entered into an agreement as to the removal of fixtures or other things on the premises.¹⁶⁸

Apart from the "parol evidence rule," the question might be raised in connection with an oral agreement calling for performance at any time during a term of more than a year, whether such agreement is not within the provision of the statute of frauds requiring a contract not to be performed within a year to be evidenced by writing. There appears to be but a single judicial reference to such a question, and it was then decided that such a covenant was within that provision.¹⁶⁹

¹⁶³ See article by Stanley Folz Whart. (Pa.) 303; Taylor v. Fin-
Esq., in 43 Am. Law Reg. (52 O. nigan, 189 Mass. 568, 76 N. E. 203,
S.) 601; 4 Wigmore, Evidence, § 2431 2 L. R. A. (N. S.) 973; Woodworth
(c). v. Thompson, 44 Neb. 311, 62 N. W.

¹⁶⁴ See Hultz v. Wright, 16 Serg. 450.
& R. (Pa.) 345, 16 Am. Rep. 575; ¹⁶⁷ Hastings v. Lovejoy, 140 Mass.
Caulk v. Everly, 6 Whart. (Pa.) 303; 261, 2 N. E. 776, 54 Am. Rep. 462;
Christ v. Diffenbach, 1 Serg. & R. Boos v. Dulin, 103 Iowa, 331, 72 N.
(Pa.) 464, 7 Am. Dec. 624; T. W. W. 533. See post, § 173 f (1).
Phillips Gas & Oil Co. v. Pittsburg ¹⁶⁸ Stephens v. Ely, 162 N. Y. 79,
Plate Glass Co., 213 Pa. 183, 62 Atl. 56 N. E. 499; Hindman v. Edgar, 24
830. Or. 581, 17 Pac. 862; Podlech v.

¹⁶⁵ See 4 Wigmore, Evidence, § Phelan, 13 Utah, 333, 44 Pac. 838.
2441; 1 Greenleaf, Evidence, § 303. ¹⁶⁹ See Cooney v. Murray, 45 Ill.

¹⁶⁶ Post v. Vetter, 2 E. D. Smith App. 463.
(N. Y.) 248; Caulk v. Everly, 6

CHAPTER VI.

EXECUTORY CONTRACT FOR LEASE.

- § 62. Contract for lease distinguished from lease.
- 63. Ascertainment of character of transaction.
- 64. Completeness of agreement.
- 65. Taking of possession by proposed lessee.
- 66. Written memorandum of agreement.
 - a. Necessity.
 - b. Contents.
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 - d. Part performance.
 - e. Recovery for repairs or improvements.
- 67. Remedies for breach.
 - a. Recovery of damages.
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- 68. "Usual" covenants.

§ 62. Contract for lease distinguished from lease.

A contract for the making of a lease in the future is to be carefully distinguished from a lease. The distinction is similar to that which exists between a contract to make a conveyance in fee and the conveyance itself.¹ The rights of both the owner of the land and of the proposed lessee under such a contract

¹It is somewhat surprising that the decisions of respectable courts quite frequently fail to discriminate between a lease and a contract for the making of a lease. The distinction involves, it is evident, the fundamental distinction between the creation of rights *in personam* and the creation of rights *in rem*. The failure to discriminate in this regard is presumably due, to a considerable extent, to the unfortunate use of the term "contract of lease" as descriptive of the whole transaction by which an estate is vested in the lessee and the parties at the same time enter into certain contractual stipulations in connection therewith, this resulting in a tendency to confuse such "contract of lease" and a contract "for a lease."

are entirely different from such as they may have after the lease itself has been made. For instance, a contract for a lease gives the proposed lessee no right of possession which he can assert against the lessor or against third persons,² while on the other hand he is not liable thereunder for rent or for use and occupation for the whole term, and is not liable to any extent unless he obtains possession.³ Nor is he liable to distress for rent.⁴ In the case of a mere contract, the parties have a right to insist upon the insertion, in the instrument of lease itself, of the "usual" covenants, while if the lease itself has been executed without some or all of these, the covenants omitted cannot be afterwards inserted, in the absence of fraud or mistake.⁵ Furthermore, the statutory requirements as to execution may be different in the case of a lease from those which control in the case of a contract for a lease, or a different character of revenue stamp may be required according as an instrument has one or the other character.⁶ If the instrument is a lease, the lessee obviously cannot bring an action for failure to execute a lease,⁷ while he may do so if it is a mere contract for a lease.⁸

² *Harrison v. Parmer*, 76 Ala. 157; *session at a less rent. Weed v. Gibson v. Needham*, 96 Ga. 172, 22 S. E. 702; *Martin v. Davis*, 96 Iowa, L. R. A. 33.

718, 65 N. W. 1001 (semble); *Hinckley v. Guyon*, 172 Mass. 412, 52 N. E. 523; *Shaw v. Farnsworth*, 108 Mass. 358; *St. Louis Brew. Ass'n v. Niederluecke*, 102 Mo. App. 303, 76 S. W. 645; *Jackson v. Delacroix*, 2 Wend. (N. Y.) 433; *Salomon v. Weisberg*, 29 Misc. 650, 61 N. Y. Supp. 60; *Becker v. DeForest*, 31 N. Y. Super. Ct. (1 Sweeny) 528; *Doe d. Wood v. Clarke*, 7 Q. B. 211; *Phillips v. Hartley*, 3 Car. & P. 121; *Doe d. Pearson v. Ries*, 8 Bing. 178. See *Crow v. Hildreth*, 39 Cal. 618. The proposed lessee may, however, obtain the right of immediate possession by express grant of such right. See post, § 65.

The proposed lessee, after having refused to accept a lease at the stipulated rent because of the failure of the owner to make improvements as agreed, cannot assert a right of pos-

³ *Pinero v. Judson*, 6 Bing. 205; *Johnson v. Phoenix Mut. Life Ins. Co.*, 46 Conn. 92; *Kabley v. Worcester Gaslight Co.*, 102 Mass. 392; *Arnold v. R. Rothschild's Sons Co.*, 37 App. Div. 564, 56 N. Y. Supp. 161; *Henderson v. Schuylkill Valley Clay Mfg. Co.*, 24 Pa. Super. Ct. 422.

⁴ *Hegan v. Johnson*, 2 Taunt. 148; *Hancock v. Caffyn*, 8 Bing. 358; *Dunk v. Hunter*, 5 Barn. & Ald. 322.

⁵ See Sugden, *Letters to a Man of Property*, 96.

⁶ *Bicknell v. Hood*, 5 Mees. & W. 104; *Gore v. Lloyd*, 12 Mees. & W. 463; *Clayton v. Burtenshaw*, 5 Barn. & C. 41; *Doe d. Phillip v. Benjamin*, 9 Adol. & E. 644.

⁷ *Crow v. Hildreth*, 39 Cal. 618; *Hurley v. Woodsides*, 21 Ky. Law Rep. 1073, 54 S. W. 8.

⁸ See post, § 67 a.

There is in force at the present day in England a statute⁹ providing that a lease required by law to be in writing shall be void at law unless made by deed, that is, unless under seal, and, as a consequence thereof, no question can there arise as to the nature of the instrument, unless this is under seal, or unless the subject thereof is not a term of such length of duration as is required by the statute of frauds to be in writing.¹⁰ An instrument, however, which is, under the statute, void as a lease because not under seal, will, though apparently intended as a lease, be allowed to take effect as a contract for a lease.¹¹ Furthermore, it has apparently been established in England that, since the fusion of law and equity, one who has what is in terms merely a contract for a lease, or has an unsealed lease, which, as just stated, may be construed as a contract for a lease, is, provided specific performance thereof would be decreed,¹² to be regarded as a lessee, at least for some purposes.¹³ In the leading case on this subject¹⁴ it is said: "A tenant holding under an agreement for a lease of which specific performance would be decreed stands in the same position as to liability as if the lease had been executed. He is not, since the Judicature Act, a tenant from year to year,¹⁵ he holds under the agreement, and every branch of the court must now give him the same rights. * * * There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and the equity rules prevail in it." It has been held, however, that this doctrine applies only as between the parties to the contract, and that the case "is to be treated as though before the Judicature Acts there had been, first, a suit in equity for specific performance, and then

⁹ 8 & 9 Vict. c. 106 (1845).

¹⁰ See ante, § 25 d.

¹¹ Bond v. Rosling, 1 Best. & S. 371; Rollason v. Leon, 7 Hurl. & N. 73; Tidey v. Mollett, 16 C. B. (N. S.) 298.

¹² See post, § 67 b.

¹³ See Walsh v. Lonsdale, 21 Ch.

Div. 9; Lowther v. Heaver, 41 Ch.

Div. 248; Swain v. Ayres, 21 Q. B.

Div. 289; Allhusen v. Brooking, 20 Ch. Div. 559.

¹⁴ Walsh v. Lonsdale, 21 Ch. Div. 9, per Jessel, M. R.

¹⁵ See post, § 65.

an action at law between the same parties; and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties, in the same court, and at the same time as the subsequent legal question falls to be determined."¹⁶ As thus explained the reason of the doctrine is clear. One having a right to compel specific performance by another of a contract by such other to make a lease to him was, before the merger of law and equity, regarded, as against such other, as actually having a lease, and, since such merger, he is to be so regarded in all the courts. In at least one case in this country this doctrine has been referred to with approval,¹⁷ and it might, it seems, be generally applicable in those states in which there is no longer any separate equity jurisdiction.¹⁸

The question whether any stipulations entered into at the time of and in connection with the making of an executory agreement for a lease are "merged" in the written instrument of lease, as finally prepared and executed, is, it is conceived, dependent upon whether the instrument of lease can be regarded as intended to cover that particular matter, that is, whether the particular stipulation can be regarded as "collateral" to the lease, within the exception to the so-called "parol evidence" rule.¹⁹

§ 63. Ascertainment of character of transaction.

Whether a particular transaction constitutes a lease or a mere contract for lease is a question in each case of the intention of the parties.²⁰ Ordinarily the question arises with reference to a

¹⁶ *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608, per Farwell, J. as a lease. And see *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496.

¹⁹ See ante, § 61.

¹⁷ *Weed v. Lindsay*, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33.

In *Stearns v. Lichtenstein*, 48 App. Div. 498, 62 N. Y. Supp. 949, it was held that, the owner having agreed to put out certain tenants of loft A in consideration of plaintiff's agreement to take loft B., he was liable for breach of his agreement, even after he had made a lease to plaintiff of loft B.

¹⁸ Such a theory is perhaps applied in *Bradley v. Metropolitan Music Co.*, 89 Minn. 516, 95 N. W. 458, and *Jourgensen v. Traitel*, 47 N. Y. St. Rep. 413, 20 N. Y. Supp. 33, the decisions in these cases being apparently to the effect that what was intended as a contract for a lease, under the circumstances, took effect

²⁰ *Doe d. Jackson v. Ashburner*, 5 Term R. 163; *Poole v. Bentley*, 12

written instrument, and calls for a construction of the instrument as a whole, but it may arise when the transaction is not embodied in a writing, and then it is a question on the evidence. Certain rules are deducible from the decisions which may aid in the solution of this question as it arises.

Language by which the owner of land "agrees to let" has been construed, under the circumstances, as constituting words of present demise creating a lease and not as involving a mere contract to make a lease.²¹ On the other hand, language which is ordinarily construed as effecting a present demise, as for instance "doth lease," has, in at least one case, been regarded as involving, in view of the context and surrounding circumstances, merely a contract for a future demise.²²

The fact that there is in the instrument a provision for the execution of a lease in the future, or a reference to such a lease, does not necessarily show that a mere agreement for a future lease is intended, since such language may be inserted merely to secure the execution of a more formal instrument.²³ Ordinarily, however, it seems, the presence of such a provision tends to show

East, 168; Doe d. Pearson v. Ries, 8 Bing. 178; Johnson v. Phoenix Mut. Life Ins. Co., 46 Conn. 92; Bacon v. Bowdoin, 39 Mass. (22 Pick.) 401; Potter v. Mercer, 53 Cal. 667; Holley v. Young, 66 Me. 520; Western Boot & Shoe Co. v. Gannon, 50 Mo. App. 642; Hallett v. Wylie, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; Jackson v. Delacroix, 2 Wend. (N. Y.) 433; Griffin v. Kinsely, 75 Ill. 411; Weed v. Lindsay, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33; Ver Steeg v. Becker-Moore Paint Co., 106 Mo. App. 257, 80 S. W. 346.

²¹ Staniforth v. Fox, 7 Bing. 590; Poole v. Bentley, 12 East, 168; Doe d. Phillips v. Benjamin, 9 Adol. & E. 644; Doe d. Pearson v. Ries, 8 Bing. 178; Kabley v. Worcester Gaslight Co., 102 Mass. 392; Averill v. Taylor, 8 N. Y. (4 Seld.) 44; Steel v. Frick,

56 Pa. 172; Western Boot & Shoe Co. v. Gannon, 50 Mo. App. 642; Holley v. Young, 66 Me. 520.

²² Jackson v. Delacroix, 2 Wend. (N. Y.) 433. See Bac. Abr., Leases (K).

²³ Maldon's Case, Cro. Eliz. 33; Baxter v. Browne, 2 W. Bl. 973; Poole v. Bentley, 12 East, 168; Pinero v. Judson, 6 Bing. 206; Doe d. Walker v. Groves, 15 East, 244; Chapman v. Bluck, 4 Bing. N. C. 187; Jones v. Reynolds, 1 Q. B. 506; Bradley v. Metropolitan Music Co., 89 Minn. 516, 95 N. W. 458; Jackson v. Kisselbrack, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; Coffee v. Smith, 109 La. 440, 33 So. 554 (semble); In re Woodville, 115 La. 810, 40 So. 174 (semble); Grigsby v. Western Union Tel. Co., 5 S. D. 561, 59 N. W. 734; Feust v. Craig, 107 N. Y. Supp. 637.

that the intention is merely to make a contract for a future lease.²⁴

An express stipulation that the instrument shall not operate as a lease will override words *prima facie* indicative of a present demise,²⁵ as will a clause in effect requiring something further to be done or some contingency to be satisfied before there shall be an operative demise.²⁶ But the instrument may be a lease though it does not give a right of immediate possession, since, as is well recognized, a lease for years may create an estate to commence *in futuro*.²⁷

If the writing is in other respects ambiguous as to whether it is intended to operate as a lease or as an agreement for a lease, it will, it seems, usually receive the latter construction when it shows on its face that, at the time of its execution, the alleged lessor had no title sufficient to support the lease,²⁸ or when the person in whose name the lease should be made is uncertain,²⁹ or when the terms of the tenancy are left unsettled in some material point,³⁰ as, for instance, the time of commencement³¹ or

²⁴ See *Goodtitle v. Way*, 1 Term R. 735; *Doe d. Bromfield v. Smith*, 6 East, 530; *Tempest v. Rawling*, 13 East, 18; *Bicknell v. Hood*, 5 Mees. & W. 104; *Rollason v. Leon*, 7 Hurl. & N. 73; *Griffin v. Knisely*, 75 Ill. 411; *Harrison v. Parmer*, 76 Ala. 157; *St. Louis Brew. Ass'n v. Niederluecke*, 102 Mo. App. 303, 76 S. W. 645.

²⁵ *Perring v. Brook*, 7 Car. & P. 360; *Brook v. Biggs*, 2 Bing. N. C. 572.

²⁶ *Doe d. Jackson v. Ashburner*, 5 Term R. 163; *Johns v. Jenkins*, 1 Cromp. & M. 227; *Jones v. Reynolds*, 1 Q. B. 506; *Doe d. Wood v. Clarke*, 7 Q. B. 211; *Gove v. Lloyd*, 12 Mees. & W. 463; *Buell v. Cook*, 4 Conn. 238; *Weed v. Lindsay*, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33; *Donovan v. P. Schoenhofen Brew. Co.*, 92 Mo. App. 341; *Jackson v. Delacroix*, 2 Wend. (N. Y.) 433; *Proctor v. Benson*, 149 Pa. 254, 24 Atl. 279.

²⁷ See *Bacon v. Bowdoin*, 39 Mass. (22 Pick.) 401; *Weed v. Crocker*, 79 Mass. (13 Gray) 219; *Shaw v. Farnsworth*, 108 Mass. 358; *Western Boot & Shoe Co. v. Gannon*, 50 Mo. App. 642; *Holley v. Young*, 66 Me. 520; *Whitney v. Allaire*, 1 N. Y. (1 Comst.) 305, 311; *Colclough v. Carpeles*, 89 Wis. 239, 61 N. W. 836.

²⁸ *Hayward v. Haswell*, 6 Adol. & E. 265; *Clarke v. Moore*, 1 Jones & L. 723.

²⁹ *Doe d. Bailey v. Foster*, 3 C. B. 215.

³⁰ *Chapman v. Towner*, 6 Mees. & W. 100; *Arnold v. R. Rothschild's Sons Co.*, 37 App. Div. 564, 56 N. Y. Supp. 161.

³¹ *Dunk v. Hunter*, 5 Barn. & Ald. 322; *Doe d. Wood v. Clarke*, 7 Q. B. 211; *Weed v. Lindsay*, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33. But in *Staniforth v. Fox*, 7 Bing. 590, it was held that a clause "doth this day agree to let," without any other

duration³² of the tenancy, or the amount of the rent.³³

The fact that, by the terms of the instrument in question, permission is given to the proposed lessee to take immediate possession, has not been regarded as showing that the transaction is a lease rather than a contract for a lease.³⁴ It is conceived, however, that such a provision for immediate possession is in itself a lease, though it does not give the character of a lease to the contract for the making of a lease in the future. In other words, in such case, the writing embodies two separate legal acts, an agreement to make a lease in the future, and also a lease, at will or otherwise, taking immediate effect, and intended to operate, ordinarily, until the making of the principal lease.³⁵

The fact that, though there is no express stipulation in the writing as to the taking of immediate possession, the proposed lessee is admitted into possession immediately upon the execution of the instrument; has been regarded in several cases as tending to show that a lease is intended,^{35a} though the English cases do not generally, it seems, give it such effect.³⁶ In such

designation of the commencement of the term, tended to show a lease to begin on that date.

³² Clayton v. Burtenshaw, 5 Barn. & C. 41; Pentland v. Stokes, 2 Ball & B. 68; Hinckley v. Guyon, 172 Mass. 412, 52 N. E. 523.

³³ John v. Jenkins, 1 Comp. & M. 227; Gibson v. Needham, 96 Ga. 172, 22 S. E. 702.

³⁴ Goodtitle v. Way, 1 Term R. 735; Stone v. Rogers, 2 Mees. & W. 443; Brashier v. Jackson, 6 Mees. & W. 549. But see Hancock v. Caffyn, 8 Bing. 358.

³⁵ See post, § 65.

In Billings v. Canney, 57 Mich. 425, 24 N. W. 159, where the owner of land agreed with one about to erect a building thereon for him to pay for the cost of the building by giving a lease to the latter, it was held that this constituted a lease because the builder immediately took "possession" for the purpose of con-

structing the building. But one who enters on another's land merely to erect a building for the owner is not ordinarily in legal possession. He is rather a licensee.

^{35a} Jenkins v. Eldredge, 3 Story, 325, Fed. Cas. No. 7,268; People v. St. Nicholas Bank, 3 App. Div. 544, 38 N. Y. Supp. 379; Jackson v. Kisselbrack, 10 Johns. (N. Y.) 336, 6 Am. Dec. 34; Hallett v. Wylie, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; Eagle Tube Co. v. Holsten, 110 N. Y. Supp. 242; Potter v. Mercer, 53 Cal. 667. See McGrath v. City of Boston, 103 Mass. 369.

³⁶ In 1 Platt, Leases, 610, it is said that "from a review of the decisions it is apparent that the fact of immediate possession has not affected the construction." Mr. Platt mentions, however, Doe d. Pearson v. Ries, 8 Bing. 178, in which the opposite view is asserted, and also a dictum of Ashhurst, J., in Doe d.

a case, it appears, as in the case when permission to take immediate possession is inserted in the instrument in which the agreement to lease is embodied, there is a lease as well as an agreement for a lease.³⁷

The fact that the instrument, if construed as a lease, would be void, as undertaking to create a freehold to commence *in futuro*,³⁸ or as being a defective execution of a power,³⁹ has been regarded as ground for construing it as an executory agreement merely. There are likewise several English cases to the effect that if, by operating as a lease, it would create a forfeiture, as being a lease by a copyhold tenant for a greater period than that allowed by the custom of the manor, the instrument would be construed as an agreement.⁴⁰ And, by analogy to this view, it seems that the courts might tend to refrain from construing an instrument at a sublease if this would subject the sublessor to a forfeiture for breach of a condition against subleasing.

✠

§ 64. Completeness of agreement.

There is no binding contract when some of the terms yet remain to be settled⁴¹ or when the agreement, as made, is not

Jackson v. Ashburner, 5 Term R. 168, *contra*.

In Harrison v. Parmer, 76 Ala. 157, it is said that the taking of possession is not conclusive. This is undoubtedly so. To this effect, see, also, Tillman v. Fuller, 13 Mich. 113.

³⁷ See ante, at note 35.

³⁸ Jones v. Duggan, 1 Jebb & B. 3, 4 Ir. Law Rep. 86.

³⁹ Clarke v. Moore, 1 Jones & L. 723.

⁴⁰ Lenthall v. Thomas, 2 Keb. 267; Penny v. Child, 2 Maule & S. 255.

⁴¹ Wood v. Midgley, 5 De Gex, M. & G. 41; Charlton v. Columbia Real Estate Co., 64 N. J. Eq. 631, 54 Atl. 444; *Id.*, 67 N. J. Eq. 629, 60 Atl. 192, 69 L. R. A. 394, 110 Am. St. Rep. 495; Sourwine v. Truscott, 17 Hun. (N. Y.) 432; Brown v. New York Cent. R.

Co., 44 N. Y. 79; Disbrow v. Wilkins, 11 App. Div. 628, 44 N. Y. Supp. 1115; Jenkelson v. Ruff, 31 Misc. 276, 64 N. Y. Supp. 40; Franke v. Hewitt, 56 App. Div. 497, 68 N. Y. Supp. 968; Schaltz v. Northwestern Mut. Life Ins. Co., 40 C. C. A. 556, 100 Fed. 573. But in Weaver v. Wood, 9 Pa. 220, it was decided that an agreement to lease "at a fair rent" was sufficiently certain.

The mere fact that no time for payment of rent is named is immaterial, since, in the absence of any provision on the subject, rent is payable at the end of the year. McFarlane v. Williams, 107 Ill. 33. And if the agreement states how the amount of rent is to be ascertained, it need not name the rent. *Id.*

In Gardner v. Hazelton, 121 Mass. 494, it was held that an agreement

intended to be binding but it is expressly made "subject to the approval of a formal contract" or the like,⁴² or there appears a design of further negotiation.⁴³ But the fact that it is stipulated that a formal contract shall be prepared does not necessarily show that the preliminary one is not in the meanwhile to be binding,⁴⁴ even though such formal contract is to be satisfactory to the attorneys of the parties.⁴⁵

§ 65. Taking of possession by proposed lessee.

The fact that the owner of land has contracted to make a lease to another does not of itself give the latter any right to the possession of the land.⁴⁶ Not infrequently, however, the owner, at the time of making the contract or subsequently thereto, gives permission to the other party to occupy pending the making of the actual lease. The right of possession thus given, contempor-

to lease which failed to specify the term of the lease could not be shown to be an agreement to assign a term which was vested in the person so agreeing.

⁴² *Winn v. Bull*, 7 Ch. Div. 29; *Harvey v. Barnard's Inn*, 50 Law J. Ch. 750; *Martin v. Davis*, 96 Iowa, 718, 65 N. W. 1001; *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457. This is merely an ordinary rule, applicable to all classes of contracts (*Pollock, Contracts* (6th Ed.) 41; *Hammon, Contracts*, § 85), and does not mean that an executory contract for a lease is not binding if it looks toward the making of a formal written lease. Practically every agreement for a lease does that. It means merely that the fact that the parties have provisionally come to an agreement upon terms, does not render such terms binding upon them if it is intended that they shall not be so binding until incorporated in a formal instrument. Certain expressions in *Law v. Pemberton*, 10 Misc. 362, 31 N. Y. Supp. 435, seem to be somewhat misleading in this regard.

⁴³ *Charlton v. Columbia Real Estate Co.*, 64 N. J. Eq. 631, 54 Atl. 444; *Arnold v. Rothschild's Sons Co.*, 37 App. Div. 564, 56 N. Y. Supp. 161; *Foster v. Clifford*, 42 Misc. 496, 86 N. Y. Supp. 28; *Stratford v. Bosworth*, 2 Ves. & B. 341; *Donnison v. People's Cafe Co.*, 45 Law T. (N. S.) 187.

⁴⁴ *Bonnewell v. Jenkins*, 8 Ch. Div. 70; *Eadie v. Addison*, 52 Law J. Ch. 80; *Chipperfield v. Carter*, 72 Law T. (N. S.) 487; *Gramm v. Sterling*, 8 Wyo. 527, 59 Pac. 156.

⁴⁵ *Eadie v. Addison*, 31 Wkly. Rep. 320; *Chipperfield v. Carter*, 72 Law T. (N. S.) 487. That the contract requires the instrument of lease to be satisfactory to the parties or their attorneys does not authorize a disapproval thereof not based on reasonable ground. *Pittsburgh Amusement Co. v. Ferguson*, 100 App. Div. 453, 91 N. Y. Supp. 666.

⁴⁶ See ante, note 2.

aneously with or subsequently to the making of a contract for a lease, is, ordinarily perhaps, spoken of as possession "under" such contract or agreement, which seems hardly accurate, as the right to possession does not result from the agreement to make the lease, but rather from the lease involved in the giving of permission to take possession. That this is so seems apparent when we consider the case of a permission to take possession, given after the making of the contract. The intended lessee can certainly not then be said to take possession under the contract, and, on, principle, the fact that such permission is embodied in the same writing as the contract to make a lease seems entirely immaterial.'

The proposed lessee, thus entering by permission, is evidently in a position in many respects similar to that of a vendee so entering.⁴⁷ That he is a tenant seems apparent from the fact that he is in possession by permission of another,⁴⁸ and he is ordinarily regarded as being in the first place a tenant at will,⁴⁹ as is any other person obtaining possession by bare permission,⁵⁰ becoming a tenant from year to year or other periodic tenant upon the payment of a yearly or other periodic rent.⁵¹ If it

⁴⁷ See ante, § 43 a.

⁴⁸ See ante, § 3 a.

One who thus entered by permission of the person who had agreed to make a lease to him, which the latter afterwards refused to make, was held to be a tenant of the latter, so that he could not be ousted by forcible entry and detainer proceedings without the ninety days' notice required by statute in the case of agricultural tenancies. *Neppach v. Jordan*, 15 Or. 308, 19 Pac. 353.

⁴⁹ *Chapman v. Towner*, 6 Mees. & W. 100; *Braythwayte v. Hitchcock*, 10 Mees. & W. 494; *Tuttle v. Langley*, 68 N. H. 464, 39 Atl. 488 (semble); *Weed v. Lindsay*, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33. See *Lyon v. Cunningham*, 136 Mass. 532. In *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496, it seems to be considered that one so taking possession pend-

ing the execution of a lease to him for a year is a tenant for a year.

⁵⁰ See ante, § 13 a (3).

⁵¹ *Hamerton v. Stead*, 3 Barn. & C. 483; *Braythwayte v. Hitchcock*, 10 Mees. & W. 497; *Chapman v. Towner*, 6 Mees. & W. 100; *Cox v. Bent*, 5 Bing. 185; *Doe d. Wood v. Clarke*, 7 Q. B. 211. In *Cheney v. Newberry*, 67 Cal. 125, 7 Pac. 444, it is said that if one enters "under a contract for a lease" for a stated term and at a specified rent, and the rent is paid, there is a valid lease for the term and at the rate named.

It does not clearly appear whether the court regarded the written instrument as a lease or as a contract for a lease. If merely the latter, entry and payment of rent could not convert it into a lease, though these facts, or rather the owner's grant of permission to enter,

should happen, however, that in the particular case he is given possession to endure until the making of a lease, and a particular time is named for this, he would be, it seems, a tenant for years, as having possession for a determinate time.⁵² It has been said that he is a tenant at will after he refuses to accept a lease as agreed,⁵³ but it does not seem that such refusal would have the effect of creating a tenancy at will, if such tenancy was not before existent. He is, it seems, in each case, before any default on his part, either a tenant at will, a periodic tenant, or a tenant for years, and such default could, it seems, have an effect in changing the character of his tenancy only if, in the particular case, his right of possession was then to come to an end, in which case he would become a tenant at sufferance.⁵⁴

and his acceptance of rent, would be evidence of the creation of a periodic tenancy.

In *Huntingdon v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146, it is said of one having a verbal agreement for a lease that "if he enters awaiting the execution of the agreement, his entry is one under a license, but if, after being in possession of the premises, he pays rent for the use of them in accordance with the agreement which was to be reduced to writing, his relation is that of a tenant at will." It may, however, be questioned whether, assuming that an intending lessee so entering is a licensee, the fact that he pays a periodic sum is sufficient to change him into a tenant. He might pay it merely for the enjoyment of the license. It has been suggested in no other jurisdiction that one entering under such circumstances, not paying any rent, is primarily a licensee rather than a tenant, but such view is supported by the decisions to the effect that a vendee so entering is a licensee. Ante, § 43 a, note 11.

In *Childers v. Lee*, 5 N. M. 576, 25 Pac. 781, 12 L. R. A. 67, it was held that where one whose lease ended June 1 agreed to make a lease to another for a year from April 1, provided he could obtain a renewal of his own lease, and the intending lessee took possession and paid rent, he did not become a tenant from year to year, but was at most a tenant at will, on the theory apparently that a tenancy from year to year could not have been intended when the landlord's interest might endure but a few months. This seems to be an application of the principle that payment and acceptance of a periodic rent do not create a periodic tenancy if this was evidently not intended. See ante, § 14 b (2) (a).

⁵² See ante, 43 a, at note 24.

⁵³ *Dunne v. Trustees of Schools*, 39 Ill. 578. See *Weed v. Lindsay*, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33. In *Anderson v. Prindle*, 23 Wend. (N. Y.) 616, it is said that by refusing to accept the lease he becomes "a tenant at will or at sufferance."

⁵⁴ In *Welch v. Winterburn*, 25 Hun

In jurisdictions in which a vendee who enters before conveyance is not regarded as a tenant, or is regarded as a tenant *sub modo* only,⁵⁵ an intending lessee so entering would, presumably, be in a similar position.⁵⁶

It has been decided in England that the tenancy from year to year or other periodic tenancy which may result from the permissive entry of the person to whom the owner has agreed to make a lease, and his payment of a yearly or other periodic rent, is subject to the terms of the intended lease, so far as they are applicable to and not inconsistent with a tenancy of that character, on a presumption, it seems, of an agreement to that effect.⁵⁷ So it has been decided that a tenancy from year to year thus arising was subject to a stipulation, in an agreement for a three years' lease, to keep the premises in repair during the tenancy,⁵⁷ to a stipulation, in an agreement for a seven years' lease, to paint at the end of the seventh year,⁵⁸ to a stipulation "to keep open the shop and to use the best endeavors to promote the trade of it during the tenancy,"⁵⁹ and to one binding the landlord to pay the tenant for tillages on the expiration of his tenancy.⁶⁰ A proviso for re-entry on nonpayment of rent or nonperformance of other covenants has also been held applicable to such a tenancy,⁶¹ and, at the expiration of the term named for the proposed lease, the tenancy will cease without any notice to quit.⁶² On the other hand it has been held that a provision for a two

(N. Y.) 437, it is said that he would in such case be a trespasser, but this statement is made merely as a basis for his liability for mesne profits after re-entry by the owner. One who enters by permission is not properly a trespasser, although, by a fiction of law, he may be liable in trespass for mesne profits if he remains longer than he is authorized to remain. Ante, § 15 a, at note 561.

⁵⁵ See ante, § 43 a.

⁵⁶ In *Lyon v. Cunningham*, 136 Mass. 532, it was decided that one who was given possession in anticipation of a written lease to him could, upon a refusal to make a lease, relinquish possession and so termin-

ate his liability for use and occupation without giving the notice required by statute in the case of tenancies at will.

⁵⁷ *Richardson v. Gifford*, 1 Adol. & E. 52. See *Pistor v. Carter*, 9 Mees. & W. 315.

⁵⁸ *Martin v. Smith*, L. R. 9 Exch. 50.

⁵⁹ *Sanders v. Karnell*, 1 Fost. & F. 356.

⁶⁰ *Brocklington v. Saunders*, 13 Wkly. Rep. 46.

⁶¹ *Thomas v. Packer*, 1 Hurl. & N. 669; *Doe d. Thomson v. Amery*, 12 Adol. & E. 479.

⁶² *Doe d. Tilt v. Stratton*, 4 Bing. 446; *Doe d. Davenish v. Moffatt*, 15

years' notice to quit is not applicable to a tenancy from year to year so arising.⁶³ A covenant to build, or to do such material repairs as are not usually done by tenants from year to year, is apparently not applicable.⁶⁴

A proposed lessee, thus allowed to take possession in anticipation of the execution of a written lease to him, is ordinarily liable for use and occupation.⁶⁵

§ 66. Written memorandum of agreement.

a. **Necessity.** An agreement for the future making of a lease of land is within the fourth section of the English statute of frauds, providing that "no action shall be brought whereby to charge any person" upon "any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person by him lawfully authorized."⁶⁶ In most states in this country there is a statutory provision of a similar character, and a contract for a lease would ordinarily be regarded as in effect a contract for the sale of an interest in land, and so within such a provision.⁶⁷ The fourth section of the English statute does not contain any exception of short time leases, and, consequently, under that statute, while a lease for three years or less, on which a rent equal to two-thirds the value

Q. B. 257; *Tress v. Savage*, 4 El. & Metc.) 319; *Crain v. Thompson*, 87 Bl. 36. Minn. 172, 91 N. W. 483; *Smith v.*

⁶³ *Tooker v. Smith*, 1 Hurl. & N. Phillips, 69 N. H. 470, 43 Atl. 183; 732. Charlton v. Columbia Real Estate

⁶⁴ *Bowes v. Carroll*, 6 El. & Bl. 255. Co., 67 N. J. Eq. 629, 60 Atl. 192, 69 L. R. A. 394; *Hawley v. Moody*, 24

per Erle, J. Vt. 603; *Richards v. Redelsheimer*,

⁶⁵ See post, § 304 a. 36 Wash. 325, 78 Pac. 934.

⁶⁶ *Sanderson v. Graves*, L. R. 10 In *Wiessner v. Ayer*, 176 Mass. Exch. 234; *Lever v. Koffler* [1901] 1 Ch. 543; *Moore v. Kay*, 5 Ont. App. 425, 57 N. E. 672, it was held that if a written offer to take a lease was amended by telephone, before it was accepted, as to the time for payment of rent, there was no enforceable contract. The offer as written was never accepted, and the amended offer was not evidenced by writing.

⁶⁷ *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586; *Diamond v. Macfarlane*, 11 Hawaii, 181; *Townsend v. Townsend*, 47 Mass. (6

of the land is reserved, is valid, though not in writing,⁶⁸ a contract for the making of such a short time lease is, it seems, unenforceable if not evidenced by writing.⁶⁹

The statutory provision, found in a number of states in this country, that a "contract for leasing" shall be in writing, would seem, as before remarked,⁷⁰ to be particularly applicable to a contract to make a lease.^{71,72}

Occasionally it has been assumed that a contract to make a lease for a term of more than one year is within the provision of the statute of frauds requiring any contract not to be performed within a year to be evidenced by writing.⁷³ But since the performance of such an agreement consists in the making of the lease, the fact that the lease when made will extend until the expiration of a period greater than a year from the date of the agreement should not, it seems clear, bring the agreement within such provision.⁷⁴

b. **Contents.** The memorandum must, to comply with the requirements of the statute, state all the material terms of the contract. For instance, the identity of the lessor or his agent,⁷⁵ and of the lessee or his agent,⁷⁶ must appear, though they need not be actually named, it seems, a reference to the lessor, for instance, as the "proprietor" or person in possession being sufficient.⁷⁷

⁶⁸ See ante, § 25 d.

⁶⁹ Sugden, *Vendors & Purchasers* (14th Ed.) 123; Smith, *Landl. & Ten.* (3d Ed.) 100.

⁷⁰ See ante, § 25 b.

^{71, 72} In *Tillman v. Fuller*, 13 Mich. 113, it is clearly stated by Christianity, J., that such a clause refers to an executory agreement for a lease. And see *Hand v. Osgood*, 107 Mich. 55, 64 N. W. 867, 61 Am. St. Rep. 312, to the same effect.

⁷³ *Donovan v. Schoenhofen Brew. Co.*, 92 Mo. App. 341; *Crain v. Thompson*, 87 Minn. 172, 91 N. W. 483.

⁷⁴ *Shakespeare v. Alba*, 76 Ala. 351; *Tillman v. Fuller*, 13 Mich. 113; *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586.

In *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, 59 N. E. 995, it was held that this clause of the statute did not apply to such a contract because it is one "conveying an interest in land." It might rather be said, it is submitted, that such a contract is one "for the conveyance of" an interest in land. The contract itself does not convey any interest, in the view at least of a court of law.

⁷⁵ *Warner v. Willington*, 3 Drew. 523; *Williams v. Jordan*, 6 Ch. Div. 517.

⁷⁶ *Stokell v. Niven*, 61 Law T. (N. S.) 18; *Carroll v. Williams*, 1 Ont. 150.

⁷⁷ *Carr v. Lynch* [1900] 1 Ch. 613; *Rossiter v. Miller*, 3 App. Cas. 1124;

The time for the commencement of the term must appear,⁷⁸ and, in the absence of such statement, the term will not be deemed to commence at the date of the agreement.⁷⁹ But the date of commencement may be ascertained by a construction of the agreement as a whole when there is no specific designation thereof.⁸⁰ The written memorandum must also state the period of the duration of the term.⁸¹ And it must, it would seem, also state the amount of rent to be paid or fix some mode for its ascertainment, as by providing for its settlement by arbitration.⁸² Any special covenants which are to be inserted in the lease must be clearly and accurately stated,⁸³ though what are regarded as "usual covenants" need not be mentioned, they being a part of the agreement as of course.⁸⁴ It must also describe or name the premises to be leased,⁸⁵ though it is sufficient if the property referred to can be identified by the aid of parol evidence.⁸⁶

It is no objection to the memorandum that some of its terms are, as stated therein, to be ascertained by reference to something to be done in the future, as, for instance, by reference to the terms of another lease subsequently to be made, provided they

Catling v. King, 5 Ch. Div. 660; *Cummins v. Scott*, L. R. 20 Eq. 11; 29 Am. & Eng. Enc. Law (2d Ed.) 865.

⁷⁸ *Blore v. Sutton*, 3 Mer. 237; *Bayley v. Fitzmaurice*, 8 El. & Bl. 664; *Clarke v. Fuller*, 16 C. B. (N. S.) 24; *Humphery v. Conybeare*, 80 Law T. (N. S.) 40; *Carroll v. Williams*, 1 Ont. 150.

⁷⁹ *Marshall v. Berridge*, 19 Ch. Div. 233.

⁸⁰ *Marshall v. Berridge*, 19 Ch. Div. 233; *In re Lander & Bagley's Contract* [1892] 3 Ch. 41; *Erskine v. Armstrong*, 20 L. R. Ir. 296.

⁸¹ *Clinan v. Cooke*, 1 Schoales & L. 22; *Clarke v. Fuller*, 16 C. B. (N. S.) 24; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78.

⁸² *Gregory v. Mighell*, 18 Ves. Jr. 328.

⁸³ *Doe d. Bute v. Guest*, 15 Mees. & W. 160; *Propert v. Parker*, 3 Mylne & K. 280; *Wiessner v. Ayer*, 176 Mass. 425, 57 N. E. 672.

⁸⁴ *Church v. Brown*, 15 Ves. Jr. 258; *Scholtz v. Northwestern Mut. Life Ins. Co.*, 40 C. C. A. 556, 100 Fed. 573; *Woodfall, Landl. & Ten.* (16th Ed.) 97. As to usual covenant, see *infra*, § 68.

⁸⁵ *Daniels v. Davison*, 16 Ves. Jr. 249; *Lancaster v. De Trafford*, 31 Law J. Ch. 554; *Price v. Griffith*, 1 De Gex, M. & G. 80.

⁸⁶ *Owen v. Thomas*, 3 Mylne & K. 353; *McMurray v. Spicer*, L. R. 5 Eq. 527; *Magee v. Lavell*, L. R. 9 C. P. 107. See 4 Wigmore, Evidence, § 2465.

are so ascertained before the bringing of an action upon the agreement.⁸⁷

c. **Execution.** In regard to the execution of the memorandum the same requirements exist as in the case of any other agreement within the fourth section of the statute of frauds. It must be signed "by the party to be charged or some other person by him lawfully authorized," but there is a signature within the requirement, if his name is placed by him or by his direction in any part of the instrument,⁸⁸ provided it is so placed with the intention of thereby executing the same as a binding obligation,⁸⁹ and, provided further, it is intended to authenticate the whole and not merely a part.⁹⁰ If the local statute requires the agreement to be "subscribed," a signature elsewhere than at the foot of the writing is insufficient.⁹¹

d. **Part performance.** Although a contract for a lease is not evidenced by writing, as required by the fourth section of the statute of frauds, courts of equity will frequently decree specific performance,⁹² in case the contract has been partially performed by the person seeking specific performance.⁹³ The doctrine of part performance is ordinarily based on the theory that if one party to a contract allows the other to act upon it, he should not be allowed to assert the lack of the evidence of the

⁸⁷ *Freeland v. Ritz*, 154 Mass. 257, 28 N. E. 226, 12 L. R. A. 561, 26 Am. St. Rep. 244. The defendant's grantor had agreed to make the lease to the complainant, and defendant, by his contract

⁸⁸ *Proper v. Parker*, 1 Russ & M. 625; *Bleakley v. Smith*, 11 Sim. 150; *Tourret v. Cripps*, 48 Law J. Ch. 567. of purchase of the land, assumed the agreement for the lease and gave bond to perform his contract of purchase, and thereafter the vendor

⁸⁹ See cases cited 29 Am. & Eng. Enc. Law (2d Ed.) 856 note 7; *Browne*, Stat. of Frauds, § 357. gave the proposed lessee a memorandum of the agreement for a lease, on which he might have been held

⁹⁰ *Caton v. Caton*, L. R. 2 H. L. 127; *Stokes v. Moore*, 1 Cox, 219. liable, and it was decided that the defendant was estopped from setting

⁹¹ 29 Am. & Eng. Enc. Law (2d Ed.) 857; 20 *Cyclopedia Law & Proc.* 274. up the statute of frauds in a suit for specific performance, as this would involve a fraud on the pro-

⁹² See post, § 67 b. posed lessee and on the vendor, and

⁹³ In *Hodges v. Howard*, 5 R. I. 149, the court decreed specific performance of an oral agreement to make a lease on a principle somewhat analogous to part performance. to prevent this fraud, and to avoid the circuitry of action involved in bringing suit on the bond, specific performance would be decreed.

contract required by the statute, such conduct on his part in effect constituting a fraud upon the other.⁹⁴ In accordance with this theory it seems that acts by one party which are done without the knowledge of the other cannot properly be regarded as sufficient part performance to render the contract enforceable as against the latter.⁹⁵ And even though there is in the particular case sufficient part performance to authorize the interposition of equity, the terms of the contract must be clearly and fully proven before the court can act.⁹⁶

As to the character of the acts of part performance necessary thus to relieve a party in equity from the operation of the statute, the best considered authorities are to the effect that they must be such as to show that some contract exists between the parties, and that they are consistent with that alleged.⁹⁷ There are a number of cases to the effect that the delivery of possession to the intending lessee is sufficient to take the case out of the statute and to render parol evidence of the contract admissible,⁹⁸ and this coincides with the rule which is perhaps ordinarily adopted in the case of contracts of sale,⁹⁹ the theory being that "the acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement."¹⁰⁰

The act of the proposed lessee in expending money on the premises in improvements on the faith of the agreement and with the knowledge and consent of the other party¹⁰¹ are sufficient

⁹⁴ Fry, Spec. Perf. § 585; Pomeroy, burgh, 35 N. J. Eq. (8 Stew.) 266. Eq. Jur. § 1409.

⁹⁵ Fry, Spec. Perf. § 589; Pomeroy, Spec. Perf. § 106; *Blore v. Sutton*, 3 Mer. 237; *Shannon v. Bradstreet*, 1 Schoales & L. F. 52.

⁹⁶ Fry, Spec. Perf. § 631 et seq.; 26 Am. & Eng. Enc. Law (2 Ed.) 59.

⁹⁷ Fry, Spec. Perf. § 582; Pomeroy, Spec. Perf. § 107.

⁹⁸ *Morphett v. Jones*, 1 Swanst. 172; *Pain v. Coombs*, 1 De Gex & J. 34; *Bowers v. Cator*, 4 Ves. Jr. 91; *Maddison v. Alderson*, 8 App. Cas. 467; *Clark v. Clark*, 49 Cal. 586; *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586; *Wharton v. Stouten-*

burgh, 35 N. J. Eq. (8 Stew.) 266. But that the proposed lessee voluntarily goes into possession without any request or permission by the proposed lessor does not make the contract valid as against the latter. *Pulse v. Hamer*, 8 Or. 251.

⁹⁹ Fry, Spec. Perf. § 601 et seq.; Pomeroy, Spec. Perf. § 115 et seq.; 26 Am. & Eng. Enc. Law (2d Ed.) 56.

¹⁰⁰ *Plumer, M. R., in Morphett v. Jones*, 1 Swanst. 181, quoted Fry, Spec. Perf. § 602.

¹⁰¹ Fry, Spec. Perf. § 610; Pomeroy, Spec. Perf. § 126; *Farrall v. Davenport*, 3 Giff. 363; *Sutherland*

acts of part performance, and this is so even though the possession was at first acquired without the owner's consent, if subsequently acquiesced in by him.¹⁰² The payment of part of the rent has been decided not to be sufficient,¹⁰³ and this accords with the view usually adopted that part payment of the price will not take an oral contract of sale out of the statute.¹⁰⁴

The fact that one already in possession under a previous lease remains in possession after the term, and after having entered into an oral agreement for a new lease, is not, ordinarily, sufficient part performance, the continuance of possession not being referable to such agreement.¹⁰⁵ A different view has been taken, however, when it seemed to the court that the continuance in possession was unequivocally referable to the agreement.¹⁰⁶

The fact that one already in possession as tenant, or one claim-

v. Briggs, 1 Hare, 26; *Savage v. Foster*, 9 Mod. 35; *Williams v. Evans*, L. R. 19 Eq. 547; *People's Pure Ice Co. v. Trumbull*, 17 C. C. A. 43, 70 Fed. 166; *Morrison v. Herck*, 130 Ill. 631, 22 N. E. 537; *McCarger v. Rood*, 47 Cal. 138; *West v. Washington & C. R. Co.*, 49 Or. 436, 90 Pac. 666; *Deisher v. Stein*, 34 Kan. 39, 7 Pac. 608; *Harrell v. Sonabend*, 191 Mass. 310, 77 N. E. 764.

In *Wendell v. Stone*, 39 Hun (N. Y.) 382, it was held that the acts of the proposed lessee in taking possession and cutting his carpets to fit the premises constituted sufficient part performance. In *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, 59 N. E. 995, it was held that one who constructed a mill on the strength of an oral agreement to make a "lease" of water power to him to be used for the purposes of the mill could obtain specific performance of such agreement.

In *Czermak v. Wetzel*, 114 App. Div. 816, 100 N. Y. Supp. 167, it was held by a majority of the court that if, before the intended lessee took

possession and made improvements, the intending lessor repudiated the agreement to make a lease, the lessee could not claim that he made the improvements on the strength of the contract, and there was consequently no part performance.

¹⁰² *Gregory v. Mighell*, 18 Ves. Jr. 328; *Shillabear v. Jarvis*, 8 De Gex, M. & G. 79.

¹⁰³ *Thursby v. Eccles*, 70 Law J. Q. B. Div. 91. See *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586; *Charleton v. Columbia Real Estate Co.*, 64 N. J. Eq. 631, 54 Atl. 444.

¹⁰⁴ See *Fry, Spec. Perf.* § 613 et seq.; *Pomeroy, Spec. Perf.* § 112 et seq.; 26 Am. & Eng. Law (2d Ed.) 54.

¹⁰⁵ *Wills v. Stradling*, 3 Ves. Jr. 378; *In re National Sav. Bank Ass'n*, 15 Wkly. Rep. 753; *Rosenthal v. Freeburger*, 26 Md. 75; *Browder v. Phinney*, 37 Wash. 70, 79 Pac. 598; *Dart, Vendors & Purchasers* (6th Ed.) 1136-1137.

¹⁰⁶ *Hodson v. Heuland* [1896] 2 Ch. 428; *Dowell v. Dew*, 1 Younge & C. Ch. 345.

ing under him as subtenant,¹⁰⁷ expends money on repairs or improvements, will take the case out of the statute,¹⁰⁸ provided, it seems, that the expenditures are not merely of such a character as can be referred to the tenancy at will or from year to year¹⁰⁹ arising from his holding over a former term,¹¹⁰ and provided further that they were not made in the mere hope or expectation, not encouraged by the landlord, of a renewal.¹¹¹ A payment of an installment of an increased rent by a tenant holding over has been regarded as sufficient part performance of an agreement for a renewal lease at such increased rent to render admissible evidence of such agreement.¹¹²

It has been held that there was sufficient part performance to justify a decree against one who had orally agreed to take a lease where the owner had, on the strength of such contract, broken off negotiations for a lease to another, altered the premises to suit the defendant, and the latter had entered and held possession for two years, paying rent.¹¹³ Where one orally agreed to give a lease to another of certain land, provided the latter would purchase such land at his own cost and have it conveyed to the former, it was held that, having purchased the land and had it so

¹⁰⁷ *Williams v. Evans*, L. R. 19 Eq. 547.

¹⁰⁸ *Wills v. Stradling*, 3 Ves. Jr. 378.

¹⁰⁹ *Brennan v. Bolton*, 2 Dru. & War. 349; *Mundy v. Joeliffe*, 5 Mylne & C. 167; *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. 537.

¹¹⁰ See post, § 210.

¹¹¹ *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Pilling v. Armitage*, 12 Ves. Jr. 78; *Brennan v. Bolton*, 2 Dru. & War. 349.

¹¹² *Wills v. Stradling*, 3 Ves. Jr. 378; *Nunn v. Fabian*, 1 Ch. App. 35; *Miller v. Sharp*, 68 Law J. Ch. 322. See *Fix*, Spec. Perf. § 6175; *Humphreys v. Green*, 10 Q. B. Div. 156.

¹¹³ *Seaman v. Aschermann*, 51 Wis. 678, 8 N. W. 818, 37 Am. Rep. 849.

It does not seem, however, that what the intending lessee may have done can properly be considered as part performance justifying a decree for specific performance against him. It is only what the applicant for specific performance has done which constitutes part performance entitling him to a decree. See *Browne*, Stat. of Frauds, § 453; *Pomeroy*, Spec. Perf. § 105; 26 Am. & Eng. Enc. Law (2d Ed.) 60. For this reason the statement in the above case that "if there has been sufficient execution or performance of the parol contract to entitle the lessee to enforce it the lessor has the same equity, and both will be equally entitled to specific performance," may be regarded as questionable.

conveyed, he was entitled to specific performance of the agreement to give a lease.¹¹⁴

Part performance is properly a doctrine applied by courts of equity in connection with that of specific performance. In some states, however, this appears to have been lost sight of, and the doctrine has occasionally been applied to support the recovery of damages in an action at law.¹¹⁵ In one state at least, where the statutes have undertaken to obliterate the distinction between law and equity, part performance has been regarded as authorizing a recovery of damages for breach of an oral contract to lease.¹¹⁶

e. **Recovery for repairs or improvements.** It is well established that, although a contract is unenforceable because not evidenced by writing as required by the fourth section of the statute of frauds, an action will lie to recover money or property delivered under the contract, or for the value of services rendered thereunder.¹¹⁷ In accordance with this rule, it has been held that if the proposed lessee makes repairs or improvements on the premises in accordance with the provisions of an oral contract for a lease, he may recover the cost thereof on the owner's refusal to make the lease.¹¹⁸ On the other hand it has been decided that where one orally agreed with another to buy certain land and erect a building thereon, and then to lease the land to the latter, he could not, upon the latter's refusal to take a lease, recover the amount of his outlay for land and buildings, less the present value of the property, since what was done by him was "not the contemplated consideration of any promise, void or otherwise, but merely a step taken by one party as a means to enable him to furnish the consideration."¹¹⁹

¹¹⁴ Kincaid v. Kincaid, 85 Hun, 141, 32 N. Y. Supp. 476.

¹¹⁵ See ante, § 25 g (5).

¹¹⁶ Deisher v. Stein, 34 Kan. 39, 7 Pac. 608. That the doctrine is not applicable in an action at law on a contract for a lease, see Cram v. Thompson, 87 Minn. 172, 91 N. W. 483; Smith v. Phillips, 69 N. H. 470, 43 Atl. 183.

¹¹⁷ Pollock, Contracts (6th Ed.) 632; Browne, Stat. of Frauds, §§ 118,

118 a; Williams v. Bemis, 108 Mass. 91, 11 Am. Rep. 318.

¹¹⁸ White v. Wieland, 109 Mass. 291; Parker v. Tainter, 123 Mass. 185. And so where the agreement provided that the intending lessee pay a certain sum towards repairs to be made by the lessor and by way of payment he made the repairs himself. Pulbrook v. Lawes, 1 Q. B. Div. 284. See Worthington v. Worthington, 8 C. B. 134.

¹¹⁹ Bacon v. Parker, 137 Mass. 309.

§ 67. Remedies for breach.

a. **Recovery of damages.** If the party agreeing to give a lease refuses to do so, he is liable in damages to the other,¹²⁰ and the party agreeing to accept the lease is so liable in case he refuses to carry out his contract.¹²¹ The proposed lessor is liable to suit even before the time for the making of the lease, if he previously, by leasing to another, disables himself from making a good and effective lease.¹²² And the action need not, in any case, be deferred until the termination of the period for which the lease was to be granted.¹²³ The intending lessor is also liable in damages, it has been held, if he is shown not to have, at the time for the execution of the lease, sufficient title to support it.¹²⁴

The proposed lessee cannot, it has been decided, after having entered and occupied for the full term, sue for breach of the contract to give a lease, unless he can show that he demanded a lease, or that such demand was waived.¹²⁵ But the proposed lessee is under no obligation to tender a written instrument for signature, if not under an express obligation to prepare it or unless, it seems, there is a local usage for him so to do.¹²⁶ On the other hand, it has been held to be no defense to an action by the intended lessors on a contract for a lease that the instrument sent by them to the intended lessee for signature did not correspond with the agreement, if the latter made no objection to the form thereof and in effect refused to sign any lease whatever.¹²⁷

The measure of damages for the lessor's breach of a contract to

¹²⁰ Ward v. Smith, 11 Price, 19; agreement was for the carrying on Hayward v. Parke, 16 C. B. 295. of defendant's farm by plaintiff,

¹²¹ Bond v. Rosling, 1 Best & S. with a division of the products, and 371; De Medina v. Norman, 9 Mees. & W. 820; Freeland v. Ritz, 154 by the defendant's sale of the farm. Mass. 257, 28 N. E. 226, 12 L. R. A. ¹²⁴ Stranks v. St. John, L. R. 2 C. 561, 26 Am. St. Rep. 244; Donovan v. P. 376; De Medina v. Norman, 9 P. Schoenhofen Brew. Co., 29 Mo. Mees. & W. 820.

App. 341. ¹²⁵ Manning v. West, 60 Mass. (6 Cush.) 463.

¹²² Ford v. Tiley, 6 Barn. & C. 325. ¹²⁶ Cantley v. Powell, Ir. R. 10 C. L. 200; Price v. Williams, 1 Mees. & Bradley, 4 Abb. Dec. (N. Y.) 363. W. 6.

There it does not appear clearly ¹²⁷ Freeland v Ritz, 154 Mass. 257, whether the agreement was regarded 28 N. E. 226, 12 L. R. A. 561, 26 Am. by the court as a lease or as an St. Rep. 244.

agreement to make a lease. The

give a lease would, in most states, no doubt, be the value of the bargain lost to the proposed lessee,¹²⁸ that is, the difference between the rental value of the premises for the term and the rent agreed to be paid,¹²⁹ and occasionally other losses caused him by the breach might possibly be allowed.¹³⁰ This is in accord with

¹²⁸ See *Taylor v. Bradley*, 4 Abb. Dec. (N. Y.) 363; *Garsed v. Turner*, 71 Pa. 56.

¹²⁹ *Rhodes v. Baird*, 16 Ohio St. 573 (semble); *North Chicago St. R. Co. v. Legrand Co.*, 95 Ill. App. 435; *Hall v. Horton*, 79 Iowa, 352, 44 N. W. 569. And not the difference between the agreed rent and that which he has to pay for a lease from the real owner. *Knowles v. Steele*, 59 Minn. 452, 61 N. W. 557. *Contra*, *B. F. Myers Tailoring Co. v. Keeley*, 58 Mo. App. 491.

In *Silva v. Bair*, 141 Cal. 599, 75 Pac. 162, the rule of damages stated in the text is approved, but there the instrument in question seems to have been a lease, not a contract for a lease, though it is difficult to say from the opinion in which way the court regarded it.

¹³⁰ In *Hall v. Horton*, 79 Iowa, 352, 44 N. W. 569, it was held that "for breach of contract to make a lease and put a tenant in possession," plaintiff could recover for loss of time caused by waiting to obtain possession and the amount of his expenses in coming from a distant state, and for money paid to a person employed by him to aid in managing the premises. Though the court speaks of this as a "contract to make a lease," and though it was "designed to be succeeded by a formal lease," the court apparently treated it as a lease and not as a contract to make a lease, since if it had been a mere contract the pro-

posed lessee could not well have complained that he was not admitted into possession.

In *Driggs v. Dwight*, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283, the proposed lessee was allowed to recover the outlay caused by removal to the place where the premises lay, and here, likewise, it is in effect stated that a contract to make a lease is broken by the refusal to allow the proposed lessee to enter. The court entirely ignores the distinction between a lease, which gives a right of possession, and a contract to lease, which does not. Ante, § 62.

In *Yates v. Bachley*, 33 Wis. 185, it is decided that the proposed lessee cannot recover for improvements made by him on the strength of the contract merely because the owner refuses to make the lease as agreed, but intimates that he could do so if he was evicted from the premises. That he cannot recover for improvements made by him, when the lease was not made because of defects in the title of the proposed lessor, is decided in *Worthington v. Warrington*, 8 C. B. 134.

In *Garsed v. Turner*, 71 Pa. 56, the intending lessee was held to be entitled to recover the profits which he would have made from the use of the premises. There, however, the agreement was not only to lease, but to furnish business likewise. *Rhodes v. Baird*, 16 Ohio St. 573, is to the effect that possible profits cannot be recovered.

the rule prevailing in most of the states as to the damages recoverable for breach of a contract to convey in fee simple.¹³¹ In England, on the other hand, if the breach of a contract for the sale of land results from a defect of title, the proposed purchaser cannot recover for the loss of his bargain, but his damages are restricted to the expenses incurred by him in preparing the agreement and investigating the title,¹³² and this rule has been adopted with reference to a contract for a lease.¹³³ But even there, presumably, the proposed lessee would be entitled to recover for loss of his bargain if the owner willfully refuses, or negligently fails, to make the lease.¹³⁴

In case the lessee refuses to comply with the terms of an agreement by which he is bound to execute an instrument of lease, he is liable in damages to the amount of the excess of the total rent which he agreed to pay during the term over and above what the owner is able to obtain from others after such refusal.¹³⁵ discounting, it has been said, both amounts at the legal rate of interest.¹³⁶

b. **Specific performance.** A suit for specific performance is an appropriate remedy for the breach of an agreement for a lease. It is perhaps more often brought by the proposed lessee against the proposed lessor,¹³⁷ but it will lie as well in favor of the pro-

¹³¹ See authorities cited 29 Am. & Eng. Enc. Law (2d Ed.) 725.

¹³² *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bain v. Fothergill*, L. R. 7 H. L. 158.

¹³³ *Gaslight & Coke Co. v. Towse*, 35 Ch. Div. 519.

¹³⁴ See *Engell v. Fitch*, L. R. 4 Q. B. 659; *Jaques v. Millar*, 6 Ch. Div. 153; *Dart, Vendors & Purchasers* (6th Ed.) 1082.

¹³⁵ *Silva v. Bair*, 141 Cal. 599, 75 Pac. 162; *Post v. Davis*, 7 Kan. App. 217, 52 Pac. 903; *Sausser v. Steinmetz*, 88 Pa. 324 (semble); *Cleveland v. Bryant*, 16 S. C. 634.

¹³⁶ *Massie v. State Nat. Bank*, 11 Tex. Civ. App. 80, 32 S. W. 797.

In *Schlumpf v. Sasake*, 38 Wash. 278, 80 Pac. 457, it was held that a

deposit made by the lessee as evidence of "good faith" at the time of making the contract was forfeited upon breach by him as being "stipulated damages." The actual decision was that he was not liable in damages besides losing his deposit. Compare *Weinberg v. Greenberger*, 47 Misc. 117, 93 N. Y. Supp. 530, where it was held that such a deposit was merely made "as security," and not as fixing a penalty or liquidated damages for breach. *Rosenfeld v. Silver*, 49 Misc. 117, 96 N. Y. Supp. 1027, is to the same effect.

¹³⁷ *People's Pure Ice Co. v. Trumbull*, 17 C. C. A. 43, 70 Fed. 166; *McCarger v. Rood*, 47 Cal. 138; *Clark v. Clark*, 49 Cal. 586; *Cram v. Thompson*, 87 Minn. 172, 91 N. W.

posed lessor on refusal of the proposed lessee to accept or execute a lease.¹³⁸

That the agreement is wanting in reasonable certainty as to matters of substance is ground for refusing specific performance,¹³⁹ as is the fact that a decree for performance would impose great hardship on one of the parties,¹⁴⁰ or that the agreement is expressly subject to the performance of some condition which has not been fulfilled.¹⁴¹

The court will be reluctant to decree specific performance in favor of an insolvent lessee,¹⁴² unless, it seems, he offers ample security for the payment of the rent.¹⁴³ But if the intended lessee has assigned the contract, his assignee may enforce it, notwithstanding the insolvency of the assignor.¹⁴⁴

A decree has been refused when the remedy in damages was regarded as sufficient,¹⁴⁵ when the term named would expire before the grant of the decree,¹⁴⁶ and when the lease was to be granted if certain buildings were erected within a specified time, and, though the time had nearly expired, the buildings had not been begun.¹⁴⁷

483; *Lenderking v. Rosenthal*, 63 Md. 28; *McFarlane v. Williams*, 107 Ill. 33; *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, 59 N. E. 995; *Wendell v. Stone*, 39 Hun (N. Y.) 332; *Kincaid v. Kincaid*, 85 Hun, 141, 32 N. Y. Supp. 476; *Deeds v. Stephens*, 8 Idaho, 514, 69 Pac. 534.

¹³⁸ *Cook v. Waugh*, 2 Giff. 201; *Jones v. Watts*, 43 Ch. Div. 574; *Hanbury v. Litchfield*, 2 Mylne & K. 629; *Seaman v. Ascherman*, 51 Wis. 678, 8 N. W. 818, 37 Am. Rep. 849.

¹³⁹ *Callaghan v. Callaghan*, 8 Clark & F. 374; *Gardner v. Fooks*, 15 Wkly. Rep. 388; *Taylor v. Portington*, 7 De Gex, M. & G. 328; *Fry, Spec. Perf.* § 380 et seq.; *Pomeroy, Spec. Perf.* § 159 et seq. For adjudications as to what constitutes uncertainty in agreements to lease, see *Foa, Landl. & Ten.* (2d Ed.) 275; *Woodfall, Landl. & Ten.* (16th Ed.) pp. 113, 121.

¹⁴⁰ *Talbot v. Ford*, 13 Sim. 173; *Costigan v. Hastler*, 2 Schoales & L. 160; *City of London v. Nash*, 3 Atk. 512; *Fry, Spec. Perf.* § 417 et seq.; *Pomeroy, Spec. Perf.* § 185 et seq.

¹⁴¹ *Abbot v. Blair*, 8 Wkly. Rep. 672; *Williams v. Brisco*, 22 Ch. Div. 441; *Modlen v. Snowball*, 4 De Gex, F. & J. 143.

¹⁴² *Brooke v. Hewitt*, 3 Ves. Jr. 253; *Buckland v. Hall*, 8 Ves. Jr. 92.

¹⁴³ *McFarlane v. Williams*, 107 Ill. 33.

¹⁴⁴ *Crosbie v. Tooke*, 1 Mylne & K. 431; *Powell v. Lloyd*, 2 Younge & J. 372.

¹⁴⁵ *Clayton v. Illingworth*, 10 Hare, 451, explained in *Lever v. Koffler* [1901] 1 Ch. 543.

¹⁴⁶ *Nesbitt v. Meyer*, 1 Swanst. 226.

¹⁴⁷ *Asylum for Female Orphans v. Waterlow*, 16 Wkly. Rep. 1102.

Specific performance will not be decreed if the contract was obtained by the complainant by fraud or misrepresentation as to material facts.¹⁴⁸ Nor will it be decreed in favor of the proposed lessee if, having entered into possession, he has already been guilty of acts, such as waste or failure to repair, which would entitle the lessor to re-enter under the terms of the lease.¹⁴⁹ But if there is a question on the evidence whether there has been a breach of condition, the court, it has been decided, will decree specific performance, and direct the lease to be antedated, with liberty to the landlord to proceed at law on account of such alleged breach.¹⁵⁰

There is a decision to the effect that a bill for specific performance cannot properly be filed till the time at which the proposed term is to begin.¹⁵¹ The reason for such a view is not stated, and in another jurisdiction an opposite view is apparently adopted.¹⁵²

§ 68. "Usual" covenants.

The parties to the agreement are entitled to have incorporated in the lease the "usual" covenants,¹⁵³ even though the agreement contains no stipulation to that effect. What are usual covenants depends on the usage of the locality,¹⁵⁴ as well as the character of the property,¹⁵⁵ and that a covenant was usual a number of years ago does not necessarily show that it is so at the present

¹⁴⁸ *Willingham v. Joyce*, 3 Ves. Jr. 168; *Clermont v. Tashburgh*, 1 Jac. & W. 112; *Pomeroy, Spec. Perf.* § 209 et seq.; *Fry, Spec. Perf.* § 650 et seq.

¹⁴⁹ *Hill v. Barclay*, 18 Ves. Jr. 63; *Nunn v. Truscott*, 3 De Gex & S. 304; *Gregory v. Wilson*, 9 Hare, 683; *Jones' Devisees v. Roberts*, 3 Hen. & M. (Va.) 436.

¹⁵⁰ *Pain v. Coombs*, 3 Smale & G. 449, 1 De Gex & J. 34; *Lillie v. Legh*, 3 De Gex & J. 204; *Rankin v. Lay*, 2 De Gex, F. & J. 65; *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, 59 N. E. 995.

¹⁵¹ *Friedman v. McAdory*, 85 Ala. 61, 4 So. 835.

¹⁵² See *Ryder v. Robinson*, 109 Mass. 67, where it was decided that there was, under the circumstances, no laches in delaying the proceeding until the term was to begin, this clearly involving an assumption that it might have been instituted before that time.

¹⁵³ *Church v. Brown*, 15 Ves. Jr. 258; *In re Lander & Bagley's Contract* [1892] 3 Ch. 41; *Eaton v. Whitaker*, 18 Conn. 233, 44 Am. Dec. 586; *Scholtz v. Northwestern Mut. Life Ins. Co.*, 40 C. C. A. 556, 100 Fed. 573.

¹⁵⁴ *Parish v. Sleeman*, 1 De Gex, F. & J. 328; *Strelley v. Pearson*, 15 Ch. Div. 113.

¹⁵⁵ *Bennett v. Womack*, 7 Barn. & C. 627; *Strelley v. Pearson*, 15 Ch. Div. 113; *Hampshire v. Wickens*, 7 Ch. Div. 555.

time.¹⁵⁶ There are numerous English cases upon the question whether certain covenants are usual,¹⁵⁷ but these obviously have little bearing upon the question as it may present itself in any particular locality in this country. There are also occasional decisions in this country on the subject.¹⁵⁸ The question has ordinarily been decided by a court of equity without a jury, in a suit for specific performance, and whether it has been decided as a question of law or of fact does not appear. It would seem, however, to be a mixed question of law and fact, as in the ordinary case of the allegation of a custom.¹⁵⁹

¹⁵⁶ *Hampshire v. Wickens*, 7 Ch. Div. 555.

¹⁵⁷ They are collected in Woodfall, Landl. & Ten. (16th Ed.) 127.

¹⁵⁸ The following have been decided not to be "usual" covenants: A provision that rent shall cease on destruction of the buildings by fire (*Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586); that the lessee shall not be liable for injury by fire even though caused by his negligence, and that on destruction by fire the lessor should immediately rebuild, rent to be suspended in the meantime (*Bodman v. Murphy*, 35 Md. 154); that the lessee should occupy personally (*Clark v. Clark*, 49 Cal. 586); that rent should be paid in advance (*Arcade Realty Co. v. Tunney*, 52 Misc. 148, 101 N. Y. Supp. 593). It has likewise been decided that the proposed lessor cannot insist that the lease shall contain covenants that repairs shall be made at the lessee's expense, that the lessor shall have the right to enter to inspect the premises, that the lessee shall keep them free from all nuisances and that if any abatement of nuisance becomes necessary the lessee shall pay the expense thereof. *Hayden v. Lucas*, 18 Mo. App. 325. As to an

unusual covenant sought to be inserted in a lease of mining land, see *Cochran v. Justice Min. Co.*, 16 Colo. 415, 26 Pac. 780.

¹⁵⁹ In *Brookes v. Drysdale*, 3 C. P. Div. 52, it was left as a question of fact to the jury to say whether certain covenants were usual. And that it is a question of fact seems to be implied in the view that evidence of conveyancers (*Strelley v. Pearson*, 15 Ch. Div. 113; *Hart v. Hart*, 18 Ch. Div. 670) or of other persons (*Bennett v. Womack*, 7 Barn. & C. 627) is admissible upon the question. It was, however, regarded as a question of law in *Church v. Brown*, 15 Ves. Jr. 265, and apparently so in *Hampshire v. Wickens*, 7 Ch. Div. 555, where a textbook on the subject was consulted. In *Bennett v. Womack*, 7 Barn. & C. 627, the fact that a covenant ordinarily appeared in conveyances in that neighborhood was regarded as making it a usual one, while in *Hodgkinson v. Crowe*, L. R. 19 Eq. 591, the fact that it was ordinarily so inserted was regarded as utterly immaterial. In *In re Canadian Pac. R. Co.*, 27 Ont. App. 54, it was regarded as a question of fact.

CHAPTER VII.

THE TITLE AND POSSESSION OF THE LESSOR.

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§ 69. Lease by owner of limited estate.

a. **Tenant in fee simple.** One who has a fee simple estate can make leases to endure for any period.¹ But, presumably, if his estate is subject to an executory limitation over to another person upon the happening of a contingency named, the lease would be voidable by the latter upon the taking effect of such limitation.

b. **Tenant in fee tail.** A lease by a tenant in tail was, at common law, voidable as against the issue in tail, and absolutely void as against the remainderman or reversioner.² By the statute of 32 Hen. 8, c. 28, tenants in tail were enabled to grant leases

¹ Com. Dig., Estates by Grant (G 2 Bac. Abr., Leases (D) 1. 2); 1 Platt, Leases, 65.

for any term not exceeding twenty-one years, reserving the most accustomed yearly rent, or more, and subject to certain other restrictions, but such a lease was good only against the issue in tail, and not against the reversioner or remainderman.³ In this country, in states in which an estate in tail is still recognized, the tenant in tail has ordinarily by statute the power to bar the entail by a conveyance in fee simple.⁴ Whether such a statute would be regarded as empowering him to lease, so as to bind the issue in tail and the reversioner or remainderman, would depend upon the construction of the particular language used. A statute authorizing a tenant in tail to convey as if seised of an estate in fee simple has been regarded as enabling him to make a lease, effective as against the subsequent tenant in tail, the latter being entitled to possession only upon the expiration of the term thereby created.⁵

c. **Tenant for life.** A lease by a tenant for his own or another's life is valid for every purpose so long as the life endures. Upon the death, however, of the life tenant or of the *cestui quò vie*, the lessee has no right by reason of the lease to retain possession as against the person entitled in reversion or remainder,⁶ unless, it seems, he has encouraged the lessee to make improvements on the premises,⁷ or has otherwise subjected himself to an estoppel in this regard,⁸ or unless the lease was made under a power.⁹ A lease by a tenant *pur autre vie* comes to an end upon the death of the *cestui que vie*¹⁰ even though the lessor acquires the reversion after making the lease.¹¹

³ Bac. Abr., Leases (D) 2; 1 Platt, Guthman v. Vallery, 51 Neb. 824, 71 N. W. 734, 66 Am. St. Rep. 475; McLeases, 66.

⁴ See 1 Stimson, Am. Stat. Law, Intyre v. Clark, 6 Misc. 377, 26 N. Y. Supp. 744; Coakley v. Chamberlain, 8 Abb. Pr. (N. S., N. Y.) 37; § 1313; 1 Dembitz, Land Titles, § 18.

⁵ Laidler v. Young, 2 Har. & J. (Md.) 69. Standard Metallic Paint Co. v.

⁶ Brudnell v. Roberts, 2 Wils. 143; Prince Mfg. Co., 133 Pa. 474, 19 Atl. Ex parte Smyth, 1 Swanst. 355; Horsey v. Horsey, 4 Har. (Del.) 517; 411; Collins v. Crownover (Tenn.) 57 S. W. 357.

Hoagland v. Crum, 113 Ill. 365, 55 Am. 7 Stiles v. Cowper, 3 Atk. 692.

Rep. 424; Murr v. Glover, 34 Ill. App. 8 See 2 Tiffany, Real Prop. § 457.

373; Johnson v. Grantham, 104 Ga. 9 See post, § 70.

558, 30 S. E. 781; Carman v. Mosier, 10 Blake v. Foster, 8 Term R. 487.

105 Iowa, 367, 75 N. W. 323; Page v. 11 Co. Litt. 47 b; Bac. Abr., Leases Wright, 96 Mass. (14 Allen) 182; (I) 2. See post, § 76.

Even though the remainderman or reversioner desires to continue or revive the lease made by the life tenant, he cannot do so, since he is in no privity with the latter.¹² The only course for him to pursue, if he desires the person holding under the life tenant's lease to continue in possession under him, is to make a new lease to such person. By his grant of permission to such person to retain possession, the latter would become primarily his tenant at will,¹³ while the payment by the latter to such remainderman or reversioner of a periodic rent, whether the same as or different from that paid to the life tenant, would be evidence to support a finding of the creation of a periodic tenancy,¹⁴ though not conclusive in this regard, particularly if there is a disparity between the rental value and the rent actually paid.¹⁵

A new tenancy evidenced by the payment to and acceptance of rent by the remainderman is *prima facie* subject to stipulations similar to those contained in the lease by the life tenant, provided these are known to the remainderman and applicable to such a periodic holding. If not known to him and not in accordance

¹² Co. Litt. 341 b; *Miller v. Manwaring*, Cro. Car. 397; *Jenkins v. Church*, Cowp. 482; *Jones v. Verney*, Willes, 169; *Ludford v. Barber*, 1 Term R. 95; *Doe d. Simpson v. Butcher*, 1 Doug. 50; *Doe d. Potter v. Archer*, 1 Bos. & P. 531.

There seems a contrary assumption in *Lake Erie Gas, Coal & Coke Co. v. Patterson*, 184 Pa. 364, 39 Atl. 68, where it appears to be regarded as a question of the intention in making the lease whether it can, with the consent of the remainderman, continue after the death of the lessor who had a life estate merely. The opinion makes the mistake of regarding the lease merely as a contract.

¹³ See ante, § 13 a (3).

¹⁴ *Doe d. Tucker v. Morse*, 1 Barn. & Adol. 365; *Doe d. Pennington v. Taniere*, 12 Q. B. 998; *Doe d. Martin v. Watts*, 7 Term R. 83; *Roe d. v. Jordan Ward*, 1 H. Bl. 96.

¹⁵ *Roe d. Brune v. Prideaux*, 10 East, 158; *Smith v. Widlake*, 3 C. P. Div. 10. See ante, § 14 b (2) (a).

In *Lowrey v. Reef*, 1 Ind. App. 244, 27 N. E. 626, it was decided that where a life tenant made a lease for a year and died during the year, and the remainderman permitted the lessee to remain in possession and accepted payment of a note given by the lessee to the life tenant for a part of the rent, there was a new demise by him for the balance of such year. It does not appear how the note for the rent came into the possession of the remainderman upon the death of the life tenant. It would naturally have passed to the personal representative of the latter. The finding that, under the circumstances, there was a new demise, was quite possibly justified.

with custom, he will not be bound thereby.¹⁶ Such new tenancy of a periodic character, evidenced by the acceptance of rent by the remainderman in the amounts and at the times named by the original lease, is *prima facie*, it has been decided, to be regarded as commencing on the same day of the year as the original tenancy for the purpose of ascertaining the time of expiration of any of the periods by which it is measured.¹⁷

Although the right of the reversioner or remainderman to assert that the tenant's right of possession under the lease has come to an end by reason of the death of the life tenant, or in the case of a lease by one having an estate *pur autre vie*, by reason of the death of the *cestui que vie*, is fully conceded, the question whether the tenant under the lease may assert the expiration of the lessor's life estate as against the latter is a difficult one. This we will consider in another connection.^{18, 19}

Even after the termination of the estate of one holding under a lease from a life tenant by reason of the death of the life tenant or *cestui que vie*, the person so holding is entitled to enter to reap the crops planted by him, that is, he has the right of "emblemments," a right which exists generally when the interest created by a lease terminates upon an uncertain event.²⁰ In some states, however, there is substituted, by statute, for the right to take emblements, a right to retain possession for a named period, or until a certain time of the calendar year.²¹

¹⁶ *Oakley v. Monck*, 3 Hurl. & C. (If a lease for years of land let for farming terminate by the happening of an uncertain event, the tenant shall continue in possession till the end of the current year, paying a proportionate amount of rent to the person then entitled to the land and receiving reasonable compensation for the tillage and seed of crop not then gathered). "Lease for years" includes lease for a year. *King v. Foscoe*, 91 N. C. 116. S. C. Civ. Code 1902, § 2410 (If any person rent or hire lands of tenant for life, who dies, the person so renting or hiring shall not be dispossessed until the crop of that year is finished, he or she securing the payment of

¹⁷ *Roe d. Jordan v. Ward*, 1 H. Bl. 97; *Holden v. Boring*, 52 W. Va. 37, 43 S. E. 86.

^{18, 19} See post, § 78 p (3).

²⁰ See post, § 251.

²¹ Ga. Code 1895, § 3093 (If tenant for life rents the land for a year and dies, or the estate is otherwise terminated during the year, the tenant is entitled to the land for the year upon complying with his contract with the tenant for life). See *Story v. Butt*, 2 Ga. App. 119, 58 S. E. 388. N. C. Revision 1905, § 1990

d. **Tenant for years.** A tenant ~~for years, unless~~ there is a provision to the contrary in the lease under which he holds, may make a lease, termed a "sublease" or "~~underlease,~~" of the premises or any part thereof for a period less than that for which he holds. If such an attempted sublease be for the whole of his term, it will then ordinarily take effect as an "assignment." The matter of subleases is elsewhere considered.²²

e. **Periodic tenant.** A tenant ~~from year to year, or other~~ periodic tenant, may make a sublease ~~from year to year,~~²³ or even for a term of years,²⁴ ~~retaining a reversion in himself.~~²⁵ Such a lease will, ~~however, terminate upon the termination of his~~ own estate.²⁶

f. **Tenant at will.** A lease by a tenant at will is invalid as against his landlord,²⁷ and the effect is to terminate his estate at the landlord's option.²⁸ The landlord may, however, indicate an intention that such lessee of the tenant at will shall remain as *his* tenant, so creating a new tenancy,²⁹ and, even if such lessee is merely a wrongdoer in entering on the land, his possession

the rent when due). This is perhaps no more than a statement of the law of emblements. Va. Code 1904, § 2809. (If there be tenant for life or other uncertain interest which is let to another, the lessee may hold the land to the end of the current year of the tenancy, he paying a reasonable rent to the persons who succeed to the land). W. Va. Code 1906, § 3419 (Same as Virginia, with the addition of provisions preserving right of emblements, securing to the persons who succeed to the land a right to plant crops in certain cases, and providing for compensation by the latter to the tenant for any preparation of the land for a crop). This statute does not apply to town lots used for building purposes (Shufflin v. House, 45 W. Va. 731, 31 S. E. 974, 72 Am. St. Rep. 851), and it does not affect the principle that if the remainder

man accepts rent from the lessee in accordance with the terms of the lease by the life tenant, the tenancy from year to year thus created is to be computed with reference to the beginning of the term named in the lease, that is, it may be terminated on the corresponding day in each year (Holden v. Boring, 52 W. Va. 37, 43 S. E. 86).

²² See post, §§ 151, 161-164.

²³ Pike v. Eyre, 9 Barn. & C. 909; Curtis v. Wheeler, Moody & M. 493; Peirse v. Sharr, 2 Man. & R. 418.

²⁴ Mackay v. Mackreth, 4 Doug. 213.

²⁵ Curtis v. Wheeler, Moody & M. 493; Oxley v. James, 13 Mees. & W. 209. See ante, § 14 a, at notes 448-455.

²⁶ Pike v. Eyre, 9 Barn. & C. 909.

²⁷ Moss v. Gallimore, 1 Doug. 279.

²⁸ See ante, § 13 b (4) (b).

²⁹ See ante, § 13 b (4) (b).

would be good, it seems, as would that of any other disseisor,³⁰ to support an action of ejectment against a third person ousting him from possession.³¹

g. Tenant at sufferance. A tenant at sufferance, that is, one wrongfully holding over the period for which he is entitled to hold, cannot make a lease good as against the person entitled to possession.³² The person entering under such a lease would be in the position of any person wrongfully entering on land, a trespasser.

§ 70. Powers of leasing.

We have before referred to the "powers" which a trustee having the legal title only may have to make leases which shall be binding upon the beneficial interest of the *cestui que trust*.³³ Another class of power is that which may be given to one having a legal estate of limited duration to make leases which will be effective, after the termination of his own estate, as against the estate of him in reversion or remainder. In England the giving of such a power to one having a limited interest was formerly an ordinary incident of a deed of settlement,³⁴ and though now not so common, owing to statutory enactments giving powers of leasing to tenants for life,³⁵ such powers are still not infrequently given by express provision in the settlement. In this country, owing partly to the comparative infre-

³⁰ See *Spark's Case*, Cro. Eliz. 676, Burrow, 120, 121) that of all kinds and other decisions cited in 1 Platt, of powers the most frequent is that Leases, 104, and 9 Vin. Abr. 105 et to make leases. For the encourage- seq., to the effect that a disseisin re- ment of farmers to occupy, stock sults upon a lease by a tenant at and improve the land, it is neces- will. sary they should have some per-

³¹ See Prof. Ames' article in 3 Harv. Law Rev., at p. 325, note, and permanent interest. Unless the owner of the estate for life was enabled to cases cited in 10 Am. & Eng. Enc. Law (2d Ed.) at p. 486, to the effect make a permanent lease, he could not enjoy to the best advantage dur- that prior possession will support ing his own time; and they who ejectment. come after must suffer by the land

³² See *Thunder v. Belcher*, 3 East, being untenanted, out of repair, and 448. in a bad condition."

³³ See ante, § 22 a.

³⁴ In Sugden, Powers (8th Ed.) at & 41 Vict. c. 18); The Settled Land p. 712, it is said: "Lord Mansfield Act 1882 (45 & 46 Vict. c. 38). truly observed (*Taylor v. Horde*, 1

quency of settlements of land by which one person is given a legal life estate, and partly, no doubt, to a comparative lack of care in the framing of legal instruments, such powers occur but infrequently, and there are but few cases upon the subject. The numerous English decisions are collected and discussed in standard works upon the subject of powers.³⁶

The primary question, in determining the validity of a lease made under a power of leasing, is whether it is in accordance with the intention of the creator of the power as shown by the instrument creating it.³⁷ If it does not comply with such intention, it is invalid as against the reversioner or remainderman, and cannot even be confirmed by him.³⁸ A power to lease for a certain number of years is regarded as authorizing a lease for a less number,³⁹ and if the lease is for a greater number of years than authorized by the power, it is good for the time authorized, at least in equity.⁴⁰ A power of leasing without any limitation expressed as to the length of the term, has ordinarily been regarded as authorizing a lease for any number of years.⁴¹

A power to lease for a certain number of years does not, unless a contrary intention clearly appears, authorize leases to begin *in futuro*, that is, it authorizes leases in possession only and not in reversion, since otherwise the donee of the power could make a lease in possession for the term authorized, and also leases for the same term in reversion, and so in effect make leases to run for an indefinite time.⁴²

A power given to a life tenant to sell and reinvest has been held to authorize a lease, but not to validate a covenant therein by such tenant to convey in fee simple upon payment of a sum named.⁴³

³⁶ The leading works are those of Chance, Sugden and Farwell.

³⁷ *Pomeroy v. Partington*, 3 Term R. 665; *Vivian v. Jegon*, L. R. 3 H. L. 285; *Mostyn v. Lancaster*, 23 Ch. Div. 583.

³⁸ *Jones v. Verney*, Willes, 169; *Doe d. Martin v. Watts*, 7 Term R. 83; *Taussig v. Reel*, 134 Mo. 530, 34 S. W. 1104.

³⁹ *Isherwood v. Oldknow*, 3 Maule & S. 382.

⁴⁰ *Campbell v. Leach*, Amb. 740; *Alexander v. Alexander*, 2 Ves. Sr. 644.

⁴¹ *Sheehy v. Muskerrey*, 1 H. L. Cas. 576; *Farwell, Powers* (2d Ed.) 608.

⁴² *Sussex v. Wroth*, Cro. Eliz 5; *Taussig v. Reel*, 134 Mo. 530, 34 S. W. 1104; *Sugden, Powers* (8th Ed.) 749. See *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543, 581.

⁴³ *Dean v. Adler*, 30 Md. 147.

§ 71. Lease of undivided interest or interests.

a. **By joint tenant or tenants.** Since joint tenants have but a single estate, they may join in making a demise, they then forming together but one lessor.⁴⁴ In such case the lessee's interest continues in spite of the death of either of them, since the joint demise operates as a demise by each joint tenant and by all, and the survivor will be entitled to the whole rent.⁴⁵ If the lease is terminable by notice, either of the joint lessors may so terminate it, it seems, without the concurrence of the other.⁴⁶

One of two or more joint tenants cannot, by making a lease of the whole, vest in the lessee more than his own share, since that is all to which he has an exclusive right.⁴⁷ Such a lease is, however, valid as to his share, and, if he afterwards die, the other joint tenant or tenants, although succeeding to his interest by right of survivorship, take it subject to the lease, even though this was, by its terms, not to commence till after the lessor's death.⁴⁸

b. **By tenant or tenants in common.** Since each tenant in common has a separate estate, if they join in making a lease, it operates, not as a joint demise, but as a separate demise by each of his undivided share, and a confirmation thereof by the other or others.⁴⁹

⁴⁴ Com. Dig., Estates by Grant 357, 73 N. E. 582, 105 Am. St. Rep. (G 6).

⁴⁵ Doe d. Aslin v. Summersett, 1 Barn. & Adol. 135, 140; Henstead's Case, 5 Coke, 10 b.

⁴⁶ It was so decided as to a lease by joint tenants from year to year. Doe d. Aslin v. Summersett, 1 Barn. & Adol. 135.

⁴⁷ Co. Litt. 186 a; Kingsland v. Ryckman, 5 Daly (N. Y.) 13.

⁴⁸ Litt. § 289; 1 Platt, Leases, 127; Whitlock v. Horton, Cro. Jac. 91; Harbin v. Barton, Moore, 395; Codman v. Hall, 91 Mass. (9 Allen) 335.

⁴⁹ Bac. Abr., Joint Tenants (H) 1; Mantle v. Wollington, Cro. Jac. 166; Doe d. Poole v. Errington, 1 Adol. & E. 750, 3 Nev. & M. 646; Burne v. Cambridge, 1 Moody & R. 539.

In Schwartz v. McQuaid, 214 Ill.

112, it was assumed that a lease by one tenant in common, witnessed by another, to which no objection was made by the other cotenants, was made with the knowledge and consent of the latter. It was in that case decided that, the lease having been made pending a suit for partition, a purchaser at the partition sale could not forcibly expel the lessee, the decree not referring in any way to the lessee's interest. The court here seems to combine two questions, first, whether one taking under a lease *pendente lite* takes subject to the decree, and second, whether one entitled to possession can forcibly expel the person wrongfully in possession.

Any one of two or more tenants in common may make a separate lease of his own share which will be effective in his own favor as regards any of the covenants,⁵⁰ and will also give to the lessee a right to share in the possession for the term of the lease, similar to that previously vested in the lessor. That is, the lessee is substituted, for the time being, as tenant in common in place of his lessor.⁵¹ In some states a lease by one tenant in common of his interest in a specific part of the land jointly held is absolutely void, it seems, as against his cotenants.⁵² A lease of his interest in the whole land by one tenant in common is not valid as regards the shares of the other tenants in common, so as to give the lessee the exclusive right to possession of any part of the land as against them and persons claiming under them,⁵³ unless he was authorized to act as their agent in making a lease, or unless, he having done so, his act was ratified by them.⁵⁴

Since one claiming under a lease by one tenant in common stands in the place of the latter as regards the latter's cotenants, he may make the customary and ordinary use of the land, and is not liable in trespass to such cotenants for doing so, though he might be so liable if he were guilty of an actual ouster.⁵⁵ Moreover, any recognized product of the land which he may obtain by

⁵⁰ *Harms v. McCormick*, 132 Ill. 104, 22 N. E. 511; *Colorado Fuel & Iron Co. v. Pryor*, 25 Colo. 540, 57 Pac. 51. premises by a cotenant is void, cited in *Freeman, Cotenancy & Partition*, § 199; 1 *Tiffany, Real Prop.* p. 395; 17 *Am. & Eng. Enc. Law* (2d Ed.) 682.

⁵¹ *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593, 28 Pac. 45; *Barnum v. Landon*, 25 Conn. 137; *Harman v. Gartman*, *Harp. Law* (S. C.) 430, 18 Am. Dec. 656; *Rising v. Stannard*, 17 Mass. 282; *Grundy v. Martin*, 143 Mass. 279, 9 N. E. 647; *King v. Dickerman*, 77 Mass. (11 Gray) 480; *Austin v. Ahearne*, 61 N. Y. 6; *Jacobs v. Seward*, L. R. 5 H. L. 464; *Freeman, Cotenancy & Partition*, § 253; *Co. Litt.* 199 a. ⁵³ *Cunningham v. Pattee*, 99 Mass. 248; *Hussey v. Holt*, 24 N. H. 248, 55 Am. Dec. 234; *Mott v. Underwood*, 73 Hun, 509, 26 N. Y. Supp. 307; *Moreland v. Strong*, 115 Mich. 211, 73 N. W. 140, 69 Am. St. Rep. 553; *Jackson v. O'Rourke*, 71 Neb. 418, 98 N. W. 1068.

⁵² See *Cunningham v. Pattee*, 99 Mass. 250; *Tainter v. Cole*, 120 Mass. 164, and cases to the effect that any conveyance of a specific part of the ⁵⁴ *Martens v. O'Connor*, 101 Wis. 18, 76 N. W. 774; *Hassard v. Tomkins*, 108 Wis. 186, 84 N. W. 174. ⁵⁵ *Jacobs v. Seward*, L. R. 5 H. L. 464; *Ord v. Chester*, 18 Cal. 79; *Harman v. Gartman*, *Harp. Law* (S. C.) 430, 18 Am. Dec. 656.

such ordinary utilization of the land belongs, in most jurisdictions at least, to him alone.⁵⁶

c. **By one joint owner to another.** A joint tenant or tenant in common may demise his share to his cotenant, thus depriving himself of the right to share in the possession and profits of the land during the term of the demise, and creating the relation of landlord and tenant between them.⁵⁷ If, in such a case, the lessee retains possession after the termination of the lease, he is, it has been decided, to be presumed to be holding, not by reason of his entry under the lease as tenant by sufferance, but by reason of his title as tenant in common.⁵⁸ And this principle has been extended in one state to the case of a demise to a firm, of which

⁵⁶ *Jacobs v. Seward*, L. R. 5 H. L. 464; *Blewett v. Coleman*, 40 Pa. 45; *Freeman, Cotenancy & Partition*, § 258.

In *Conwell v. Jeger*, 21 Ind. App. 110, 51 N. E. 733, it was decided that one tenant in common who without objection "stood by" and saw the lessee of another "put out and tend and reap" a crop could not thereafter assert that such lessee did not have a tenant's interest in the crop. This seems to assume that one tenant in common is not, apart from estoppel, entitled to the crop made by him on the land jointly owned, an assumption which is not supported by the authorities generally.

⁵⁷ Co. Litt. 186 a; Bac. Abr., Leases (I) 5; *Cowper v. Fletcher*, 6 Best & S. 464; *Leigh v. Dickeson*, 15 Q. B. Div. 60; *Snelgar v. Henston*, Cro. Jac. 611; *Luther v. Arnold*, 8 Rich. Law (S. C.) 26, 62 Am. Dec. 422; *Boley v. Barutio*, 120 Ill. 192, 11 N. E. 393; *Schmidt v. Constans*, 82 Minn. 347, 85 N. W. 173, 83 Am. St. Rep. 437; *McKie v. Anderson*, 78 Tex. 207, 14 S. W. 576. In *Medlin v. Steele*, 75 N. C. 154, it is questioned whether a tenant in common can lease to his cotenant. No reference is made to the num-

erous authorities to the effect that he can do so.

In *Smith v. Smith*, 98 Me. 597, 57 Atl. 999, it was decided that the fact that one tenant in common permits his cotenants to have the "sole occupation" of the property in consideration of the payment by the latter of a sum named each month for apparently an indefinite time did not create the relation of landlord and tenant, there being "no evidence of any intention on either side to establish the ordinary relation of landlord and tenant." It is not clear what is meant by the statement that there was no evidence of an intention to create the relation of landlord and tenant. If there was evidence of an intention by one cotenant to confer the exclusive possession on the other for a period less than that for which the former's estate was to endure, there was, it is submitted, evidence of an intention to create the relation of tenancy, without regard to whether the parties recognized that such would be the legal effect of the transaction.

⁵⁸ *Mumford v. Brown*, 1 Wend. (N. Y.) 52, 19 Am. Dec. 461; *McKay v.*

one of the tenants in common was a member, it being held that, as such joint owner, he could authorize his firm to remain for a limited time.⁵⁹ In England it seems to be considered that a tenant in common holding over after the expiration of the lease to him is *prima facie* in the position of a tenant at sufferance, and as such is liable in use and occupation.⁶⁰⁻⁷¹

§ 72. Lease subject to existing incumbrances.

The lessee, it seems clear, is in the position of any other grantee of land, and cannot assert that his title is in any way better than that of his lessor. That is, he takes subject to any incumbrances thereon or defects therein, so far as he may have actual or constructive notice of them.⁷² He is charged with knowledge of the terms of the instrument under which his lessor claims,⁷³ and he takes the land subject to a prior mortgage duly recorded,⁷⁴ or an apparent easement or servitude.⁷⁵ So he evidently cannot claim as against a prior lessee in possession whose lease conflicts with his own,⁷⁶ and he is bound by proceedings in an ejectment⁷⁷ or foreclosure⁷⁸ suit pending at the time of the execution of the lease.

Mumford, 10 Wend. (N. Y.) 351; years, or 1,000 years, or for 100
Rockwell v. Luck, 32 Wis. 70. years, or any lease at all, bound to

⁵⁹ Valentine v. Healey, 158 N. Y. make reasonable inquiry into his lessor's title."

369, 52 N. E. 1097, 43 L. R. A. 667. ⁷³ Philadelphia & Reading Coal
There is a well written dissenting & Iron Co. v. City of New York, 21
opinion by O'Brien, J. Fed. 97; Patman v. Harland, L. R.

⁶⁰⁻⁷¹ Leigh v. Dickeson, 15 Q. B. 17 Ch. Div. 353; Marks v. Gartside,
Div. 60. As to liability of tenant at 16 Ill. App. 177; Sanborn v. Van
sufferance in use and occupation, see Dwyne, 90 Minn. 215, 96 N. W. 41.

post, § 304 d. ⁷⁴ Thompson v. Flathers, 45 La.
Ann. 120, 12 So. 245. And see post,
§ 73.

⁷² This is forcibly expressed by ⁷⁵ Taylor v. Mohan, 19 La. Ann.
Jessel, M. R., in Patman v. Harland, 324; Friend v. Oil Well Supply Co.,
L. R. 17 Ch. Div. 353, as follows: 179 Pa. 290, 36 Atl. 219.

"The man who takes a lease is in a ⁷⁶ Weaver v. Coumbe, 15 Neb. 167,
similar position as regards construc- 17 N. W. 357; Hodge v. Giese, 43 N.
tive notice as (sic) a man who buys. J. Eq. 342, 11 Atl. 484. See post, §
There could not be any reason for 146.

any distinction between purchasing ⁷⁷ Marshall v. Eggleston, 82 Ill.
a fee simple and taking a lease for App. 52.

10,000 years. If a man who pur- ⁷⁸ McLean v. McCormick (Neb.)
chases a fee simple is bound to look 93 N. W. 697.
into the title in a regular way, so
is a man who takes a lease for 10,000

Whether a lessee is a purchaser for a valuable consideration, entitled to the benefit of the recording acts, so as to be exempt from the operation of a prior unrecorded conveyance of which he had no notice otherwise, appears to be a question seldom, if ever, discussed. Presumably he is such a purchaser when he pays a valuable consideration for the grant of the lease,⁷⁹ as is a purchaser of an already existing term.⁸⁰ When, however, he does not pay anything for the grant of the lease, but merely agrees to pay a periodic rent, it appears doubtful whether he is a purchaser for a valuable consideration. His position would seem to be analogous to that of a grantee in fee simple, who has not actually paid the price, but has merely agreed to pay it, at the time he receives notice of the earlier conveyance or incumbrance, in which case the grantee takes subject thereto.^{81,82} And so it would seem that a lessee is not a *bona fide* purchaser as against a prior conveyance or incumbrance which comes to his knowledge during any rent period, unless he has previously paid the rent for that period, which he would not usually have done. In one state it has been held that a lease is not a conveyance within the protection of a statute protecting one claiming under a subsequent conveyance as against a prior unrecorded conveyance.⁸³ In another it has been assumed that he is charged with notice of all matters appearing of record, as is any purchaser.⁸⁴

§ 73. Lease of mortgaged premises.

a. **Legal title in mortgagee**—(1) **Mortgagee not transferee of reversion.** A lease may be made of premises already subject to a mortgage. In such case the mortgage lien is paramount to the title of the lessor as it existed at the time of the lease, and the making of the mortgage, therefore, in no sense involves a transfer of the reversion to the mortgagee, even in jurisdictions where a

⁷⁹ In *Attorney General v. Backhouse*, 17 Ves. Jr. 283, a sublessee was protected as having given "a fair consideration," when he had. It seems, paid nothing at the time of the lease, but agreed to make improvements to a certain amount, and subsequently made them.

⁸⁰ *Harding v. Hardrett*, Finch, 9; *McDaid v. Call*, 111 Ill. 298.

^{81, 82} 2 Pomeroy, Eq. Jur. §§ 691, 750. Cases cited 23 Am. & Eng. Enc. Law (2d Ed.) 489, 517, 521; 2 Tiffany, Real Prop. § 483, note 70.

⁸³ *Topping v. Parish*, 96 Wis. 378, 71 N. W. 367.

⁸⁴ *Sanborn v. Van Duyne*, 90 Minn. 215, 96 N. W. 41.

mortgage passes the legal title, in this differing from a mortgage made by the lessor after the lease, which, in such jurisdictions, may, as hereafter explained,⁸⁵ be regarded as a transfer of the reversion to the mortgagee. Since one claiming under a mortgage made prior to the lease is not a transferee of the reversion, he is not in privity with the lessor or lessee, and he cannot assert any rights against the latter under the lease, as by an action for rent or a distress proceeding.⁸⁶

(2) **Mortgagee entitled to possession.** Though the mortgagee can assert no rights under the provisions of the instrument of lease, he may, in jurisdictions where he has the legal title, and in the absence of a clause giving the mortgagor the right of possession,⁸⁷ assert his right to possession as against such tenant claiming under a lease made subsequently to the mortgage, since the mortgagor could not, by making such a lease subsequently to the mortgage, affect the mortgagee's rights previously vested. As against such prior mortgagee, having the legal title, the tenant under the mortgagor's lease is merely a trespasser, and as such may be evicted by the mortgagee, as he might be by any other owner of a paramount title.⁸⁸

It has been held that where the mortgagee demanded the rent from the mortgagor's tenant as a payment upon the interest due, and the tenant paid the rent to him under threat of distress, he thereby recognized that the tenant was then in lawful possession, and could not thereafter assert the contrary.⁸⁹ And likewise the mortgagee might, by encouraging the mortgagor's tenant to lay

⁸⁵ See post, § 146 e.

⁸⁷ See ante, § 45 a.

⁸⁶ *McKircher v. Hawley*, 16 Johns. (N. Y.) 289; *Fitchburg Cotton Manufactory Corp. v. Melven*, 15 Mass. 268; *Mayo v. Shattuck*, 31 Mass. (14 Pick.) 533; *Teal v. Walker*, 111 U. S. 242; *Souders v. Vansickle*, 8 N. J. Law (3 Halst.) 313; *Kimball v. Lockwood*, 6 R. I. 138; *Drakford v. Turk*, 75 Ala. 339; *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *Hogsett v. Ellis*, 17 Mich. 351; *Bartlett v. Hitchcock*, 10 Ill. App. (10 Bradw.) 87; *Rogers v. Humphreys*, 4 Adol. & E. 299; *Evans v. Elliott*, 9 Adol. & E. 342.

⁸⁸ *Keech v. Hall*, 1 Doug. 21; *Rogers v. Humphreys*, 4 Adol. & E. 299; *Corner v. Sheehan*, 74 Ala. 452; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59; *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *Moran v. Pittsburgh, C. & St. L. R. Co.*, 32 Fed. 878; *Doe d. Brown v. Mace*, 7 Blackf. (Ind.) 2.

⁸⁹ *Doe d. Whitaker v. Hales*, 7 Bing. 322.

out money on improvements, estop himself to assert that the latter was not rightfully in possession.⁹⁰

(3) **Attornment to mortgagee.** Instead of actually evicting the mortgagor's tenant, the mortgagee may prefer to have such tenant remain in possession as his tenant, and if, upon his notification to the latter of his desire to this effect, the tenant, expressly or by implication, recognizes him as his landlord, "attorns" to him, as it is frequently expressed,⁹¹ the tenant will thereupon cease to hold under the mortgagor and will hold under the mortgagee.⁹² Such "attornment" to the mortgagee is in effect the acceptance of a new demise from the latter,⁹³ and in fact it is not unusual for the mortgagee actually to make, and the mortgagor's tenant to accept, a new lease. In case there is no new lease, definitely fixing the character and duration of the new tenancy, the tenant, by his mere acknowledgment of the mortgagee as his landlord, that is, by attorning to him, becomes, it would seem, in the first place his tenant at will, as does any other person who occupies under a bare permission.⁹⁴ but such tenancy at will would ordinarily, by the tenant's payment of a periodic rent to the mortgagee, be converted into a periodic tenancy.⁹⁵

The legal title being in the mortgagee, and he having consequently the right to possession as against the mortgagee even before default,⁹⁶ it would seem that he may thus assert such right as against the mortgagor's tenant before as well as after default,

⁹⁰ See *Doe d. Parry v. Hughes*, 11 Jur. 698; *Evans v. Elliot*, 9 Adol. & E. 342; *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59.

⁹¹ See ante, § 19.

⁹² *Brown v. Storey*, 1 Man. & G. 126; *Doe d. Higginbotham v. Barton*, 11 Adol. & E. 315; *Corbett v. Plowden*, 25 Ch. Div. 678.

In *Mason v. Gray*, 36 Vt. 308, it was decided that where one purchased land subject to a mortgage, after condition broken, a person who went into possession under an agreement to hold under such purchaser, but subsequently agreed upon notification from the mortgagee to hold under the latter on certain terms,

was the tenant of the mortgagee, who had the superior right to the premises, rather than of the mortgagor's vendee, and that the mortgagee was entitled to assert his right to a share of the crops as provided by the agreement with him.

⁹³ See ante, § 19 c.

⁹⁴ See ante, § 13 a (3).

⁹⁵ *Corbett v. Plowden*, 25 Ch. Div. 678; *Doe d. Prior v. Ongley*, 10 C. B. 25; *Doe d. Hughes v. Bucknell*, 8 Car. & P. 566; *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59. See ante, § 14 b (2) (a).

⁹⁶ 1 Jones, Mortgages, § 702; 2 Tiffany, Real Prop. § 507.

and it has been so decided in England.⁹⁷ In other jurisdictions it has been decided that the mortgagee may force the mortgagor's tenant to relinquish possession⁹⁸ or to attorn to him⁹⁹ after there has been a default under the provisions of the mortgage, without any judicial assertion that the mortgagee would or would not have this right before default. The only ground upon which the mortgagee, entitled, even before default, to possession as against the mortgagor, could possibly be precluded from then asserting his rights against the tenant and obtaining the possession or an acknowledgment of tenancy from him, is the English statute, reenacted in most of the states of this country,¹⁰⁰ making void all attornments by tenants to strangers, with certain exceptions, including an attornment to a mortgagee "after the mortgage has become forfeited."¹⁰¹ And there is at least one decision that it is by force of such statute that the mortgagor's tenant may, after default, acknowledge the mortgagee as his landlord,^{101a} thus implying that such acknowledgment, if before the mortgagor's default, would not be valid to substitute the mortgagee as landlord in place of the mortgagor. The statute could, however, not prevent the mortgagee, entitled to possession, from asserting such right as against the mortgagor's tenant by an actual eviction of the latter, this having no element of an attornment, and it does not seem probable that it was intended by the statute to preclude an attornment by the tenant to one who, by reason of his paramount title, has the right immediately to evict him and who is threatening so to do.¹⁰²

It has been decided that when a mortgagee, after accepting an

⁹⁷ *Keech v. Hall*, 1 Doug. 21; *Rogers v. Humphreys*, 4 Adol. & E. 299. *Massachusetts Hospital Life Ins. Co. v. Wilson*, 51 Mass. (10 Metc.) 126.

⁹⁸ *Hutchinson v. Dearing*, 20 Ala. 798; *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59; *Henshaw v. Wells*, 28 Tenn. (9 Humph.) 568; *Doe d. Brown v. Mace*, 7 Blackf. (Ind.) 2.

⁹⁹ *Lockwood v. Tracy*, 46 Conn. 447; *Jones v. Clark*, 20 Johns. (N. Y.) 51; *Anderson v. Robbins*, 82 Me. 422, 19 Atl. 910, 8 L. R. A. 568; *Kimball v. Lockwood*, 6 R. I. 138; *Mass-*

¹⁰⁰ See ante, § 19 b (2).

¹⁰¹ *Jones v. Clark*, 20 Johns. (N. Y.) 51.

In *Kimball v. Lockwood*, 6 R. I. 138, the court seems to be under the mistaken impression that an attornment by the mortgagor's tenant to one claiming under a mortgage paramount to the lease is an attornment to the grantee of the reversion.

¹⁰² See post, § 78 p (2).

attornment from the mortgagor's tenant, obtains a judgment of foreclosure and for possession against the mortgagor, on averments that the latter is in possession, he thereby precludes himself from asserting that his own tenant is in possession, and cannot maintain a summary proceeding for possession as landlord against the tenant.¹⁰³

(4) **New tenancy under mortgagee.** The tenancy thus created by attornment between the mortgagor's lessee and the mortgagee is an entirely new tenancy, and not a continuation of the old tenancy with the substitution of a new landlord.¹⁰⁴ Any suggestions to the contrary must be erroneous.¹⁰⁵ The mortgagee is not the transferee of the reversion, he having obtained his title before there was any reversion, and the tenancy created by the mortgagor's lease could be regarded as continuing, with the mortgagee as landlord, only on the theory that the mortgagor, in making the lease, acted as representative of the mortgagee, a theory which is not only not in accord with the facts, but is also incompatible with the decisions that the mortgagee cannot proceed against the tenant for rent in the absence of an attornment or new lease, as well as those that he may treat the mortgagor's tenant as a trespasser.

Whether the new holding under the mortgagee is upon terms similar to those of the lease made by the mortgagor is a question of fact, to be decided in each particular case with reference to the understanding of the mortgagee and his tenant, the parties to the new relation.¹⁰⁶ The terms of the new holding are evidently not the same as those of the old holding, if the parties expressly agree upon different terms. In some cases it seems to be assumed that the new holding is at the same rent as was reserved in the lease made by the mortgagor,¹⁰⁷ but, as before stated, this would seem to be a question of fact in each case.

(5) **Who entitled to rent.** After an actual eviction by the mortgagee of the mortgagor's tenant, the former will no longer

¹⁰³ *Turner v. Davis*, 48 Conn. 397. Exch. 159; *Keith v. R. Gancia & Co.*

¹⁰⁴ *Oakley v. Monck*, 3 Hurl. & C. [1904] 1 Ch. 774, 783.

706, L. R. 1 Exch. 159; *Brown v. Storey*, 1 Man. & G. 117; *Towerson v. Jackson* [1891] 2 Q. B. 484; *Corbett v. Plowden*, 25 Ch. Div. 678. ¹⁰⁷ *Lockwood v. Tracy*, 46 Conn. 447; *Clark v. Abbott*, 1 Mo. Ch. 474; *Massachusetts Hospital Life Ins. Co. v. Wilson*, 51 Mass. (10 Metc.) 126;

¹⁰⁵ See ante, § 19 c.

¹⁰⁶ See *Oakley v. Monck*, L. R. 1 Humph. 568. *Henshaw v. Wells*, 28 Tenn. (9

be liable under the lease to the mortgagor for rent,¹⁰⁸ since an eviction under paramount title is always a defense to a claim for rent;¹⁰⁹ and the case will be the same when, to avoid an actual eviction, the tenant attorns to the mortgagee,¹¹⁰ since such an attornment to the owner of a paramount title to avoid eviction is properly to be regarded as a "constructive" eviction by paramount title.¹¹¹

The new tenancy created by the tenant's acknowledgement of the mortgagee as landlord gives the latter a right to assert against the tenant a claim for rent thereafter accruing, provided a promise to pay rent can be inferred, as it might, no doubt, from the payment to the mortgagee of one installment of rent,¹¹² and, in the absence of such ground for inferring a promise to pay rent, an action would lie, it seems, in favor of the mortgagee, for the value of the use and occupation from the time of the attornment, on the presumption of an agreement to that effect.¹¹³ This question of the theory of recovery by the mortgagee is not discussed by the cases, and in some, as before stated, it seems to be considered that it is necessarily based on the original lease by the mortgagor, and that the amount thereof is to be measured by the terms of the lease.¹¹⁴ But this, it is believed, is a mistaken theory, and such former lease given by another person, not in privity with the new

¹⁰⁸ See *Simers v. Saltus*, 3 Denio (N. Y.) 214; *Smith v. Sheppard*, 32 Mass. (15 Pick.) 147, 25 Am. Dec. 432; *Duff v. Wilson*, 69 Pa. 316.

¹⁰⁹ See post, § 182 e (2).

¹¹⁰ *Magill v. Hinsdale*, 6 Conn. 464, 16 Am. Dec. 46; *Lockwood v. Tracy*, 46 Conn. 447; *Fitzgerald v. Beebe*, 7

Ark. 310; *Farris v. Houston*, 74 Ala. 162; *Smith v. Shepard*, 32 Mass. (15 Pick.) 147, 25 Am. Dec. 432; 447; *Anderson v. Robbins*, 82 Me. 422, 19 Atl. 910; *Adams v. Bigelow*, 128 Mass. 365.

¹¹¹ See post, §§ 182 p (2), 186 a (2).
¹¹² *Lockwood v. Tracy*, 46 Conn. 447; *Anderson v. Robbins*, 82 Me. 422, 19 Atl. 910; *Cook v. Johnson*, 121 Mass. 326.

¹¹³ *Doe d. Downe v. Thompson*, 9 Q. B. 1037; *Lucier v. Marsales*, 133 Mass. 454. As to apportionment of rent when the lease included personal chattels, see post, § 69 c, at note 78.

The mortgagor cannot demand an apportioned part of the rent, or the ¹¹⁴ See ante, at note 106.

landlord, can, it would seem, be at most merely one item of evidence to be considered, in connection with the form and mode of the attornment and the tenant's action thereafter, bearing on the question of the extent of the obligations assumed by the tenant under the new tenancy.

Though the mortgagee may thus acquire a right of action against the tenant in possession for rent or for use and occupation from the time of the attornment, he cannot assert any right of action for rent which had previously accrued under the mortgagor's lease, since, as before stated, there is no privity between him and the tenant, previous to the creation of the new tenancy by the acknowledgment of him as landlord, the "attornment" to him, so-called.^{115, 116} And since the tenant cannot assert a paramount title until he is actually or constructively evicted,¹¹⁷ he cannot repudiate liability for rent to the mortgagor accruing before his eviction by reason of his enforced attornment.¹¹⁸

(6) **Acts showing attornment.** The question has occasionally arisen as to what will effect such attornment to the mortgagee as will entitle the latter to proceed against the tenant for rent or for use and occupation, and the tenant to defend against a claim by the mortgagor for rent.¹¹⁹ It is settled in England that a mere notice by the mortgagee to the mortgagor's tenant to pay rent to him, not assented to by the tenant, will not be sufficient to create a tenancy in favor of the mortgagee, even though the tenant continues in possession, since a tenancy cannot thus be created without the assent of the proposed tenant.¹²⁰ Nor will such notice, without the tenant's assent thereto, be effective as a defense to an action by the mortgagor for rent, since there is no element of constructive eviction in the mere giving of such notice, the tenant not having acted thereon.¹²¹ The same view, that

^{115, 116} *Souders v. Vansickle*, 8 N. rights of the lessee under a lease
J. Law (3 Halst.) 313; *Massachu-* made by a mortgagor. *Kennett v.*
setts Hospital Life Ins. Co. v. Wilson, Plummer, 28 Mo. 142.

51 Mass. (10 Metc.) 126; *Anderson* ¹¹⁹ See ante, § 19 d.
v. Robbins, 82 Me. 422, 19 Atl. 910.
See ante, at note 86.

¹¹⁷ See post, § 78.

¹¹⁸ *Wheeler v. Branscombe*, 5 Q. ¹²⁰ *Evans v. Elliot*, 9 Adol. & E.
B. 373; *McDowell v. Hendrix*, 67 342; *Towerson v. Jackson* [1891] 2
Ind. 513. Q. B. 484, disapproving *Brown v.*
Storey, 1 Man. & G. 117; *Underhay v.*
Read, 20 Q. B. Div. 209.

¹²¹ *Wheeler v. Branscombe*, 5 Q.

B. 373; Wilton v. Dunn, 17 Q. B. 294.

A third person cannot question the

the notice itself, not acted on by the tenant, does not create a tenancy in favor of the mortgagee, has been asserted in this country,¹²² though in at least one case the contrary view, then held by the English courts, was approved.¹²³ The soundness of the later English view, that the tenant of the mortgagor does not, without his assent, become the tenant of the mortgagee, the owner of a paramount title, merely because the latter indicates his desire in that regard, would seem unquestionable.

The payment of rent by the tenant to the mortgagee on demand therefor has been regarded as a sufficient attornment,¹²⁴ unless, it seems, it is otherwise intended by the parties,¹²⁵ as when it is merely on account of interest due under the mortgage.¹²⁶

b. **Legal title in mortgagor.** In states where the mortgagee has not, even after default, the legal title to the land, he cannot, it is evident, assert any right of possession as against the mortgagor's tenant until the title has passed to him by foreclosure.¹²⁷ And even though the mortgage has been foreclosed, so long as the period of redemption endures, the mortgagor's tenant cannot

See *Hickman v. Machin*, 4 Hurl. & good payment and to relieve the lessee from paying the rent to the mortgagor (*Johnson v. Jones*, 9 N. 716.

¹²² *Gartside v. Outley*, 58 Ill. (10 Bradw.) 210; *Bartlett v. Hitchcock*, 10 Ill. App. 87, 11 Am. Rep. 59; *Comer v. Sheehan*, 74 Ala. 452 (dictum); *Drakford v. Turk*, 75 Ala. 339, 51 Am. Rep. 454. See *Hawes v. Shaw*, 100 Mass. 187; *Field v. Swan*, 51 Mass. (10 Metc.) 112.

¹²³ *Stedman v. Gassett*, 18 Vt. 346. *Lucier v. Marsales*, 133 Mass. 454, seems to be to the same effect. Compare *Hawes v. Shaw*, 100 Mass. 187.

¹²⁴ *Doe d. Higginbotham v. Barton*, 11 Adol. & E. 307, 315; *Gartside v. Outley*, 58 Ill. (10 Bradw.) 210, 11 Am. Rep. 59.

A payment of the rent to the mortgagee under threat of eviction has, in England, been held, without reference to whether this constituted an attornment, to constitute a

good payment and to relieve the lessee from paying the rent to the mortgagor (*Johnson v. Jones*, 9 Adol. & E. 809; *Underhay v. Read*, 20 Q. B. Div. 209) on the theory that this is merely a payment upon the prior mortgage, and is consequently good, as a payment of the rent, by analogy to the cases holding that a tenant may, upon paying a prior charge, assert it as a payment of rent. Post, § 177 e.

¹²⁵ *Wheeler v. Branscombe*, 5 Q. B. 373, where the payment of rent was to the mortgagee as agent of the mortgagor who expressly authorized payment of the rent to him.

¹²⁶ *Johnson v. Jones*, 9 Adol. & E. 809; *Underhay v. Read*, 20 Q. B. Div. 209; *Forse v. Sovereign*, 14 Ont. App. 482.

¹²⁷ *Hogsett v. Ellis*, 17 Mich. 351; *Myers v. White*, 1 Rawle (Pa.) 353.

repudiate his tenancy under the mortgagor and acknowledge a tenancy under the mortgagee.¹²⁸

c. **Effect of foreclosure sale.** A purchaser at foreclosure sale under a mortgage made before the lease is, it is evident, not in privity with the mortgagor's tenant to any greater extent than the mortgagee, and, consequently, he cannot recover rent under the lease made by the mortgagor,¹²⁹ and he may, at his option, treat the tenant as a trespasser,¹³⁰ unless he has so acted as to be estopped from doing so.¹³¹ If, however, such purchaser at fore-

¹²⁸ *Chadbourn v. Rahilly*, 34 Minn. 346, 25 N. W. 633; *Mills v. Hamilton*, 49 Iowa, 105; *Mills v. Heaton*, 52 Iowa, 215, 2 N. W. 1112. In this last case it is decided that in the Iowa statute making void an attornment to a stranger, the exception of an attornment to a mortgagee "after the mortgage has been forfeited" means after all rights under the mortgage have been lost.

¹²⁹ *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *McDermott v. Burke*, 16 Cal. 580; *Bartlett v. Hitchcock*, 10 Ill. App. (10 Bradw.) 87. See post, §§ 78 n (3), 148.

¹³⁰ *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211; *McDermott v. Burke*, 16 Cal. 580; *Bartlett v. Hitchcock*, 10 Ill. App. (10 Bradw.) 87; *Downard v. Groff*, 40 Iowa, 597; *Simers v. Saltus*, 3 Denio (N. Y.) 214; *Russum v. Wanser*, 53 Md. 92; *Hemphill v. Tevis*, 4 Watts & S. (Pa.) 535; *Western Union Tel. Co. v. Ann Arbor R. Co.*, 61 U. S. App. 741, 33 C. C. A. 113, 90 Fed. 379.

Such tenant cannot claim emblements as against the purchaser. *Downard v. Groff*, 40 Iowa, 597; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105.

Ala. Code 1907, § 4757, provides that if land sold under a mortgage

is in the possession of a tenant, notice to him by the purchaser or his vendee of the purchase after the lapse of ten days from the time of the sale, and that it has not been redeemed, vests the right to the possession in him in the same manner as if the tenant had attorned to him. This provision, it is said in *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211, was intended, not to create the relation of landlord and tenant between the purchaser and the tenant of the mortgagor, but merely to cut off the tenant from any defense against the right of the purchaser to the possession of the property, and to vest in him the same right of possession as a landlord has on the termination of the tenancy. It seems, however, that the purchaser under the foreclosure would have the right to immediate possession without any statutory provision.

¹³¹ In *McDermott v. Burke*, 16 Cal. 580, Field, C. J., says that "there are cases, undoubtedly where the purchaser would be estopped from treating the tenant of the mortgagor as a trespasser; as, for instance, where the lease was taken upon the encouragement of the mortgagee, and the purchaser was cognizant of the fact at the time of his purchase."

✓ closure sale demands possession or the payment of rent of the mortgagor's tenant, and the latter thereupon expressly or impliedly agrees to hold under him, there is, as in the case of such an agreement with a mortgagee entitled to possession, a constructive eviction of the tenant entitling him to defend against a claim for rent by the mortgagor.¹³² Upon such attornment by the tenant to the purchaser or upon the making of a lease to the former by the latter, a new tenancy is created,¹³³ and whether such new tenancy is upon the same terms as the tenancy under the mortgagor is a question of fact in each case.¹³⁴ Unless the tenant under the former lease does, by accepting a new lease, or otherwise attorning, indicate a willingness to hold under the purchaser, he cannot, it seems clear, be subjected to liability as a tenant of the latter. That one enters as tenant of one person does not subject him to liability as tenant to another person having paramount title.¹³⁵ But a purchaser under foreclosure has, it seems, so long as the mortgagor's right of redemption exists, no power to make a lease, or to accept an attornment, which will be effective as against the mortgagor in case the latter redeems.¹³⁶

¹³² *Simers v. Saltus*, 3 Denio (N. Y.) 214.

¹³³ *McFarland Real Estate Co. v. Joseph Gerardi Hotel Co.*, 202 Mo. 597, 100 S. W. 577. And see ante, § 73 a (4). But in Pennsylvania, by statute, the purchaser at execution sale upon the mortgage may adopt the lease made by the mortgagor. Act June 16, 1836 (P. L. 755, § 119). *Pepper & Lewis Dig.* 1993.

¹³⁴ See ante, § 73 a (4).

¹³⁵ *Holmes v. McMaster*, 1 Rich. Eq. (S. C.) 340, and authorities cited ante, note 86.

But in *McFarland Real Estate Co. v. Joseph Gerardi Hotel Co.*, 202 Mo. 597, 100 S. W. 577, it is apparently considered, on the strength of *Kane v. Mink*, 64 Iowa, 84, 19 N. W. 852, that the tenant under the prior lease, even without attorning to the purchaser, became his tenant at will. In the Iowa case referred to

it was in effect so decided where there was a sale under a judgment prior to the lease. And in *Newton v. Speare Laundering Co.*, 19 R. I. 546, 37 Atl. 11, it was held that the purchaser of land under foreclosure can not recover the full rent reserved under a lease made (it seems) subject to the mortgage, the lease including personalty, and that he could recover the value of the use and occupation of the land only. There being no attornment to the purchaser, it would seem that there was no relation of tenancy to support use and occupation.

In the analogous case of a sale for nonpayment of taxes, it has been recognized that the tenant under the pre-existing lease does not become the tenant of the purchaser. *Carlson v. Curran*, 42 Wash. 647, 85 Pac. 627.

¹³⁶ See ante, note 128. If there is

There are decisions to the effect that a purchaser at foreclosure of a mortgage prior to the lease is entitled to possession as against the tenant, even though the latter was not a party to the foreclosure proceeding.¹³⁷ There are, however, cases to the contrary,¹³⁸ and it would seem that a lessee, whether for one or for a thousand years, or his assignee, should not be affected by a decree rendered after the lease, to which he is not a party, to any greater extent than would a grantee in fee simple. Whether the purchaser under a proceeding to which the mortgagor's tenant is not a party is entitled to possession as against such tenant would seem to depend on whether the mortgagee was entitled to possession as against him before foreclosure. In jurisdictions where such tenant is, as regards the mortgagee, a mere trespasser, he cannot, it seems, have any better position as regards one purchasing at foreclosure sale under the mortgage, while, in jurisdictions where the mortgagor retains the right of possession as against the mortgagee, he, or one claiming under him, whether by way of lease or otherwise, cannot be deprived of such right by a proceeding to which he is not a party. It has been decided that when the mortgagor lessor was not made a party to the foreclosure proceeding, the lessee could not refuse to pay rent on the ground of a constructive eviction by the purchaser, based on the lessee's attornment to the latter under threat of dispossession.^{138a} It would seem, however, that if the purchaser has the right of possession as against the lessee, by reason of the latter having been made a party to the proceeding, he has title paramount to that of the lessee, and that, consequently, an eviction by him, actual or constructive, might be asserted in defense to

a redemption after foreclosure sale, the lessee of the purchaser may be evicted by the mortgagor redeeming. *Tyson v. Chestnut*, 118 Ala. 387, 24 So. 73. In this case it was assumed that the tenant would be entitled to emblements, and that, in view of this, the mortgagor's acceptance of the rent for the balance of the crop year could not be regarded as creating a tenancy for the balance of the term of the lease.

¹³⁷ *McDermott v. Burke*, 16 Cal. 580; *Downard v. Groff*, 40 Iowa, 597; *Western Union Tel. Co. v. Ann Arbor R. Co.*, 61 U. S. App. 741, 33 C. C. A. 113, 90 Fed. 379.

¹³⁸ *Richardson v. Hadsall*, 106 Ill. 476; *Hirsch v. Livingston*, 3 Hun (N. Y.) 9; *Lockhart v. Ward*, 45 Tex. 227.

^{138a} *Alford v. Carver*, 31 Tex. Civ. App. 607, 72 S. W. 869.

the claim for rent, irrespective of whether the lessor was a party to the proceeding.

It has been decided in New York that, upon a sale under a mortgage prior to the lease, the lessee is entitled, by reason of the covenant for quiet enjoyment, to be paid from the surplus proceeds of sale the amount of loss resulting from the destruction of his leasehold estate.¹³⁹

§ 74. Lease by mortgagee.

A mortgagee, having the legal title and the right of possession, has the right to make a lease of the premises, but upon the redemption of the mortgage all rights under the lease come to an end, unless the mortgagee had authority from the mortgagor to make a lease extending beyond the time of possible redemption.¹⁴⁰ In states where the mortgagee has no legal title he has, except when the possession is expressly given him for an ascertained time, no more right than any stranger to make a lease,¹⁴¹ but the lessee will be precluded from asserting this in defense to an action for rent or for possession.¹⁴² If he is expressly given the right of possession, he is, it seems, a lessee, and as such entitled to make a sublease to the same extent as any other lessee.¹⁴³

¹³⁹ *Clarkson v. Skidmore*, 46 N. Y. 297; *Larkin v. Misland*, 100 N. Y. 212, 3 N. E. 79; *Ely v. Collins*, 45 Misc. 255, 92 N. Y. Supp. 160. The two latter cases do not, as does the first, state that the lessee's right to compensation is by reason of the covenant for quiet enjoyment. This, it seems, was tacitly assumed.

¹⁴⁰ *Hungerford v. Clay*, 9 Mod. 1; *Willard v. Harvey*, 5 N. H. 252; *Holt v. Rees*, 44 Ill. 30.

In *Holt v. Rees*, 46 Ill. 181, it was held that the court would not require the redelivery of the premises by the lessee to the mortgagor immediately upon redemption if this would involve a hardship upon the lessee.

In *Chapman v. Smith* [1907] 2 Ch. 97, it was regarded (by Parker, J.) as a question of construction wheth-

er the fact that a lease by the mortgagee, stated to be by him "as agent," was to be regarded as a lease by him in his own right or by his as agent for the mortgagor.

¹⁴¹ *Connolly v. Giddings*, 24 Neb. 131, 37 N. W. 939; *Candler v. Mitchell*, 119 Mich. 464, 78 N. W. 551.

¹⁴² See post, § 78. This principle is ignored in *Union Mut. Life Ins. Co. v. Lovitt*, 10 Neb. 301, 4 N. W. 986, it being there held that the mortgagee could not recover rent of his lessee.

That the tenant of the mortgagee attorns to the purchaser at foreclosure sale does not place the mortgagee in possession so as to entitle him to bring trespass against the purchaser. *Lindenbower v. Bentley*, 86 Mo. 515.

¹⁴³ This seems to be the theory on

Occasionally, in order to make a lease of mortgaged land, where the legal title and right of possession are in the mortgagee, effectual as against both the mortgagor and mortgagee, both join in the lease. Such an instrument operates as a lease by the mortgagee with a confirmation by the mortgagor until the estate of the former has been terminated by the payment of the debt secured, and then it becomes the lease of the mortgagor and the confirmation of the mortgagee.^{143a} A right of re-entry reserved only to the mortgagor in such a lease has been held to be available to neither, not to the mortgagee, since it did not purport to give him any right of re-entry, and not to the mortgagor, because he had no legal interest in the reversion.¹⁴⁴ It has been also decided that if the covenants of such a lease to pay rent and to repair are with the mortgagor and his assigns only, the mortgagee's assignee cannot sue thereon, since they are collateral to his interest in the land.¹⁴⁵

§ 75. Lease by person not in possession.

At common law, and under the statute 32 Hen. 8, c. 9, one could not make a lease of land in the adverse possession of another which would be valid as against such other, that is, a disseisee could not by a lease,^{146, 147} as he could not by a feoffment,¹⁴⁸ transfer his right of entry to another. This prohibition of a transfer of land in the adverse possession of another no longer exists in many jurisdictions,¹⁴⁹ and so it has been

which *Candler v. Mitchell*, 119 Tyrw. 289; *Doe d. Barker v. Goldsmith*, 2 Tyrw. 710.

There it was held that the mortgagee, if so requested by the mortgagor, could make a valid lease, that is, apparently, that such request from the mortgagor constituted in effect a grant to the mortgagee of the right of possession for the purpose of supporting the lease. The decision might have been based on the ground that the lessee of the mortgagee could not, in a summary proceeding to recover possession, question the lessor's title.

¹⁴⁴ *Saunders v. Merryweather*, 3 Hurl. & C. 902.

¹⁴⁵ *Webb v. Russell*, 3 Term R. 393.

^{146, 147} *Comyn, Landl. & Ten.* 17; *Bac. Abr., Leases (I) 4*; *Sheppard's Touchstone*, 269; *Lee v. Norris*, Cro. Eliz. 331.

¹⁴⁸ *Litt.* § 347; *Co. Litt.* 213 b; *Partridge v. Strange*, Plowd. 88. Article by Prof. Maitland, 2 *Law Quart. Rev.* 483.

¹⁴⁹ See 1 *Stimson, Am. Stat. Law*, § 1401; 3 *Harv. Law Rev.* 25, article by J. B. Ames, Esq.; 19 *Harv. Law*

^{143a} *Doe d. Barney v. Adams*, 2

occasionally decided that a lease of land adversely possessed is valid.¹⁵⁰ Even in jurisdictions where the old rule prevails, the lease would usually be valid except as against the adverse possessor, the disseisor.¹⁵¹

The fact that the land is, at the time of the lease, in the actual possession of another, holding under the lessor, the lessor having merely a reversion, cannot affect the validity of the lease. In other words, the validity of "concurrent" leases and leases "in reversion" is unquestionable.¹⁵² Nor is a lease invalid because the lessor has not yet entered under a lease to him, there being no adverse possession.¹⁵³

§ 76. Lease operating on after-acquired title.

It is a well settled rule of the common law that if a man by indenture, that is, by an instrument sealed by both parties, makes a lease for a term of years of land in which he has no interest, and he thereafter acquires an interest in such land, the lease will operate upon his interest as if it had been vested in him at the time of the lease.¹⁵⁴ This rule has been stated to be based upon "the circumstance that a lease for years was anciently nothing more

Rev. 278, article by George P. Costigan, Esq.

¹⁵⁰ *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479; *Beck v. Minnesota & Western Grain Co.*, 131 Iowa, 62, 107 N. W. 1032, 7 L. R. A. (N. S.) 930; *Kinsman v. Greene*, 16 Mo. 60; *Lewis v. Brandle*, 107 Mich. 7, 64 N. W. 734.

¹⁵¹ *University of Vermont v. Joslyn*, 21 Vt. 52. And see authorities cited 2 *Tiffany*, Real Prop. p. 1120; 9 *Harv. Law Rev.* 278, 281.

¹⁵² See post, § 146 d. But in *Cohen v. Suckus*, 32 Misc. 689, 66 N. Y. Supp. 467, it is said, without any discussion, that if the owner of the reversion on an outstanding lease in another under which such other is in possession makes a lease, this lease is invalid, since "it is essential to the validity of a lease that the

lessor shall be in possession of the premises." Compare the statement in 1 *Platt*, Leases, 51, that "it is clear that a person having a present right to the future enjoyment of an estate, as a remainderman or reversioner, expectant either upon an estate for years, for life, or in tail, may make a lease, which will take effect in possession on the determination of the preceding estate."

¹⁵³ *Co. Litt.* 46 b; *Saffyn v. Adams*, *Cro. Jac.* 60; *Doe d. Parsley v. Day*, 2 *Q. B.* 147, 156; *Beck v. Minnesota & Western Grain Co.*, 131 Iowa, 62, 107 N. W. 1032, 7 L. R. A. (N. S.) 930.

¹⁵⁴ *Co. Litt.* 45 a, 47 b; *Rawlyns' Case*, 4 *Coke*, 53; *Anonymous*, *Moore*, 20, pl. 69; s. c., *Dal.* 26, pl. 4; *Trevivan v. Lawrence*, 1 *Salk.* 276; *Bigelow*, *Estoppel* (5th Ed.) 420; *Mc-*

than a mere contract.''¹⁵⁵ The rule has been applied in the case of a mortgagor, who, though having divested himself of the legal title by the making of the mortgage, made a lease, and subsequently redeemed, and he was regarded as precluded from claiming the land as against his lessee.¹⁵⁶

In this country an analogous, though possibly questionable,¹⁵⁷ rule has been applied in the case of conveyances in fee containing particular classes of covenants for title, and it seems probable that a lease, although not by indenture, would be regarded as effective to pass such an after-acquired title, provided it contains covenants of the character referred to. And even apart from the presence of any covenants in the lease, the doctrine, apparently equitable in its nature, that if a deed of conveyance purports to convey an estate of a certain character the grantor will be estopped, upon subsequently acquiring title, to deny that such an estate was conveyed,¹⁵⁸ would ordinarily be applied in the case of a conveyance by way of lease.¹⁵⁹

Kenzie v. Lexington, 34 Ky. (4 91 S. W. 31; *Skidmore v. Pittsburg*, C. & St. L. R. Co., 112 U. S. 33.

¹⁵⁵ *Williams, Real Prop.* (18th Ed.) 476. See *Rawle, Covenants for Title* (5th Ed.) § 243, note. In *Wright v. MacDonnell*, 88 Tex. 140, 30 S. W. 907, a like doctrine was applied in favor of the lessee's right

¹⁵⁶ *Omelaughland v. Hood*, 1 Rolle, Abr. 874, pl. 10, 876, pl. 5; *Webb v. Austin*, 7 Man. & G. 701. to remove fixtures in accordance with stipulations of the lease, the lessor having procured the paramount title after making the lease.

¹⁵⁷ See *Rawle, Covenants for Title*, § 248 et seq.; 2 *Smith's Leading Cases*, Hare & Wallace's notes (8th Am. Ed.) 839 et seq.; 2 *Tiffany, Real Prop.* § 456. In *Iowa Sav. Bank v. Frink*, 1 Neb. Unoff. 14, 26, 92 N. W. 916, it was held that a transferee of the reversion was precluded from asserting, as against the tenant, a paramount title procured by him after accepting the transfer of the reversion.

¹⁵⁸ See *Rawle, Covenants for Title*, §§ 245, 265. In *Burr v. Stenton*, 43 N. Y. 462, it is in effect decided that if there is a covenant for quiet enjoyment which is limited to the acts of the lessor and his representatives, the subsequent acquisition of title by the lessor does not enure to the benefit of the lessee.

¹⁵⁹ The view that the lease operates on the after acquired title of the lessor is applied, without any suggestion of the necessity of a seal or of any covenants of title, in *McKenzie v. Lexington*, 34 Ky. (4 Dana) 129; *Cunningham v. Pattee*, 99 Mass. 248; *Porch v. Fries*, 18 N. J. Eq. (3 C. E. Green) 204; *Austin v. Ahearne*, 61 N. Y. 6; *Blackburn v. Muskogee Land Co.*, 6 Ind. T. 232,

The common-law rule that the after-acquired interest will pass under a lease by indenture does not apply in case the actual state of the lessor's title at the time of the lease appears from the indenture.¹⁶⁰ That is, there is no estoppel (by deed) when the truth appears. Furthermore, it is stated by writers of high standing not to apply in case the lessor had some interest in the land at the time of the lease, though not an interest so great as that which he purported to grant,¹⁶¹ and Coke himself says that "whensoever any interest passeth from the party, there can be no estoppel against him."¹⁶² That, as Coke elsewhere says,¹⁶³ if a tenant for his own life or the life of another makes a lease for years by indenture, and afterwards acquires the reversion upon his life estate, and the life then comes to an end, he or his heir may avoid the lease, is unquestioned.¹⁶⁴ But Lord Holt distinguishes between such a case, where the lessor has at the time of the lease an estate sufficient to support the lease, that is, a life estate, greater than an estate for years, and the case of a lease for years by one having a less estate for years, and considers the estoppel applicable in the latter case as if no interest had passed,¹⁶⁵ and the contrary view is questioned by another high

¹⁶⁰ Jenkins' Centuries, 255, case 46; *Hermitage v. Tomkins*, 1 Ld. Raym. 729; *Cooks v. Bellamy*, 1 Keb. 531; Co. Litt. 352 b.

¹⁶¹ 1 Platt, Leases, 56; 2 Preston, Abstracts, 217; Williams, Real Prop. (18th Ed.) 476; Bigelow, Estoppel (5th Ed.) 391.

¹⁶² Co. Litt. 45 a. There is a like dictum by him in his report of *Treport's Case* (6 Coke, 15). This latter case has been frequently cited in support of this doctrine, but, as has been remarked (opinion of Bushe, C. J., in *Pluck v. Digges*, 2 Huds. & B. 108) "in that case, no question of estoppel, as between the plaintiff and defendant, arose, or from facts of the case, could have arisen; and in the report of the same case by Popham, the chief justice then on the bench (*Poph. 57*, sub. nom., *Rex v. Bery*), no mention is made of

anything on the subject of estoppel." The case was ejectment, and the plea of not guilty put in issue the demise by the lessor of the nominal plaintiff, and the question was merely whether the demise as stated, being made by tenant for life and remainderman, would support the ejectment. See *Friend v. Estabrook*, 2 W. Bl. 1152.

¹⁶³ Co. Litt. 47 b.

¹⁶⁴ Anonymous, Moore, 20, pl. 69; s. c., Dal. 26, pl. 4; *Rothwell's Case*, Het. 91; *Doe d. Strode v. Seton*, 2 Crompt. M. & R. 728; *Langford v. Selmes*, 3 Kay & J. 220.

¹⁶⁵ *Gilman v. Hoare*, 1 Salk. 275; s. c., sub nom., *Hilman v. Hore*, Carth. 247. In this case one made a lease for forty years to A and a year later made a lease for forty years to B, and it was held that the fact that the last of the forty years

authority.¹⁶⁶ By the modern cases, a so-called lease made by a tenant for years, for a term greater than his own term, is an assignment and not a lease,¹⁶⁷ and consequently the question whether such a transaction would operate on an after-acquired interest would seem primarily to depend on the question whether an assignment operates on such an interest. Presumably, in most jurisdictions, the courts would apply the doctrine of estoppel in such a case to the same extent as in the case of a conveyance in fee simple.¹⁶⁸

Even in cases where the estoppel does not operate owing to the existence of an interest in the lessor at the time of the lease, equity will, it is said, if the lease is on a valuable consideration, require the lessor to make it good out of the interest subsequently acquired by him.¹⁶⁹

passed by the second lease would not prevent the operation of the estoppel. See, also, note to *Fawcett v. Hall*, Alc. & N. 248. The same view as that of Lord Holt is clearly asserted in *Jenkins' Centuries*, 255, case 46 (*Rawlyn's Case*, also reported 4 Coke, 53). Here it is said that "tenant for life makes a lease by indenture for 1,000 years, and afterwards purchases the reversion, and dies. His heir shall avoid this lease, for it was the lease which gave the interest, and a freehold is a greater estate in law than any term. But if a lessee for twenty years makes a lease by indenture for 1,000 years, this is an estoppel. If the lessor afterwards purchases the fee of the said land, it binds him and his heirs."

In *Langford v. Selmes*, 3 Kay & J. 220, Page Wood, V. C., decided that what purported to be a demise at a rent by a tenant for years, but which, being of the whole term, took effect as an assignment (see post, § 151), could not be regarded as a demise with a reversion in the

assignor merely because the latter afterwards acquired the fee. In this case it was held that the existence of any reversion giving a right of distress for the rent reserved was too uncertain to justify the court in compelling a purchaser of the rent to complete the transaction. The statement of the vice chancellor that *Gilman v. Hoare*, 1 Salk. 275, cannot be regarded as authority because of a further report of the same case in 3 Salk. (at p. 152, sub. nom., *Holman v. Hore*), seems to be based on a misreading of the latter report. There is no contradiction between the two reports, nor is the statement of facts in the first report questioned in the later one.

¹⁶⁶ See Bac. Abr., Leases (O), an article supposed to be by Chief Baron Gilbert.

¹⁶⁷ See post, § 151.

¹⁶⁸ See ante, at note 158.

¹⁶⁹ 2 Preston, Abstracts, 217, referred to in *Bigelow, Estoppel* (5th Ed.) 394; *Williams, Real Prop.* (18th Ed.) 476.

§ 77. Estoppel of owner of paramount title.

It may happen that, though the lessor has no title, or has merely a defective or limited title, the person who has the rightful title is estopped by his actions to assert a right to possession as against the lessee. For instance, where the rightful owner induced one to take a lease from another by stating that the latter had an interest in the property, he was regarded as estopped to deny that the lessor had such interest.¹⁷⁰ And, presumably, there might be cases in which the rightful owner's failure to assert his rights, thereby causing the lessee to make improvements in ignorance of the defects in his lessor's title, might estop him thereafter to assert his rights as against the lessee.¹⁷¹ The possibility of the estoppel of the paramount owner, claiming under a mortgage, to assert his rights as against a tenant of the mortgagor, has been judicially suggested.¹⁷²

§ 78. Preclusion of tenant to deny landlord's title.

a. **Historical considerations.** Littleton, after saying that the lessor for term of years may have an action of debt for the arrearages of rent against the lessee, proceeds: "But in such case it behoveth that the lessor be seised in the same tenements at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented; in which case such plea lieth not for the lessee to plead."¹⁷³ Coke, commenting on the first part of this passage, says: "And the reason for this is, for that in every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*; and therefore if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor anything for which he should pay any rent," and then says that "if the lease be made by deed indented, then are both parties concluded, but if it be by deed poll the lessee is not estopped to say, that the lessor had nothing at the time of the lease made."¹⁷⁴

¹⁷⁰ Hill v. Wand, 47 Kan. 340, 27 Pac. 988, 27 Am. St. Rep. 288. And see Willis v. McKinnon, 37 Misc. 386, 75 N. Y. Supp. 770.

¹⁷¹ See Stiles v. Cowper, 3 Atk. 692, and cases cited in 2 Tiffany, Real Prop. § 457. See, also, Sugden, Powers (8th Ed.) 716.

¹⁷² Evans v. Elliot, 9 Adol. & E. 342; McDermott v. Burke, 16 Cal. 580; Gartside v. Outley, 58 Ill. 210, 11 Am. Rep. 59.

¹⁷³ Litt. § 58.

¹⁷⁴ Co. Litt. 47 b.

To understand these statements by Coke, his words must be construed in connection with those of Littleton, and with reference to the mode of regarding rights in land at that time. One who was "seised" of land, even though wrongfully so, had an estate of freehold in the land,^{174a} and such a person could certainly not be regarded as having "nothing in the land."¹⁷⁵ On the other hand, a person wrongfully dispossessed, "disseised" as it was expressed, had a "right of entry" only, or a mere "right of action." When, therefore, Coke says that the lessor cannot recover rent if "he hath nothing in the land," he means, what Littleton in effect says, that there can be no recovery of rent if the lessor was not seised at the time of making the lease, except in the one case when the lease is by indenture, that is, under the seals of both parties, in which case the lessee is estopped to deny his liability for the rent on the ground that the lessor was not seised. Coke did not say, and could not have meant, that if one who was seised by wrong, as having disseised another having a better right, made a lease for years, the lessee could refuse to pay rent because the lessor was not entitled to the land as against the other. Such an idea would have been contrary to the whole theory of seisin, which governed the law of land in his day. That such was not the law is apparent from the fact that the old authorities state that liability for rent ceases upon an eviction under paramount title,¹⁷⁶ thereby in effect stating that the mere existence of a paramount title, that is, a right of entry or a right of action in another, did not affect such liability.¹⁷⁷ And the same is clearly shown by the recognized language of the replication to the plea that the lessor had nothing in the tenements, the plea of "*nil habuit in tenementis*," as it was called, such language being that, at the time of making the lease, the lessor was seised of or had a sufficient "estate" to make the

^{174a} Litt. 519; Co. Litt. 296 b, But- Abr. f. 429; Co. Litt. 201 b; Bro. ler's note; Williams, Seisin, 7; 2 Abr., Dette, pl. 39.
¹⁷⁵ If a disseisor makes a lease for Preston, Abstracts of Title, 284, 293; years, rendering rent, and afterwards the disseisee enters, and ousts Stearn's Real Actions, 6; Pollock & Wright, Possession, 94.

¹⁷⁶ Nor can he be so regarded at the present day. See Prof. Ames' article, 3 Harv. Law Rev., at p. 27.
¹⁷⁷ Y. B. 20 Hen. 6, 20 b; 2 Rolle, see cases cited post, § 182 e (2).

demise.¹⁷⁸ An averment that he had an absolute right to the land, good as against the whole world, was unnecessary. Modern writers not infrequently speak as if, at common law, provided the lease was not by indenture, the lessee could, under a plea of *nil habuit in tenementis*, show in defense to an action for the rent that another had a better right than the lessor to the land, and in effect assert that it is owing only to the development of the law of estoppel *in pais* that he no longer can make such a defense. Such a view is, it is conceived, entirely erroneous.¹⁷⁹

It appears then that, unless the lease was by indenture, that is, under the seals of both lessor and lessee,¹⁸⁰ the latter could refuse to pay rent if the former was not seised at the time of the making of the lease, or, presumably, was not holding in behalf of one who was seised, as when the lessor was himself a tenant for years holding under a freehold tenant, and the question arises as to when a person was regarded as seised. The subject of seisin has been most thoroughly and learnedly discussed by several modern writers,¹⁸¹ and no attempt will here be made to restate their conclusions. It is sufficient to say that one could acquire seisin either by right or by wrong, that is, the seisin could be transferred to him by the ceremony known as livery of seisin,

¹⁷⁸ See 1 Wms. Saund. 276 d, note (1), 325 a, note (4); Wilson v. Feild, Skin. 624; Treviban v. Lawrence, 2 Ld. Raym. 1048, Holt, 282; Harris v. Parker, 2 Vent. 271; Curson v. Faunt, 1 Lil. Ent. 168; Y. B. 2 Hen. 7, 4; Bro. Abr., Issue Joined, pl. 89; Gyll v. Glass, Cro. Jac. 312; 1 Chitty, Pleading (7th Ed.) 630.

¹⁷⁹ Knipe v. Palmer, 2 Wils. 130, is not, perhaps in entire harmony with the views above stated. This case involved an action on a covenant, the nature of which is not stated, by the committee of a lunatic against one who entered under an unauthorized lease made by such committee, and it was apparently held that he could plead *nil habuit in tenementis* in defense, though he had enjoyed possession for the term of the lease. The opinions, which

are brief and obscurely expressed, seem to proceed upon the theory that the lease was void as being made by one without title or authority, and that consequently the covenant entered into in connection therewith was also void. See ante, § 54, note 66.

¹⁸⁰ That a lease by deed poll is not sufficient to create the estoppel, see, in addition to the above citations from Littleton and Coke, Bac. Abr., Leases (O); 1 Platt, Leases, 55.

¹⁸¹ See 2 Pollock & Maitland, Hist. Eng. Law, 29 et seq. Articles by Prof. Maitland in 2 Law Quart. Rev. 481, 4 Law Quart. Rev. 24, 286, and by Prof. Ames in 3 Harv. Law Rev. 23; Butler's note to Coke's Littleton, at f. 330 b; Challis, Real Prop. (2d Ed.) 206.

made by one having the right to transfer it, or it could be transferred to him by a "tortious conveyance" by one in possession but having no right to transfer the seisin, or he could acquire it by a disseisin effected without the connivance of the person in possession, a physical ouster of such person, whether the person previously seised or one holding in his behalf.

Since seisin ordinarily meant possession, either by the person seised or by some person in his behalf, it could rarely occur, at common law, that one who had obtained possession from his lessor could assert that the seisin was in one other than the lessor or one under whom the lessor held by lease. Consequently, the right of the lessee under a lease, not by indenture, to assert that the lessor had nothing in the land, amounted, for most purposes, merely to a right, in case he was unable to obtain possession because the seisin was in another than his lessor, to assert that fact in defense to rent. This, it seems, is what Coke means by saying that "if the lessor hath nothing in the land, the lessee hath not *quid pro quo*"; and in accordance with this view is the language of Lord Holt, a century later, to the effect that the lessee might in an action of debt for rent upon a parol lease "give in evidence *nil habuit in tenementis*, the plaintiff never having been in possession," but that "if the plaintiff had been in possession, though but tenant at will, etc., then the defendant could not have given this in evidence without having been evicted."¹⁸² So regarded, the lessee's right to plead that the lessor had nothing in the tenements seems to be merely the equivalent of the rule, generally recognized at the present day,¹⁸³ that it is a good defense to an action for rent that the lessee is excluded from possession by one having paramount title, taken in conjunction with the rule recognized in some jurisdictions,¹⁸⁴ that such exclusion from possession is a good defense even when at the hands of a wrongdoer.

While, as above stated, at common law, in almost every case the person in possession of the land would be the person seised of the land, or one holding under the latter, so as to give no opportunity for the assertion by the lessee, to whom the lessor had given possession, of seisin in another not in privity with the lessor, there was at least one case in which this would not be so,

¹⁸² *Chettle v. Pound*, 1 *Ld. Raym.*

746 (A. D. 1701).

¹⁸³ See post, § 182 a (1).

¹⁸⁴ See post, § 182 a (2).

this being that before referred to, of a tenant at sufferance, who, as we have seen,¹⁸⁵ while not holding under the person entitled to the possession, was not seised of an estate of freehold by wrong. Consequently, the question might have arisen whether, if a tenant at sufferance made a lease, not by indenture, the lessee could, even though he was given possession by such tenant, refuse to pay rent on the ground that the latter was not seised, and the analogous question might also have arisen whether, if the person in whom the seisin was, the reversioner or remainderman, made a lease, the fact that the actual possession was in the tenant at sufferance could have been asserted in defense to an action for rent. Furthermore, after the introduction of conveyances operating under the statute of uses, the transfer of the possession no longer necessarily accompanying the transfer of the seisin,¹⁸⁶ the question might have been raised whether, if the grantor in such a conveyance remained in possession, one to whom he subsequently made a lease, not by indenture, and whom he put in possession, could assert, in defense to an action for rent, that the seisin had passed out of the lessor; and so, if the grantee under such a conveyance made a lease, the question might have been raised whether the lessee could, although his lessor had the seisin by force of the statute, assert in defense to an action for rent that the possession was in another, his lessor's grantor. Another case which might have involved difficulty would have arisen when the person seised, after making a lease for years and placing the lessee in possession, made another lease not by indenture. In such a case the second lessee would have been excluded from possession and yet he could not truly assert that his lessor had nothing in the tenements. At the present day, presumably, in these cases, the liability for rent would be regarded as dependent on the acquisition of possession by the lessee, or rather on the opportunity to acquire it.¹⁸⁷ What view would have been taken in the time of Coke as to the right of the lessee to assert that he had not received possession, for the reason that his lessor, though seised, was not possessed, or to assert that, though he had received possession, his lessor was not seised, and did not hold

¹⁸⁵ See ante, § 15 a.

195, 352; authorities cited Tiffany,

¹⁸⁶ Pollock & Wright, Possession, Real Prop. p. 207, n. 34.

55; Williams, Real Prop. (18th Ed.) ¹⁸⁷ See post, § 182 a, b.

under one who was seised, is a matter as to which we have no information.

The foregoing remarks, to the effect that, unless the lease was by indenture, while the lessee had a right to show, in defense to an action for rent, that the lessor was not seised at the time of the lease, he could not show merely that another had a better right to the land than the lessor, have reference to an action of debt for rent, which was practically the only action utilized for the recovery of rent until a comparatively late date.¹⁸⁸ The same rule applied, it would seem, in the case of an action of covenant brought on a lease by deed poll,¹⁸⁹ but if the lease was by indenture the lessee was, in an action of covenant, as in an action of debt, estopped to assert that the lessor was not seised at the time of the lease.¹⁹⁰

In the case of a lease by indenture, the plea of *nil habuit in tenementis* was, as before indicated, inadmissible, that is, the lessee could not, in defense to an action for rent, assert that the lessor was not seised of the land or was not holding under one who was seised. Likewise, any plea equivalent to that of *nil habuit* was inadmissible,¹⁹¹ and if any such plea was pleaded, the estoppel by indenture appearing of record, the plaintiff could demur.¹⁹² But if the plaintiff replied "*habuit, etc.*," he waived the estoppel.¹⁹³ The estoppel by indenture of the lessee to assert that the lessor had nothing in the land applied even though the lease was of land of which the lessee was himself seised.¹⁹⁴ The

¹⁸⁸ See articles by Professor Ames, 2 Harv. Law Rev., at pp. 56, 377. But there the covenant was to pay, not sue upon the covenant for rent. But

¹⁸⁹ See *Aylet v. Williams*, 3 Lev. 193. But see *Knipe v. Palmer*, 2 Wils. 130, ante, note 179. to him, but to the person who had given him the power of attorney.

¹⁹⁰ *Palmer v. Ekins*, 2 Ld. Raym. 1550; *Parker v. Manning*, 7 Term R. 537; *Blake v. Foster*, 8 Term R. 487; *Cuthbertson v. Irving*, 4 Hurl. & N. 742, 6 Hurl. & N. 135. ¹⁹¹ *Palmer v. Ekins*, 2 Ld. Raym. 1550, 2 Strange, 817; *Blake v. Foster*, 8 Term R. 487.

¹⁹² *Kemp v. Goodal*, 1 Salk. 277; *Palmer v. Ekins*, 2 Strange, 817, 2 Ld. Raym. 1550.

¹⁹³ *Trevivan v. Lawrance*, 1 Salk. 276, 3 Salk. 151, Holt, 282, 2 Ld. Raym. 1036, 1048.

¹⁹⁴ *James v. Landon*, Cro. Eliz. 36, Moore, 181, pl. 323; *Rawlyn's Case*, 4 Coke, 54 a. wrongfully executed an indenture of lease in his own name, could not

estoppel did not, however, in any case, extend beyond the term of the lease.¹⁹⁵

Whether, in the later cases involving the exclusion of the defense of "*nil habuit in tenementis*," in an action for rent on a lease by indenture, the defense intended to be asserted was always a lack of seisin rather than an outstanding paramount title, may perhaps be doubted. With the disappearance of the primary importance attached to the idea of seisin, the idea of asserting, as a defense to an action for rent, an outstanding right of entry or action, might readily suggest itself, and the plea of *nil habuit in tenementis*, though originally framed for a somewhat different purpose, might naturally be availed of as the proper mode of asserting this defense. And it seems that in the English decisions hereafter referred to, in which the defense of *nil habuit* was overruled in connection with actions or proceedings other than debt or covenant for rent, the intended defense may have been a lack of title, that is, of right, rather than a lack of seisin, in the lessor.

In an avowry for rent, that is, a plea in replevin for goods distrained, justifying the taking, the avowant was, by the common law, required to show either that he, while seised of a certain estate, made the lease in question, or that, if it was made by another, the reversion had passed to him by descent or grant, and even if a tenant for years had leased for a less term, it was necessary for him in his avowry to show the commencement of his own term by laying the fee in some person who granted his term and then deducing the title to himself from the grantee of the term.¹⁹⁶ In other words, it was necessary in every case for the avowant to set forth the derivation of his title from some person who was seised of an estate of freehold prior to the lease. This was often a difficult thing to do, especially in the case of long terms of years,¹⁹⁷ and, to relieve the landlord in this regard, it was provided by the statute of 11 Geo. 2, c. 19, § 22, that it should be lawful for all defendants in replevin "to avow or make cognizance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made,

¹⁹⁵ Co. Litt. 47 b, 48 a; Rawlyn's Case, 4 Coke, 54 a; James v. London, Cro. Eliz. 36, Moore, 181, pl. 323; Bac. Abr., Leases (O). ¹⁹⁶ 2 Wms. Saund. 285, note 3 to Poole v. Longueville; Gilbert, Distress & Replevin, 185, 188. ¹⁹⁷ 2 Wms. Saund. loc. cit.

enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due; * * * without further setting forth the grant, tenure, demise or title of such landlord or landlords." This statute was held to preclude the plaintiff in replevin from pleading to the avowry *nil habuit in tenementis*, that is, he could not attack the distress on the ground that the lessor had no estate in the land sufficient to support the demise.¹⁹⁸

In ejectment by a landlord against his tenant to recover the premises, it was stated, as an established rule, in the latter part of the eighteenth century, that the defendant tenant could not assert a right to the land in a third person as against the landlord for the reason, as stated by Lord Mansfield, that "the tenant derives his title from him."¹⁹⁹ This rule was stated at that time²⁰⁰ to be of somewhat recent origin, but a suggestion at least to the same effect was made a hundred years earlier,²⁰¹ and we find, among the older authorities, no case in which a lessor was debarred from recovery of possession at the end of the term on the ground that a third person had a better right to the land. The propriety, and indeed necessity, of excluding such a defense in an action by the landlord to recover possession is hereafter considered.²⁰²

It had, at a date some thirty years earlier than that last referred to, that is, about the middle of the eighteenth century, been decided that in *indebitatus assumpsit* for use and occupation

¹⁹⁸ *Syllivan v. Stradling*, 2 Wils. Knight v. Smythe, 4 Maule & S. 347 (1815). Dampier, J., said that "It

¹⁹⁹ *Doe d. Bristow v. Pegge*, 1 Term R. 758, note. has been ruled often that neither the tenant, nor any one claiming by

²⁰⁰ Buller, J., in *Doe d. Bristow v. Pegge*, 1 Term R. 758, note, said: "An objection has been taken at the bar that the plaintiff in ejectment must recover by the strength of his own title. The old cases certainly say so, but for the last forty or fifty years, constant exceptions to this rule have been admitted," and he then refers to previous decisions by himself allowing recovery by the lessor as against the lessee without reference to title. And in *Doe d.*

²⁰¹ Scroggs, C. J., is, in 2 Show. 126, reported to have said, *anno* 32 Car. 2 (1680), in an ejectment case, that "payment of rent to the lessor or to any for his use is a sufficient title for the plaintiff if the defendant have no title at all but possession."

²⁰² See post, § 78 c (1).

the defendant could not plead *nil habuit in tenementis*,²⁰³ for the reason, it would seem, that the statute of 11 Geo. 2, c. 19, § 14, on which this action is based, in terms gives the action to the landlord, without any suggestion that the landlord must have seisin or title.²⁰⁴ It appears likewise to have been decided, previous to the statute, that this defense was not available in special assumpsit to recover on an express promise to pay the value of the use and occupation²⁰⁵ for the reason, presumably, that the promise was regarded as so entirely collateral to the reservation of rent, and so purely personal in character, as to be independent of the title to the land.²⁰⁶

The above review of the earlier authorities bearing upon the question of the right of a tenant to assert, as against the landlord, either that the lessor was not seised or that another had a better right to the land than the lessor at the time of the lease, shows that, by the end of the eighteenth century, his inability so to do had been asserted in connection with proceedings of six distinct classes: (1) An action of debt for rent; (2) an action of covenant; (3) an avowry in support of a distress; (4) an action of ejectment; (5) *indebitatus assumpsit* for use and occupation; and (6) special assumpsit for use and occupation. In the first two cases the ruling was based on the theory of estoppel by indenture, in the third on a particular statute, in the fourth, apparently, on the equitable principle that one who has procured possession from another for a limited period shall not be allowed to retain possession after such period on the plea that there is an outstanding paramount title, in the fifth upon the language of the statute on which the action is based, and in the sixth upon the theory of the particular action.

It thus appears that the earliest assertions of the view that the lessee (or tenant) could not deny the title of the lessor were

²⁰³ *Lewis v. Willis*, 1 Wils. 314 supra, it is said to have been decided in *Richard v. Holditch*, 13 Geo. 2 (1752), in which the court says that "there is no occasion * * * to show any title upon these contracts," and refers to the statute 11 Geo. 2, c. 19, § 14. 1, that *non habuit* is a bad plea to an action upon the case for the use and occupation.

²⁰⁴ See the statement of Denman, C. J., in *Dolby v. Iles*, 11 Adol. & E. 335. ²⁰⁵ As to the character of the action on the express promise in such case, see article by Prof. Ames in 2 Harv. Law Rev., at p. 378.

²⁰⁶ In *Lewis v. Willis*, 1 Wils. 314,

based on grounds peculiar to the particular class of action in which the question arose, and this being so, they would seem to furnish an insufficient basis for the assertion of a broad and general rule that the lessee (or tenant) cannot deny the title of the lessor (or landlord.) This generalization began to be made, however, in the early part of the nineteenth century, and before long the courts and textwriters began to apply the word "estoppel" in connection with the rule thus laid down, with the result that it is now frequently asserted as almost an axiom in the law, that, as it is generally stated, "a tenant is estopped to deny his landlord's title."

b. **The modern doctrine as stated.** The asserted doctrine, which is the subject of our present discussion, is, as just stated, ordinarily formulated in the shape of a rule that "a tenant is estopped to deny his landlord's title."²⁰⁷ But, we may remark, the question in any particular case is as to the right of the lessee or tenant to question the title of the lessor at the time of the lease, and the right to question the landlord's title is involved only because it is the title of the lessor. That is, conceding that otherwise the rule of estoppel as stated is correct, it might perhaps be better expressed by saying that "a tenant is estopped as against the landlord to deny the lessor's title." This statement seems proper in order to justify the inclusion of this matter in a chapter devoted to a discussion of "the title and possession of the lessor."

The preclusion of the lessee or tenant to deny the lessor's title extends, in any case, only to the land which is the subject of the lease, and not to adjoining land, although both are together the subject of litigation between the parties at the same time.²⁰⁸

The rule of estoppel or preclusion has been held to apply although there is a demise of a building only, without the ground

²⁰⁷ In Georgia it is provided by statute (Code 1895, § 3122) that the tenant cannot dispute his landlord's title nor attorn to another claimant while in possession. deny the title of his landlord in an action brought by such landlord, or any person claiming under him, to recover possession of the property."

²⁰⁸ *Brenner v. Bigelow*, 8 Kan. 496; *State v. Boyce*, 109 N. C. 739, 14 S. E. 98; *Pederick v. Searle*, 5 Serg. & R. (Pa.) 236; *Swan v. Castleman*, 63 Tenn. (4 Baxt.) 257. In Minnesota it is provided (Rev. Laws 1905, § 3329) that "when any person enters into the possession of real property under a lawful lease, he shall not while so in possession

on which it is located,²⁰⁹ and so it has been decided that one in possession of land as tenant cannot assert a right to remove a building thereon because he owned the building at the time of the lease.²¹⁰

The preclusion of the lessee (or of one claiming under him) to assert a defect in the lessor's title has invariably been regarded as independent of the nature of the defect.²¹¹

In considering the asserted rule of preclusion or estoppel as applied in the decisions of the last hundred years, that is, since the beginning of the nineteenth century, we will take up the various classes of actions in turn, and seek to ascertain the grounds for applying such a rule in connection with each. We will find, it is believed, that while ordinarily the tenant is properly precluded from denying the title of the lessor, the reasons for such preclusion differ so entirely in the different classes of actions as to furnish small justification for the assertion of any general rule in this regard.

c. **Application of doctrine in connection with particular actions—**(1) **Ejectment.** In an action of ejectment by the landlord against his tenant, either at the expiration of his tenancy or in the enforcement of a condition of re-entry, the tenant cannot, it has been frequently decided, set up defects in the landlord's title as a defense, and this rule has been ordinarily asserted as

²⁰⁹ Pool v. Lamb, 128 N. C. 1, 37 S. E. 953.

²¹⁰ Betts v. Wurth, 32 N. J. Eq. (5 Stew.) 82.

²¹¹ So, for instance, the lessee cannot show that the lessor claimed under a void execution sale (Leshey v. Gardner, 3 Watts & S. [Pa.] 314, 38 Am. Dec. 764), or that the lessor was merely a mortgagee (Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576), or that the lessor, a religious society, had no power to hold the land (First English E. L. Church v. Arkle, 49 W. Va. 92, 38 S. E. 486), or that the conveyance under which the lessor claimed was in fraud of creditors (Palmer v. Melson, 76 Ga.

803; Randolph v. Carlton, 8 Ala. 606; Russell v. Fabyan, 27 N. H. 529; McCurdy v. Smith, 35 Pa. 108), or that there was an outstanding lease to another (Phipps v. Sculthorpe, 1 Barn. & Ald. 50), or that the land had, previous to the lease, been sold under execution to a third person (Wood v. Turner, 26 Tenn. [7 Humph.] 517). Likewise, if one takes a lease from two parties as tenants in common, he is estopped, in an action by them for possession, to assert that they are owners of distinct portions of the land, and so not entitled to sue jointly. Oakes v. Munroe, 62 Mass. (8 Cush.) 282.

merely one application of a general rule that the tenant is estopped to deny his landlord's title.²¹²

The basis of the rule that, in ejectment, the defendant cannot assert the invalidity of the lessor's title, has been well stated as follows: "The effect of allowing the tenant to deny the right of the landlord would be to take the estate from the latter, and confer it on the former, whenever there was a defect, either in the title itself, or the evidence brought forward to sustain it. The law consequently does not tolerate a course which is equally inconsistent with public policy and private faith, and would lead a prudent owner to consider the loss or inconvenience which might result from keeping his property in his own hands, preferable to the risk involved in placing it in the hands of a tenant."²¹³ This is, it seems, a clear case of estoppel *in pais*. One who induces another to give him possession of land for a limited period by agreeing to hold it of him as tenant, that is, by taking a lease from him, is estopped thereafter to assert a right to retain possession indefinitely on the ground that a third person is entitled thereto. Whether the same rule of estoppel should apply in such a proceeding as against a showing by the lessee of a better title in himself will be hereafter considered.

The question whether the rule of estoppel or preclusion applies as against a lessee who has not entered into possession under the lease is one which, it is evident, cannot ordinarily arise in an action by the lessor for possession, since, if the lessee has not entered, the lessor will not have occasion to bring an action against

²¹² Doe d. Knight v. Smythe, 4 I. 403, 56 Atl. 110; Wood v. Turner, Maule & S. 347; Peyton v. Stith, 30 27 Tenn. (8 Humph.) 685; Casey v. U. S. (5 Pet.) 485; Shelton v. Hanrick, 69 Tex. 44, 6 S. W. 405; Eslava, 6 Ala. 230, 31 Am. Dec. 677; Barton v. Learned, 26 Vt. 192; Burgess v. Rice, 74 Cal. 590; Thomas Davy v. Cameron, 14 U. C. Q. B. 483. v. Young, 79 Conn. 493, 65 Atl. 955; The rule of preclusion has also Arnold v. Woodard, 4 Colo. 249; been applied in trespass to try title. Vallette v. Bilinski, 68 Ill. App. 361; Thomson v. Peake, 7 Rich. Law (S. Millhollin v. Jones, 7 Ind. 715; C.) 353; Tyler v. Davis, 61 Tex. 674. Longfellow v. Longfellow, 61 Me. The lessee is obviously not estopped to assert that his leasehold 590; Griffin v. Sheffield, 38 Miss. interest has not yet expired. Smoot 359, 77 Am. Dec. 646; Hamill v. Jalonick, 3 Okl. 223, 41 Pac. 139; v. Marshall, 2 Leigh (Va.) 134. Cooper v. Smith, 8 Watts (Pa.) 536; ²¹³ 2 Smith's Leading Cases (8th Thompson v. Graham, 9 Phila. (Pa.) Am. Ed.) 902, notes to Duchess of 53; Ayotte v. Johnson, 25 R. Kingston's case.

him for the possession. It may happen, however, that, after taking a lease, the lessee repudiates it, before entry, and then enters under one who had a title paramount to that of the lessor. It seems that, if he acquired the possession from such paramount owner and not from the first lessor, he might, in an action for possession by the latter, deny his title, since he did not procure the possession by an implied admission of that title.²¹⁴ Likewise, though the question whether the tenant can relieve himself from the estoppel by relinquishing possession is not likely to arise in an action by the landlord for possession, since such an action is useless if the tenant has already given the landlord possession, it is possible that the tenant might, before the end of the term, relinquish possession for a time and so notify the landlord, and, on failure of the latter to resume the possession within a reasonable time, again enter on the premises during the term and refuse to give up possession when demanded by the landlord after the term. In such a case it would seem that if the tenant's second entry is under claim of right, the possession cannot well be regarded as obtained from the landlord, and the principle of estoppel would no longer be applicable.

Since the estoppel is based on the theory that, by entering under the lease, the lessee admits the lessor's title, the estoppel does not operate if the terms of the letting were such as to exclude the implication of such an admission. So it was held that where, at the time of the making of the lease, it was agreed between the lessor and lessee that the dispute then existing between them as to title should be settled by an amicable action, the lessee could dispute the lessor's title,²¹⁵ and where plaintiff, whose title had been attacked, permitted the defendant to occupy the premises under an agreement to sell to the latter in case his title turned out to be good, the defendant was allowed, in an action against him for possession, to deny the title of the plaintiff under whom he so entered.²¹⁶ And one who, in order to avoid being turned

²¹⁴ In *Nerhooth v. Althouse*, 8 Watts (Pa.) 427, 34 Am. Dec. 480, it was decided that one who, after contracting to purchase land, notified his vendor that he would not go into possession under the contract, and did not do so, but went into possession under a land warrant, could, in an action of ejectment by his vendor, deny the latter's title.

²¹⁵ *City of Philadelphia v. Schuylkill Bridge Co.*, 4 Bin. (Pa.) 283.

²¹⁶ *Frye v. Gragg*, 35 Me. 29.

out of possession by her grantee, agreed to pay rent to him pending a suit to set aside her conveyance, "without prejudice to her rights," was regarded as exempt from the rule of estoppel and entitled to assert her rights in such suit.²¹⁷

(2) **Summary proceedings.** The considerations which render applicable the doctrine of estoppel *in pais* to preclude the tenant from asserting a superior title in another in defense to an action of ejectment apply as well in the case of the statutory proceedings by the landlord for the recovery of possession of the premises, known in different jurisdictions as "summary proceedings," or proceedings in "foreible" or "unlawful" detainer.²¹⁸ In some jurisdictions the effect of this rule of estoppel is re-enforced by statutory provisions that no issue of title shall be raised in such proceedings.²¹⁹

(3) **Action for rent.** At common law, as we have stated above,²²⁰ the lessee could defend an action for rent by showing that the seisin was in another, claiming adversely, except when the lease was by indenture, the effect of which was to estop him from so doing.²²¹ At the present day, the cases are generally

²¹⁷ Sartwell v. Young, 126 Mich. 304, 85 N. W. 729. Wilson v. Lyons, 4 Neb. Unoff. 406, 94 N. W. 636; Pentz v. Kuester, 41

²¹⁸ Anderson v. Anderson, 104 Ala. 428, 16 So. 14; King v. Bolling, 77 Ala. 594; Hershey v. Clark, 27 Ark. 527; Peterson v. Kinkead, 92 Cal. 372, 28 Pac. 568; Eckles v. Booco, 11 Colo. 522, 19 Pac. 465; Houck v. Williams, 34 Colo. 138, 81 Pac. 800; McLean v. Spratt, 20 Fla. 515; Grizzard v. Roberts, 110 Ga. 41, 35 S. E. 291; Knefel v. Daly, 91 Ill. App. 321; Fry v. Bowman, 67 Kan. 531, 73 Pac. 61; Gage v. Campbell, 131 Mass. 566; Oakes v. Munroe, 62 Mass. (8 Cush.) 282; Granger v. Parker, 137 Mass. 228; Settle v. Henson, Morris (Iowa) 111; Newman v. Mackin, 21 Miss. (13 Smedes & M.) 383; Harrison v. Marshall, 7 Ky. (4 Bibb) 524; People v. Kelsey, 14 Abb. Pr. (N. Y.) 372, 38 Barb. 269; Falkner v. Beers, 2 Doug. (Mich.) 117; Hoffman v. Clark, 63 Mich. 175, 29 N. W. 695; Mo. 447; Heyer v. Beatty, 76 N. C. 28; Dilks v. Kelsey (N. J. Law) 59 28; Atl. 897; Emerick v. Tavener, 9 Grat. (Va.) 220, 53 Am. Dec. 217; First English E. L. Church v. Arkle, 49 W. Va. 92, 38 S. E. 486; Smith v. Hardwick, 28 Ky. Law Rep. 615, 89 S. W. 731; Turner v. Gilliland (Ind. T.) 76 S. W. 253; McFarlane v. Kirby, 28 App. D. C. 391; Chambers v. Irish, 132 Iowa, 319, 109 N. W. 787; Gies v. Storz Brew. Co., 75 Neb. 698, 106 N. W. 775; Ellis v. Fitzpatrick, 55 C. C. A. 260, 118 Fed. 430; Washington v. Moore, 84 Ark. 220, 105 S. W. 253, 120 Am. St. Rep. 29.

²¹⁹ See post, § 277, at notes 393-397.

²²⁰ See ante, § 78 a.

²²¹ For modern cases of estoppel by indenture, see Parker v. Man-

to the effect that if the possession is in a third person claiming by title paramount, the lessee may assert this in defense to the action for rent,²²² and in some jurisdictions he may assert in defense to such action that the possession is in a third person who has no right thereto.²²³ Regarding "seisin" and "possession" as synonymous, which they are, for most purposes,²²⁴ the modern rule, except, in some states, as regards possession by a wrongdoer, seems to be tantamount to the old rule, with the addition perhaps that now the fact that the lease is under seal does not preclude the lessee from showing an adverse possession, as it did at common law. That is, while formerly, if one took a lease by indenture, he was bound for the rent even though the lessor, having no possession, could not give him possession, the present rule is possibly different. In the modern cases deciding that such adverse possession in another is a defense to the claim for rent, there is no suggestion that it would be otherwise were the lease by indenture.

As we have previously undertaken to show, the old rule as to the right of the lessee, when the lease was not under seal, to plead that the lessor had nothing in the tenements, had no reference to the question whether the lessee could show that a third person had a right, either of entry or of action, which could be effectively asserted as against the lessor and those claiming under him. So far as appears from the cases, such a defense to an action for rent was never suggested in former times, but with the growth of the conception of ownership of land apart from seisin or possession, the attempt to assert such a defense has become by no means unusual, and it has frequently been decided to be inadmissible, the courts ordinarily stating this as merely one application of the asserted rule that the tenant is estopped to deny the lessor's title.²²⁵

ning, 7 Term R. 537; Wilkins v. Q. B. Div. 658; Perkins v. Governor, Wingate, 6 Term R. 62; Cuthbertson v. Irving, 6 Hurl. & N. 135.

²²² See post, § 182 a.

²²³ See post, § 182 b.

²²⁴ See Prof. Maitland's article "The Mystery of Seisin," 2 Law Quart. Rev. 481.

²²⁵ Partington v. Woodcock, 4 Law J. K. B. 239; Cook v. Whellock, 24

Minor (Ala.) 352; Nolen v. Royston, 36 Ark. 561; Lataillarde v. Santa Barbara Gas Co., 58 Cal. 4; Lyon v. Washburn, 3 Colo. 201; Palmer v. Melson, 76 Ga. 803; Pearce v. Pearce, 83 Ill. App. 77; Mackin v. Haven, 187 Ill. 480, 58 N. E. 448; Longfellow v. Longfellow, 54 Me. 240; Stagg v. Eureka Tanning & Currying Co., 56

While, as observed above, the preclusion of the tenant to deny his landlord's title in an action of ejectment is properly termed "estoppel," it is difficult to see the applicability of such a term in connection with an action for rent. The reason that the lessee, or the latter's assignee, cannot attack the landlord's title in an action on a contract to pay rent is, it is submitted, merely that the law does not recognize a lack of title in the lessor, not resulting in any interference with possession under the lease, as a ground for the repudiation of the contract.²²⁶ If this exclusion

Mo. 317; *Morrison v. Bassett*, 26 Minn. 235, 2 N. W. 851; *Mosher v. Cole*, 50 Neb. 636, 70 N. W. 275; *Allen v. Hall*, 64 Neb. 256, 89 N. W. 803; *Hatch v. Bullock*, 57 N. H. 15; *Prevot v. Lawrence*, 51 N. Y. 219; *Bigler v. Furman*, 58 Barb. (N. Y.) 545; *George A. Fuller Co. v. Manhattan Const. Co.*, 88 N. Y. Supp. 1049; *Hamer v. McCall*, 121 N. C. 196, 28 S. E. 297; *Shell v. West*, 130 N. C. 171, 41 S. E. 65; *Nearing v. Coop*, 6 N. D. 345, 70 N. W. 1044; *Howard v. Murphy*, 23 Pa. 173; *Mineral R. & Min. Co. v. Flaherty*, 24 Pa. Super. Ct. 236; *Williams v. Wait*, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768; *Moffatt v. Sydnor*, 13 Tex. 628; *Lyles v. Murphy*, 38 Tex. 75; *Tryon v. Davis*, 8 Wash. 106.

So the tenant cannot assert in defense to an action for rent by joint lessors that one of them had no title. *Moore v. Gair*, 108 App. Div. 23, 95 N. Y. Supp. 475.

In *Borlan v. Box*, 62 Ala. 87, a lessee was allowed, in an action for rent, to show that plaintiffs, who had leased the land to him as being school lands belonging to the township of which they were trustees, were not entitled to the rent because the land belonged to another township at the time of the lease, the trustees of which latter township also claimed the rent. The court

merely says that this was not a denial of the landlord's title, and gives no intelligible explanation of its position.

In *Beck v. Minnesota & Western Grain Co.*, 131 Iowa, 62, 107 N. W. 1032, it is said that since the local statute provides that a consideration is implied from the fact that a contract is in writing, a tenant under a written lease cannot assert in defense to a claim for rent a lack of consideration arising from the lessor's want of title. In reference to this it may be said that the making of the lease constitutes a consideration for the promise to pay rent. The implication that apart from such a statute, or in the case of an oral lease, the tenant could assert the lessor's lack of title in defense to rent, is obviously not in accord with the authorities.

²²⁶ This view is explicitly stated in *Long v. Douglass*, 59 Tenn. (12 Heisk.) 147, it being there said that, in an action against a tenant for breach of his contract to pay rent by making certain improvements, he cannot defend by showing that the title was not in plaintiff, not for the reason that he is estopped to deny the latter's title, but because the question of such title is not relevant. Somewhat similarly it is stated, in *Cross v. Freeman*, 22 Tex.

of an inadmissible defense to an action for rent is to be expressed in terms of estoppel, so might, it seems, any inadmissible defense to an action to enforce any obligation. In the case of the common-law action of debt for rent, the lessee's liability is not based upon a contract but upon the reservation of rent,²²⁷ and the action is proprietary in character; but in the case of such action, as in that of an action on the contract to pay rent, the reason that the lessee can not defend by showing that there is an outstanding paramount title is not, it is conceived, because he is "estopped" to do so, but the reason is rather that the law does not recognize such a defense to an action by the lessor to recover what, by the terms of the lease, belong to him. The exclusion of this defense in an action for rent is, it may be remarked, quite analogous to the exclusion of a like defense in an action for the purchase money of property conveyed in fee simple, but such a defense in the latter case is, ordinarily at least, not referred to as a case of estoppel.

An estoppel *in pais* is necessarily based on some act on the part of the person estopped (or of one in privity with him), and the only acts on the part of the tenant on which the estoppel could possibly be based, for the purposes of an action for rent, are the execution or acceptance of the lease, his acceptance of an assignment thereof, or his entry into possession. To say that the lessee (or his assignee) is estopped by his execution or acceptance of the lease (or by his acceptance of the assignment thereof) is an involved, and indeed incorrect, mode of stating that, as a party thereto, he is bound by the contract for the payment of rent, or by his consent to the reservation of rent. On the other hand, to say that he is estopped in this regard by his acquisition of possession is, it is submitted, incorrect for the reason that he has no right to make such a defense even though he does not go into possession.²²⁸ If it be said that he is estopped by his acquisition, not of the actual possession, but of the right of possession, this is equivalent merely to a statement that he is estopped by

Civ. App. 299, 54 S. W. 246, that a person competent to contract may bind himself to pay rent for the use of property to which the lessor has no title or right. And in *Hill v. Williams*, 41 S. C. 134, 19 S. E. 290, it is said the defendant cannot raise the issue of title in an action for rent, no eviction being claimed.

²²⁷ See post, § 171, at notes 122-125.

²²⁸ See post, at notes 231-236 b.

reason of his having become a party to the lease, which means that he is bound by the provisions thereof with reference to the terms of the letting, including that as to the payment of rent. The inability of the lessee or his assignee to assert the lessor's lack of title is, it is conceived, entirely independent of the doctrine of estoppel, and is the result merely of the fact that the stipulation for the payment of rent is absolute in terms and contains no exception in his favor in case the lessor's title is defective. If it did contain such an exception, he would, it can hardly be doubted, have a right to assert this in defense to rent,²²⁹ a consideration which tends strongly to support the view that his preclusion otherwise to assert it is the result of the stipulation into which he has entered and not of the doctrine of estoppel. Another consideration of the same character is that the lessee can show that his acceptance of the lease and assent to the stipulation for rent were procured by representations as to the lessor's title, and that these representations were untrue.²³⁰

The exclusion of this defense in an action of ejectment is evidently based on the fact that the lessee has acquired possession from the lessor. In the action for the rent the lessee's acquisition of actual possession seems properly to have no bearing on the admissibility of the defense. As has been remarked judicially,²³¹ "there would not be much appearance of justice in holding that where one has taken a written lease of premises and agreed to pay the rent, but has not thought proper to avail himself of the right he had thus contracted for by going into possession, when he might have done so without hinderance from any one, he can defend against his engagement by showing that there was a defect in the lessor's title," and there are decisions apparently in accord with this statement,²³² though there are other decisions²³³

²²⁹ In *Wood v. Chambers*, 3 Rich. Law (S. C.) 150, it was held that the defendant could show that the lessor agreed not to claim rent if his title turned out to be defective, and that it did so turn out. And see ante, at notes 215-217.

²³⁰ See *Finch v. Causey*, 107 Va. 124, 57 S. E. 562.

²³¹ Per Denio, C. J., in *Vernam v. Smith*, 15 N. Y. 327.

²³² *Jackson v. Whedon*, 1 E. D. Smith (N. Y.) 141; *Bigler v. Furman*, 58 Barb. (N. Y.) 545; *Howard v. Murphy*, 23 Pa. 173. In *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134, it was held that it was no defense to an action for rent that the lessor did not have title to part of the premises described in the lease and that the lessee did not enter thereon.

²³³ *Andriot v. Lawrence*, 33 Barb.

as well as occasional *dicta*²³⁴ apparently opposed thereto. Occasionally it is said that the lessee, "having taken possession under the lease," cannot defend against the claim for rent on account of defects in the lessor's title without, however, any direct statement that if he did not choose to take possession he could make such defense.²³⁵ This statement may perhaps have reference to the decisions, hereafter referred to,²³⁶ that the lessee may refuse to pay rent if prevented from obtaining possession by one having paramount title. If the view is adopted that the lessee's pre-

(N. Y.) 142; District of Columbia v. May v. Trye, Freem. 447, merely Johnson, 12 D. C. (1 Mackey) 51. contains a dictum that if a lease is And Hawkins v. Collier, 101 Ga. 145, void, no action lies on a covenant therein; and Jevens v. Harridge, 1 23 S. E. 632, is perhaps to the same Wms. Saund. 6, 2 Keb. 102 (s. c. 1 effect.

In Wright v. Graves, 80 Ala. 416, Sid. 308), is a decision to the same it is decided that a sublessee who effect (ante, § 54, note 66). Port- has not entered into possession may more v. Bunn, 1 Barn. & C. 694, 3 show, as against an action on his Dowl. & R. 145, also cited in support covenant by the sublessor, that the of the statement, is stated elsewhere latter was merely a tenant at will, (post, § 160, note 505). Of the Amer- and consequently without power to ican cases referred to by Mr. Taylor, make the lease, quoting the state- Field v. Herrick, 14 Ill. App. (14 ment in Taylor, Landl. & Ten. § 384, Bradw.) 181, was a case in which the that "rent being an equivalent for an owner of the paramount title ex- interest enjoyed, a covenant for its cluded the lessee from possession. payment cannot be enforced if no Milliken v. Thorndike, 103 Mass. 382, estate passed under the lease and involved merely the question of the tenant has not occupied the fraud on the part of the lessor in premises, since there is no legal inducing the lessee to sign the lease, consideration for the engagement." Smith v. Newcastle, 48 N. H. 70; Of the English cases cited by Mr. Learned v. Ryder, 61 Barb. (N. Y.) Taylor in support of this propo- 552, and Cleves v. Willoughby, 7 Hill sition, Frontin v. Small, 2 Ld. Raym. (N. Y.) 83, likewise involve ques- 1418, decided that one who had a tions of an entirely different nature, power of attorney from the owner and they furnish no support for the to execute a lease could not, after statement quoted.

(erroneously) executing it in his ²³⁴ Smith v. Scott, 6 C. B. (N. S.) own name, sue on the covenant to 771, 781, per Willes, J.; Trustees of pay rent to the owner. (Ante, note 190.) In Knipe v. Palmer, 2 Wils. Green Tp. v. Robinson, Wright (Ohio) 436.

130, the lessee did take possession ²³⁵ See Cressler v. Williams, 80 Ind. 366; Ankeny v. Pierce, 1 Ill. (Breese) 262; Oliver v. Gary, 42 Williams, 3 Lev. 193, involved merely the sufficiency of the replication to Kan. 623, 22 Pac. 733.

the plea of *nil habuit in tenementis*. ²³⁶ See post, § 182 a (1).

clusion to deny the lessor's title is to commence only on the latter's taking of possession, it would seem that it should end immediately on his relinquishment of possession, whether before or after the end of the agreed term, and as regards rent already accrued at the time of such relinquishment as well as that still to accrue. But there are, it seems, no decisions or even *dicta* to the effect that the tenant may deny the lessor's title upon relinquishing possession. Such an assertion cannot well be regarded as involved in the statement, sometimes made in connection with actions other than for rent, that the estoppel terminates with the relinquishment of possession.^{236a} That the exclusion of this defense is entirely independent of the question of possession would seem to be involved in occasional decisions that lack of title in the lessor of an incorporeal thing, such as a fishery, is no defense to an action for the agreed rent.^{236b} There can, strictly speaking, be no possession of such a thing.

(4) **Action for use and occupation.** The inability of the tenant, in an action for use and occupation, to question the landlord's title was, as we have before seen, asserted quite early in the history of this action,²³⁷ and this view has been adhered to in the later cases, in some as an application of a general doctrine precluding the denial by the tenant of his landlord's title,²³⁸ and in others as a rule applicable to this particular action.²³⁹

So far as concerns the action of *indebitatus assumpsit* based on the statute of 11 Geo. 2, c. 19, § 14, the defendant's inability to question the landlord's title seems to be a result of the language

^{236a} *Zimmerman v. Marchland*, 23 Ind. 474; *Smith v. Mundy*, 18 Ala. 182, 52 Am. Dec. 221; *Willson v. Cleaveland*, 30 Cal. 192.

^{236b} *Inhabitants of Watertown v. White*, 13 Mass. 477; *Inhabitants of Eastham v. Anderson*, 119 Mass. 526. The case of *Portmore v. Bunn*, 1 Barn. & C. 694, 3 Dowl. & R. 145, is not, it is conceived, to be regarded as involving a contrary view. (See post, § 160, note 505). The opinions in the case are, however, obscure.

²³⁷ See ante, § 78 a, note 203.

²³⁸ *Fordyce v. Young*, 39 Ark. 135; *Moore v. Beasley*, 3 Ohio, 294.

²³⁹ *Reynolds v. Lewis*, 59 Cal. 20; *Codman v. Jenkins*, 14 Mass. 93; *Cobb v. Arnold*, 49 Mass. (8 Metc.) 398; *Gray v. Johnson*, 14 N. H. 414; *Vernam v. Smith*, 15 N. Y. 327; *Steen v. Wadsworth*, 17 Vt. 297. The expressions "estop," or "estoppel," are not used in any of these decisions. In *City of New London v. Emerson*, 2 Root (Conn.) 372, it is decided that lack of title in the landlord is a defense to such an action.

of the statute itself,²⁴⁰ and when the validity of the action of debt for use and occupation became fully recognized,²⁴¹ it was held that this action, being similar in character to the action of assumpsit, was subject to the same rule in this regard.²⁴² Apart from any statute, however, the very nature of an action for use and occupation would seem to exclude a defense of lack of title in the plaintiff, it being based on a promise, expressed or implied in fact, to pay to the latter the value of the use and occupation of the premises, possession of which was given him by the plaintiff. If he actually obtains that for which he promised to pay, the fact that the plaintiff had no right to give it to him is no reason for the repudiation of his contract.²⁴³ This is presumably the ground on which such a defense was excluded, before the statute, in an action of special assumpsit for use and occupation.²⁴⁴

(5) **Action arising from distress.** In replevin for goods distrained, as before stated, the language of the statute of 11 Geo. 2, c. 19, § 22, was held to preclude the plea of *nil habuit in tenementis* to the avowry.²⁴⁵ In this country there are several decisions to the effect that, in proceedings based on a distress, the person in possession as tenant cannot question the landlord's title, this view being stated as an application of the general rule that the tenant is precluded from disputing his landlord's title.²⁴⁶ These decisions, however, all involved, it seems, cases in which

²⁴⁰ See ante, § 78 a. In *Dolby v. Iles*, 11 Adol. & E. 335, Denman, C.

J., said that he was of opinion that the term "landlord" in the statute "meant the person whom the defendant has treated as the landlord," and in reply to the assertion of counsel that the term "landlord" must mean the person having the legal estate, Coleridge, J., said that "that cannot be the only meaning; otherwise no one who has not the legal estate could bring an action for use and occupation." The decision was rendered in favor of the defendant without any further expression of opinion.

²⁴¹ See post, § 317.

²⁴² *Curtis v. Spitty*, 1 Bing. N. C. 15.

²⁴³ "The action of assumpsit for use and occupation depends not on the validity of the plaintiff's title, but on the contract between the parties, which may be either expressed or implied." Hubbard, J., in *Cobb v. Arnold*, 49 Mass. (8 Metc.) 398.

²⁴⁴ *Richard v. Holditch*, referred to in *Lewis v. Willis*, 1 Wils. 314. See ante, note 205.

²⁴⁵ *Syllivan v. Stradling*, 2 Wils. 208.

²⁴⁶ *Giles v. Ebsworth*, 10 Md. 333; *Ward v. City of Philadelphia*, 18 Wkly. Notes Cas. (Pa.) 561; *Alwood v. Mansfield*, 33 Ill. 452.

the lessor was holding the premises under claim of right, and adversely to the true owner, and consequently he had an estate in fee simple by wrong.²⁴⁷ In such a case, apart from any statute or any general rule of estoppel or preclusion, on the making of a lease by the disseisor, a reversion would exist in him sufficient to support the right of distress.²⁴⁸

If the land is, at the time of the lease, in the adverse possession of another than the lessor, the question of the latter's title would not be likely to arise in connection with distress proceedings, since the lessee would not have possession and, furthermore, in most jurisdictions, would not be liable for any rent.²⁴⁹

Apart from cases governed by the English statute above referred to or by some state statute bearing on the subject, those in which the lessor can be regarded as having a fee simple by wrong, and perhaps those in which, the lease being by indenture, an estoppel "by deed" may be asserted, it is difficult to see why one who enters under a conveyance from another, even though it be in terms a lease, should be precluded from asserting that the grantor has no estate and that he has consequently no right of distress. It appears to be agreed that an asserted tenant may show that there is no right of distress in one claiming as landlord for the reason that the latter has no greater estate than that conveyed by him, that is, that there was an assignment and not a lease by him,²⁵⁰ and so it seems that the asserted tenant should be allowed, except in the cases above mentioned, to show that there is no right of distress for the reason that the person claiming as landlord has no estate whatever. It has, however, been decided in two recent English cases that if one in possession of land attorned to a person having no title to the land, the latter had a reversion "by estoppel" which would support a distress. Since an attornment is, in legal effect, no more than the acceptance of a lease, these cases would seem opposed to the suggestions above made. They are hereafter discussed at some length.²⁵¹

(6) **Miscellaneous classes of actions.** The asserted general rule that the tenant is estopped or precluded to deny the landlord's title has been applied in some classes of actions other than

²⁴⁷ See ante, 78 a.

²⁴⁸ See post, § 151.

²⁴⁹ See post, § 182 a (2) (3).

²⁵⁰ See post, § 151, at note 33.

²⁵¹ See post, § 78 k (3).

those above mentioned. It has been applied in an action of trover against the tenant by the landlord for wood²⁵² or manure²⁵³ wrongfully carried away from the premises by the tenant. In such case the tenant having obtained possession of the wood or manure, as of the land itself, by an implied admission that it belongs to the landlord, cannot convert it and then repudiate liability on the ground that the lessor has no title thereto. This is merely an application of the doctrine of estoppel *in pais*, similar to that involved in connection with an action of ejectment. And the same doctrine is properly applicable in favor of a landlord seeking an injunction against waste.²⁵⁴ Having procured possession of the land by admitting it to belong to the lessor, the tenant cannot contend that the lessor is not the owner for the purpose of restraining its improper use by the tenant. And, likewise, a decision that if the lessor, at the end of the term created by the lease, ousted the lessee, the latter could not, in order to support an action of trespass on account of the ouster, show that the lessor had no title,²⁵⁵ evidently involved an application of the same principle of estoppel, based upon the acquisition of possession by means of an admission of the lessor's title.

There are some classes of actions in which the asserted doctrine of the estoppel of a tenant to deny his landlord's title has been applied, where the propriety of its application would seem to be somewhat open to question. It has, for instance, been decided that a tenant cannot question the landlord's title by a proceeding to set aside a conveyance without first relinquishing possession.²⁵⁶ So it has been decided that, without first relinquishing possession, the tenant cannot bring a proceeding for partition against the landlord,²⁵⁷ or a proceeding for the specific performance of a contract of sale made by the lessor before the

²⁵² Brooks v. Rogers, 101 Ala. 111, 55 N. E. 373; Van Cleave v. Wilson, 13 So. 386. So in the case of an action for removal of a house. Ren-
alds v. Offitt, 15 U. C. Q. B. 221.

²⁵³ Barlow v. Dahm, 97 Ala. 414, 12 So. 293, 38 Am. St. Rep. 192;
Fleming v. Mills, 182 Ill. 464, 55 N. E. 373; Henning v. Warner, 109 N. C. 406, 14 S. E. 317 (semble).

²⁵⁴ Plumer v. Plumer, 30 N. H. 558.

²⁵⁵ Parker v. Raymond, 14 Mo. 535.

²⁵⁶ Delaney v. Fox, 2 C. B. (N. S.) 768.

²⁵⁷ Fleming v. Mills, 182 Ill. 464,

lease,²⁵⁸ to redeem from a tax sale,²⁵⁹ or to enforce a trust.²⁶⁰ In any of such classes of actions, apparently, the right of the landlord as regards the rent for the residue of the term could be secured by an appropriate provision in the decree, and, this being done, he could suffer no injury from the fact that the proceeding is instituted before instead of after the expiration of the tenancy. In all these cases the question arises, if the tenant is estopped to deny his landlord's title, on what act of the tenant is the estoppel based. It cannot well be based on his acquisition of possession, since the fact that he is in possession does not in any way prejudice the landlord's defense to the suit, it being indeed immaterial, for the purpose of a suit not necessarily involving the immediate possession, who happen to be in possession of the premises at the time of its commencement. And the fact that he has accepted or executed the lease, however this may operate to preclude him from denying the lessor's title in defense to an action by the landlord, as landlord, should not, it seems, preclude him from asserting, by a proceeding of an equitable character, a right to an estate in the land to vest in possession after the expiration of the tenancy.

There is at least one decision to the effect that the tenant cannot question the landlord's title by means of a suit against the latter to quiet title.²⁶¹ So far as possession is, in the particular jurisdiction, regarded as a prerequisite to the maintenance of such a suit, and it is further considered that possession acquired by unfair means merely for the purpose of filing the bill is insufficient for the purpose,^{261a} the tenant's right to maintain

²⁵⁸ *Davis v. Williams*, 130 Ala. 530, 30 So. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55. And see *McWhorter v. Stein* (Ala.) 39 So. 617.

²⁵⁹ *Stout v. Merrill*, 35 Iowa, 47.

In *Whitaker v. Whitaker* (Tenn.) 62 S. W. 664, it is said that a bill of interpleader will not lie in favor of a tenant against his landlord, since it involves a dispute of his landlord's title.

²⁶⁰ *Courvoisier v. Bouvier*, 3 Neb. 55.

²⁶¹ *Ryerson v. Eldred*, 18 Mich. 12.

In *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856, it was decided that the lessee was estopped to claim the ownership of land in a suit by him against the lessor to quiet title, but the estoppel was based on various transactions between the parties other than the lease, and it is not suggested that he was estopped because he was lessee.

^{261a} 2 *Pomeroy, Equitable Remedies*, § 737. It has been stated that the lessee cannot use the possession acquired under the lease as a basis

such a suit would obviously be considerably restricted. But, apart from such requirement of a fair and rightful possession, there seems no particular reason for denying to a tenant the privilege of having the title to the premises settled during the tenancy.

As regards actions by the lessor for breach of a covenant, other than that for rent, the tenant's inability to assert in defense the lessor's lack of title arises from the same consideration as applies in the case of an action for rent, that he should perform his contract even though the lessor's title is imperfect, and, it is conceived, the doctrine of estoppel has no application.^{261b}

In a suit by the tenant against the landlord for breach of a covenant for title, the former can, it is evident, deny the lessor's title, the suit being indeed based on such denial. A suit by him to rescind the lease for misrepresentations as to title can likewise, it is evident, succeed only upon proof of lack of title.

(7) **Action by or against stranger.** There is no rule which precludes the tenant, in a controversy between the landlord and a third person, in which the tenant has no interest, from giving evidence adverse to the landlord's title.²⁶² And so, as against a stranger, a tenant may assert title in himself.²⁶³

d. **Evidence as to title.** The fact that the lessor's lack of title appears on the face of the instrument of lease has been held not to affect the general rule or rules precluding the tenant from showing such lack of title in defense to an action for rent²⁶⁴ or for possession.²⁶⁵ And the same view has been applied in proceedings arising from a distress.²⁶⁶ That the language of the lease thus shows knowledge on the part of both lessor and lessee of the defective state of the former's title is evidently no reason for excusing the lessee from his obligation to relinquish posses-

for a proceeding against the lessor to quiet title. *Engle v. Tennis Coal Co.*, 30 Ky. Law Rep. 1269, 101 S. W. 309. ²⁶² *Bartley v. McKinney*, 23 Grat. (Va.) 750; *South v. Deaton*, 24 Ky. Law Rep. 196, 68 S. W. 137.

²⁶³ *Cole v. Maxfield*, 13 Minn. 235 (Gil. 220); *Thomas v. Young*, 79 Conn. 493, 65 Atl. 955.

²⁶⁴ *Duke v. Ashby*, 7 Hurl. & N. 600. See *Bohn v. Hatch*, 39 N. Y. St. Rep. 404, 15 N. Y. Supp. 550.

²⁶⁵ *Tilyou v. Reynolds*, 108 N. Y. 558, 15 N. E. 534.

²⁶⁶ See post, notes 399, 400.

lord's title.

sion at the end of the term to the lessor from whom he obtained it, and to pay rent in accordance with the obligation assumed by him. And so far as in any other class of action there may be room for the application of the principle of estoppel *in pais*, that the defect of title appears on the face of the instrument would seem clearly immaterial. That the lessee actually knows, at the time of the lease, of the weakness of the lessor's title, would seem to constitute a reason for enforcing with even additional strictness, as against him or those claiming under him, any obligations assumed by him under the lease, or imposed on him, in connection therewith, by operation of law.

The applicability of the rule of preclusion is not affected by the fact that the defective character of his title appears from the lessor's evidence²⁶⁷ or from his admissions.²⁶⁸

It is obvious that the fact that the defendant, in any of the various actions named, is precluded, when he stands in the position of tenant to the plaintiff, from questioning the lessor's title, has the necessary result of dispensing with any proof of title in the lessor in order to support the action.²⁶⁹

It is obvious that the fact that the defendant, in any of the deny the lessor's title applies to the same extent in equity as at law.²⁷⁰ And the tenant cannot avoid the effect of the estoppel by bringing a proceeding in equity to restrain the action by the landlord.²⁷¹ Were the rule otherwise, so that the tenant, by going into equity, could, on the ground that another had a paramount title, restrain the landlord from maintaining an action against him at law, it is evident that the rule or rules in question

²⁶⁷ Gray v. Johnson, 14 N. H. 414; Lett v. Robinson, 52 Neb. 715, 72 N. Dolby v. Iles, 11 Adol. & E. 335; W. 1053; Thompson v. Graham, 9 Cooper v. Blandy, 1 Bing. N. C. 45. Phila. (Pa.) 53; Congregational Soc.

²⁶⁸ Francis v. Harvey, 4 Mees. & W. 331. v. Walker, 18 Vt. 600; Browne v. Haseltine, 9 S. D. 524, 70 N. W. 648; Stover v. Davis, 57 W. Va. 196, 49 S. E. 1023.

It is immaterial that the lessor said, when making the lease, that the property belonged to some person unknown. Baldwin v. Foster, 21 U. C. Q. B. 152.

²⁶⁹ Mattox v. Helm, 15 Ky. (5 Litt.) 185, 15 Am. Dec. 64; Cressler v. Williams, 80 Ind. 366; Kiernan v. Terry, 26 Or. 494, 38 Pac. 671; Bart-

²⁷⁰ Peyton v. Stith, 30 U. S. (5 Pet.) 485; Davis v. Williams, 130 Ala. 530, 30 So. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55; Betts v. Wurth, 32 N. J. Eq. (5 Stew.) 82.

²⁷¹ Jordan v. Katz, 89 Va. 628, 16 S. E. 866; Homan v. Moore, 4 Price,

would be practically nugatory. In North Carolina, however, it appears to be assumed that in equity the tenant may assert rights in himself to the premises which, apart from statute, he could not assert at law.²⁷²

f. **Existence of relation of tenancy.** There are occasional and somewhat obscure intimations that the preclusion of the tenant to deny the landlord's title exists only when the "conventional relation" of landlord and tenant exists,²⁷³ meaning by this, apparently, such a relation resulting from agreement. As the creation of the relation of landlord and tenant otherwise than as a result of agreement is approximately impossible,²⁷⁴ it seems unnecessary to consider the matter from this point of view.

The rule which precludes the tenant from retaining possession by showing defects in the lessor's title, or a rule analogous thereto, has been applied as against one who, having a contract for the purchase of land, entered into possession by his vendor's permission.²⁷⁵ Whether he is properly a tenant of the vendor is,

5 (injunction against distress); *Bohn v. Hatch*, 39 N. Y. St. Rep. 404, 15 N. Y. Supp. 550.

²⁷² See post, § 78 i (2), at notes 350-352.

²⁷³ See *Jackson v. Harsen*, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517; *Sands v. Hughes*, 53 N. Y. 287. These cases actually involved the question of adverse possession, and it is not entirely clear that the opinions intended any reference to the doctrine here under discussion, though the latter case is cited as bearing on that question in *Hoffman v. Hoffman*, 44 N. Y. St. Rep. 660, 13 N. Y. Supp. 387.

In *Vance's Heirs v. Johnson*, 29 Tenn. (10 Humph.) 214, that the rule of estoppel applies only to the "conventional" relation of landlord and tenant is asserted, and it is there decided that, conceding that one making a deed of trust to secure debts was a tenant of the grantee therein, so long as the grantor retained possession, he was not within the rule

of estoppel, and could, by taking a lease from another, give such other adverse possession as against his grantee. The question really involved in this case was not whether the maker of the trust deed, assuming that he was a tenant, was precluded from denying the landlord's title, but whether he could, by attorning to another, give the latter adverse possession. The question of "estoppel" seems to have no bearing upon this point.

²⁷⁴ See ante, § 17.

²⁷⁵ *Bigelow, Estoppel* (5th Ed.) 547; *Heermans v. Schmaltz*, 7 Fed. 566; *Hill v. Winn*, 60 Ga. 337; *Ogden v. Walker's Heirs*, 36 Ky. (6 Dana) 420; *Kirk v. Taylor*, 47 Ky. (8 B. Mon.) 262; *Jackson v. Hotchkiss*, 6 Cow. (N. Y.) 401; *Pyles v. Reeve*, 4 Rich. Law (S. C.) 555; *Dowd v. Gilchrist*, 46 N. C. (1 Jones Law) 353; *Wolf v. Holton*, 104 Mich. 107, 62 N. W. 174; *Baumgarten v. Smith*, 37 Tex. 439. The applicability of the rule may, it has been

as has been before shown,²⁷⁶ a question on which the authorities are not in accord.

A similar rule applies when one enters into land, not as tenant, but under a license merely from the person previously in possession, as, for instance, in the capacity of a lodger or servant, and he cannot refuse to relinquish possession to his licensor on the ground that the latter has no title to the land,²⁷⁷ nor can he, it has been held, defend an action for injury to the land on that ground.²⁷⁸ Likewise, there are cases to the effect that where a husband, or one claiming under him, obtained possession of property of which the wife was seised in fee, by reason of his legal life estate in his wife's freehold property, he was, by a rule analogous to that which operates between landlord and tenant, precluded from questioning the title of the wife.²⁷⁹ And it has been held

decided, be altered by fraud on the part of the vendor. *Hammers v. Hanrick*, 69 Tex. 412, 7 S. W. 345.

In *James v. Patterson*, 31 Tenn. (1 Swan) 312, 55 Am. Dec. 737; *Gudger v. Barnes*, 51 Tenn. (4 Heisk.) 570; *Baker v. Hale*, 65 Tenn. (6 Baxt.) 46, it is said that the purchaser in possession is not estopped to question the vendor's title. The question actually involved in these cases was, however, a different one, that of adverse possession.

²⁷⁶ See ante, § 43 a.

²⁷⁷ *Doe d. Johnson v. Baytup*, 3 Adol. & E. 188; *Bigelow, Estoppel* (5th Ed.) 542.

So a pastor let into possession of the church parsonage as part of his compensation could not refuse to redeliver possession on account of lack of title in the church. *West Kush-koning Congregation v. Ottesen*, 80 Wis. 62.

Hoffman v. Hoffman, 44 N. Y. St. Rep. 660, 18 N. Y. Supp. 387, is to the effect that one entering land under an agreement to work it on shares is not estopped to assert his own title in an action for possession

by the owner. This decision is based on the statement in *Sands v. Hughes*, 53 N. Y. 287, that the estoppel exists only when the "conventional relation of landlord and tenant exists," by which is meant it seems, merely that in order to apply the doctrine of estoppel as between landlord and tenant, the relation must have been the result of agreement, which it almost invariably is (*Ante*, at note 273). The decision in *Hoffman v. Hoffman*, 44 N. Y. St. Rep. 660, 18 N. Y. Supp. 387, was that the cultivator could show title in himself in defense to an action for possession, and this result corresponds with the English rule that a tenant in possession may so do. *Post*, § 78 i (2), at note 341. The reason given for the decision is obviously insufficient. He could not have defended on the ground that a third person had better title.

²⁷⁸ *Dills v. Hampton*, 92 N. C. 565.

²⁷⁹ *Morgan v. Larned*, 51 Mass. (10 Metc.) 50; *Griffin v. Sheffield*, 38 Miss. (9 George) 359, 77 Am. Dec. 646. In the latter case the decision is based on the theory that the gran-

that one who has taken and held possession under a devise or settlement giving him an estate for life, or a person claiming under him, cannot retain possession as against the remainderman.²⁸⁰ Such a case has been said to be "like that of a tenant coming in under a landlord; he is estopped from denying his landlord's title."²⁸¹ What is practically the same principle has been applied in connection with personal chattels, for instance, as against a bailee or personal representative obtaining possession of the property for a limited period only.²⁸² All these cases involve the application of a general rule, applied likewise in an action by a landlord to recover possession, that one who has obtained possession by means of a promise, express or tacit, to relinquish possession after a certain time, cannot refuse so to do by asserting that a person other than the one from whom he acquired the possession was entitled thereto.

Apart from cases of the character referred to, one is evidently not subject to any rule precluding a tenant from denying his landlord's title, if he is not the tenant of the person claiming as landlord, but is in possession in his own right, or as the tenant of another person, and he is always entitled to show that such is his possession.²⁸³

It has been decided that where one conveyed property to another and took a lease from his grantee, he could show, in defense to an action for rent, that the conveyance was for the purpose of security, and that the debt had been paid, the court saying that the rule precluding the tenant from denying his land-

tee of the husband holding over after the husband's death was a tenant at sufferance "of" the wife. This is, it is submitted, erroneous. He was not a tenant of the wife during the husband's life, and he did not become so on the latter's death. See ante, § 15 a, to the effect that a tenant at sufferance is not a tenant "of" any one.

²⁸⁰ *Dalton v. Fitzgerald* [1897] 1 Ch. 440; *Id.* [1897] 2 Ch. 86; *Board v. Board*, L. R. 9 Q. B. 48.

²⁸¹ *Blackburn, J.*, in the last cited case.

²⁸² *Bigelow, Estoppel*, 548-554.

²⁸³ *Wilborn v. Whitfield*, 44 Ga. 51; *Davis v. Delaware & H. Canal Co.*, 109 N. Y. 47, 15 N. E. 873, 4 Am. St. Rep. 418; *Buell v. Cook*, 4 Conn. 238; *Corrigan v. Riley*, 26 N. J. Law (2 Dutch.) 79; *Miller v. McBrier*, 14 Serg. & R. (Pa.) 382; *Cambridge Lodge No. 9 v. Routh*, 163 Ind. 1, 71 N. E. 148. So in an action for the possession of land, the defendant was allowed to show that he did not enter under the plaintiff, but that he was forcibly placed there by another person, in removing him from neighboring land. *Foust v. Trice*, 53 N. C. (8 Jones) 290.

lord's title should not be extended so as to deprive him of the right to show what the relation really was.²⁸⁴ Conceding the admissibility of equitable defenses in an action at law, there seems no question as to the correctness of the decision.

The preclusion of the tenant to deny the landlord's title exists in the case of a tenancy at will to the same extent as in the case of any other tenancy.²⁸⁵

g. Invalidity of the lease. The estoppel of one who has obtained possession under a lease from another to assert a defect in the lessor's title in defense to an action for possession would exist though the purported lease is defective in point of form or execution.²⁸⁶ The person so taking possession under another is the latter's tenant, even though merely at will.²⁸⁷ And so the fact that the tenancy is merely at will because of the invalidity of the intended lease would not affect the estoppel of the tenant in connection with other classes of actions, for instance, actions for waste, or of trover for wood cut.²⁸⁸ And, likewise, in actions arising from distress, the fact that the tenancy is, for the reason named, at will merely, cannot give the tenant a right to deny the lessor's title which he would not have in the case of a lease for years.²⁸⁹ As regards the right to maintain an action for rent or for use and occupation, the question of the validity of the lessor's title is, as before stated,²⁹⁰ not a material considera-

²⁸⁴ *Smith v. Smith*, 81 Tex. 45, 16 S. W. 637.

²⁸⁵ *Towne v. Butterfield*, 97 Mass. 105; *Gage v. Campbell*, 131 Mass. 566; *Hammond v. Blue*, 132 Ala. 337, 31 So. 357; *Den d. Bufferlow v. Newson*, 12 N. C. (1 Dev. Law) 208, 17 Am. Dec. 565; *Kelley v. Kelley*, 23 Me. 192. And so it applies as against one entering under a contract for a lease. *Rose v. Davis*, 11 Cal. 133; *Doe d. Bailey v. Foster*, 3 C. B. 215.

²⁸⁶ *Trustees of Caledonia County Grammar School v. Burt*, 11 Vt. 632. That one taking possession under an invalid lease is estopped is stated in *Mauldin v. Cox*, 67 Cal. 387, 7 Pac. 804, though there the question was

merely whether a lessee under a lease of a homestead by the husband without the wife's concurrence could set up adverse possession under the lease against the wife. So *Millett v. Lagomarsino* (Cal.) 38 Pac. 308, where the same statement is made, involved a question of adverse possession merely.

²⁸⁷ See *Ezelle v. Parker*, 41 Miss. 520; *Phillip's Lessee v. Robertson*, 5 Tenn. (4 Hayw.) 154; *Id.*, 6 Tenn. (5 Hayw.) 101; *Adams v. Martin*, 8 Grat. (Va.) 107; *Wood v. Doou-thett*, 44 Tex. 365.

²⁸⁸ See ante, § 78 c (6).

²⁸⁹ See ante, 78 c (5).

²⁹⁰ See ante, § 78 c (3).

tion, and the liability in this regard of one entering under a lease defective in form or execution is independent of whether the title of the intending lessor is or is not defective.²⁹¹ In regard to the right of a tenant to assert defects in the lessor's title when the lease is made for an illegal purpose, the cases are not entirely clear. It has been decided that, in an action for possession at the expiration of the term, the defendant tenant can show that the lease was immediately preceded by a conveyance by him to the lessor, and that the whole transaction constituted in effect a mortgage at usurious interest.²⁹² In another state it has been said that the fact that such a transaction is usurious would prevent the recovery of rent, but would be no defense to an action to recover the premises.²⁹³ Presumably any difference in this latter regard arises from the peculiarities of the statutes as to usury in the different states. If the usurious transaction is entirely void, the tenant could assert his title as it existed before the transaction was entered into, while he could not do so if the usury affects merely the right to recover usurious interest in the form of rent.

On an analogous principle, where the statute made it a criminal offense to establish a ferry without license, it was held that the lessee of a ferry franchise might show in defense to an action for rent that his lessor had no right to the franchise, it being said that "to allow the principle (of estoppel) to govern such a case would be to sacrifice a sound legislative policy to the presumed allegiance which a tenant owes to his landlord."²⁹⁴ But a lessee of land under the Mississippi river was not allowed to retain possession on the ground that the improvements made on the premises obstructed navigation, it being said that, if the public authorities take no steps to remove the alleged intruders, it is not for a private individual to assert the abstract rights of the public for the purpose of repudiating his own obligations.²⁹⁵

²⁹¹ See *Crawford v. Jones*, 54 Ala. 459. *sor as being usurious. Reich v. Cochran*, 151 N. Y. 122, 45 N. E. 367,

²⁹² *People v. Howlett*, 76 N. Y. 574 (summary proceeding); *Tribble v. Anderson*, 63 Ga. 31 (ejectment). ²⁹³ *Den d. King v. Murray*, 28 N. C. (6 Ired. Law) 62.

A judgment in forcible detainer is conclusive for the purposes of a subsequent suit to cancel a lease and the previous conveyance to the les- ²⁹⁴ *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523.

²⁹⁵ *St. Anthony Falls Water Power*

There are some cases in which the courts have refused to apply the generally accepted doctrine of the tenant's preclusion to deny the lessor's title on the ground that to do so would, under the circumstances, have the effect of aiding in the breach of the public land law. These cases will be considered, firstly, as they involved actions by the landlord to recover possession, and secondly, as they involved actions for rent.

It has been considered that one who entered as tenant under a lease from another, who had filed his homestead entry on the land, the lease being made as a cloak for the actual transaction, which was a sale of a homestead prior to the issue of a patent, in violation of law, the lessor could not, after receiving a patent, recover possession, the doctrine of the estoppel of a tenant not applying, since "the lease itself was a fraud upon the government, and was only executed as a pretext to carry out the arrangement" for a sale.²⁹⁶ And where a legislative grant of land to an Indian expressly provided that he should not convey it except by lease for two years, he was held not to be estopped from disputing the title of one to whom he had been induced to convey the land, and from whom he then took a lease, in an action of ejectment by the latter.²⁹⁷ Likewise, it was decided in Pennsylvania that one who took a lease from a person claiming under a so-called "Connecticut title," having subsequently procured a valid title under the state of Pennsylvania, could assert such title in defense to an action of ejectment by the lessor, such a "Connecticut title" being regarded as absolutely invalid.²⁹⁸ In Texas it has been decided that in the case of a lease of state land by an individual having no interest therein, the lessee, having procured title therefrom from the state, could assert it in defense to an action by the lessor for possession.²⁹⁹ And in another state it is intimated

Co. v. Morrison, 12 Minn. 249 (Gil. 1 S. W. 559, where it was held that a purchaser from a squatter on public land who went into possession as purchaser could deny the vendor's title in an action for the purchase money.

²⁹⁶ McKinnis v. Scottish American Mortg. Co., 55 Kan. 259, 39 Pac. 1018. The opinion is obscure on the subject of estoppel. As a matter of fact the defendant had a clear equity to the land, having paid for it and having made valuable improvements by the inducement of plaintiff. See, also, Shorman v. Eakin, 47 Ark. 351,

²⁹⁷ Smythe v. Henry, 41 Fed. 705.
²⁹⁸ Satterlee v. Matthewson, 13 Serg. & R. (Pa.) 133.

²⁹⁹ Welder v. McComb, 10 Tex. Civ. App. 85, 30 S. W. 822. Likewise,

that one taking a lease of public land from a mere "squatter" thereon might refuse to relinquish possession to the latter on the ground that he had thereafter himself obtained title from the government.³⁰⁰ In all but the first of these cases, it will be observed, the decision goes no further, in effect, than to preclude a recovery by the landlord of the possession of the leased premises when they are the property of the tenant as having obtained the legal title or as having an equitable right thereto, and they might, it seems, be supported, without reference to any question of the public land laws, by the application of the English rule, a reasonable one, it is conceived,³⁰¹ that the tenant may, in an action by the landlord for possession, assert a right of possession in himself instead of compelling him to resort to a separate action for this purpose. These cases do not assert, so far at least as the actual decisions therein are involved, that a tenant might refuse to restore the possession of the land to the landlord merely because the title is in the federal or state government, or because the title was obtained by the lessor, or the lease was made, in violation of some statute in reference to public lands. There are, on the contrary, decisions that the tenant cannot assert in defense to an action by the landlord for possession that the title is in the state,³⁰² and such a view is involved in decisions that he cannot assert a title obtained by him from the state since the making of the lease.³⁰³ Likewise, it has been decided that an Indian who had merely a right to share in common with the other members

in *Pain v. Miller*, 35 Tex. 79, it was decided that one who entered on public land under a lease from one who had only taken initial steps to acquire it could himself acquire the land as a homestead. This was a mandamus by such lessee to compel the public surveyor to survey the land for the purpose of a homestead. In *Lang v. Crothers*, 21 Tex. Civ. App. 118, 51 S. W. 271, it was decided that after a purchaser of public land had lost his right by failure to pay interest, his tenant could purchase the land from the state, this decision being based on the theory

that the landlord's title was extinguished. See post, § 78 p. (3).

³⁰⁰ *Peterson v. Kinkead*, 92 Cal. 372, 28 Pac. 568.

³⁰¹ See post, § 78 i (2).

³⁰² *Peterson v. Kinkead*, 92 Cal. 372, 28 Pac. 568; *Ellis v. Fitzpatrick*, 55 C. C. A. 260, 118 Fed. 430, affg. 3 Ind. T. 656, 64 S. W. 567; *Pappe v. Trout*, 3 Okl. 260, 41 Pac. 397; *Shy v. Brockhause*, 7 Okl. 35, 54 Pac. 306; *Young v. Severy*, 5 Okl. 630, 49 Pac. 1024; *Wallbrecht v. Blush*, 43 Colo. 329, 95 Pac. 927.

³⁰³ *Arnold v. Woodard*, 4 Colo. 249; *Jackson v. Harper*, 5 Wend. (N. Y.) 246.

of his tribe in the tribal lands could recover possession from his lessee at the end of the term.³⁰⁴ In one case, however, one who obtained possession under a lease was allowed to show in defense to an action for possession that the land was within an Indian reservation, so that, under the laws of the United States, a settlement thereon by either of the parties to the lease constituted a penal offense.³⁰⁵

In regard to the right of the tenant to assert, in defense to an action for rent, that the land was public land, there is one decision that he is not "estopped" so to do, the statute reserving the land of which the leased premises were a part "for the future disposal of the United States," and declaring that it "should not be entered, located, or appropriated for any other purpose whatever."³⁰⁶ On the other hand, it has been decided that it is no defense to an action for rent that the lessor had no claim to the land except under a lease from an Indian tribe, which lease was in direct violation of a statute of the United States.³⁰⁷ And, likewise, it was decided to be no defense to such an action that the land was tide land, the title to which was in the United States at the time of the lease, the occupancy of the land by private parties never having been objected to and having been subsequently approved by legislative declaration.³⁰⁸

This question of the right of a tenant to refuse to pay rent reserved on a lease of public or Indian land would seem to be one to be decided with reference to the legality of the transaction as a whole, this to be determined by the character of the statutes bearing on the question. If it is against public policy to enforce such an obligation in the particular case, the courts should not enforce it, but if not against public policy, it should be enforced. That the lessor has not the title to the premises has merely an incidental bearing on the question of his right of recovery, and to state the liability or nonliability of the tenant in

³⁰⁴ *Wilcoxon v. Hybarger* (Ind. T.) 38 S. W. 669. *Ass'n v. Cass Land & Cattle Co.*, 138 Mo. 394, 40 S. W. 107. And see *Ikard v. Minter*, 4 Ind. T. 214, 69 S. W. 852.

³⁰⁵ *Uhlig v. Garrison*, 2 Dak. 71, 2 N. W. 253. ³⁰⁸ *Hall & Paulson Furniture Co. v. Wilbur*, 4 Wash. 644, 30 Pac. 665. And see *St. Anthony Falls Water Power Co. v. Morrison*, 12 Minn. 249 (Gil. 162), ante, note 295.

³⁰⁶ *Dupas v. Wassell*, 1 Dill. 213, Fed. Cas. No. 4,182.

³⁰⁷ *Cherokee Strip Live Stock*

such case in terms of estoppel is, it is submitted, misleading, if not absolutely erroneous.³⁰⁹

h. **Fraud or mistake in the making of the lease.** When the lessee has entered under the lease,³¹⁰ the fact that the acceptance of the lease was procured by duress or fraud on the part of the lessor, or that the acceptance was under mistake on the part of the lessee, will not enable the lessee to defend an action by the lessor for possession on the ground that the lessor's title is defective.³¹¹ A contrary view would violate the well recognized rule that one seeking to rescind a transaction for duress, fraud or mistake must put the other party *in statu quo* by returning what he has received thereunder, and would, in the case of fraud, involve in effect the imposition on the lessor of damages out of all proportion to the injury caused by the fraud, this being particularly productive of injustice when applied as against an innocent transferee of the reversion. Occasional suggestions to the effect that the lessee may deny the lessor's title if the acceptance of the lease was procured by fraud³¹² are, it is submitted, erroneous, though, as hereafter indicated,³¹³ there seems no objection, on principle, without reference to the question of fraud, to his assertion of title in himself by way of defense to an action for possession. And that he can do this when the making of the

³⁰⁹ See ante, § 78 c (3).

³¹⁰ As to the case of the acceptance of a lease under duress, fraud or mistake by one already in possession, see post, § 18 k (4) (5).

³¹¹ See *Jackson v. Spear*, 7 Wend. (N. Y.) 401; *Simons v. Marshall*, 3 G. Greene (Iowa) 502; *Higgins v. Turner*, 61 Mo. 249.

³¹² *Loring v. Harmon*, 84 Mo. 123; *Parrott v. Hungelburger*, 9 Mont. 526, 24 Pac. 14; *Jones v. Reilly*, 174 N. Y. 67, 66 N. E. 649, 63 L. R. A. 163; *Baskin v. Seechrist*, 6 Pa. 154; *Barkman v. Barkman*, 107 Ill. App. 33. In *Gallagher v. Bennett's Heirs*, 38 Tex. 291, it was decided that if the lessor was guilty of fraud and he was unable by reason of insolvency to indemnify the tenant "for rents

wrongfully exacted," the lessee could purchase a paramount title under threat of eviction by the owner thereof and assert it as against the lessor's demand for possession. There was here, it would seem, a clear case of constructive eviction under paramount title (see post, § 78 p [2]), so that the question of fraud was immaterial.

In New Mexico (Comp. Laws 1897, § 3364) the legislature has provided in terms that "when a lessee has been induced to take a lease by means of force, fraud or intimidation, he shall be permitted to plead a paramount title in himself, an outstanding title, or the want of title in his lessor."

³¹³ See post, § 78 i (2).

lease was but one part of a fraudulent transaction by which the lessor obtained the land from him is unquestionable, provided equitable defenses are in that jurisdiction allowed in actions at law.³¹⁴

In an action for rent, the fact that the acceptance of the lease was under duress, fraud or mistake is itself sufficient as a defense, provided the lessee returns the possession,³¹⁵ and, consequently, in such case, the validity of the lessor's title becomes absolutely irrelevant. If he does not return the possession he cannot, it is conceived, assert the duress, fraud or mistake merely because the lessor's title is defective, nor should the fact that the lease was accepted under duress, fraud or mistake enable him to assert the defense, which otherwise he cannot assert,³¹⁶ that the lessor's title was defective.³¹⁷ The same may be said with reference to an action of assumpsit for use and occupation. So in other actions, it is presumed, the tenant could not, whether the lessor's title is valid or invalid, repudiate the obligations imposed on him by the terms of the lease and his entry as tenant thereunder, so long as he retains the benefits conferred thereby, on the ground that he assumed such obligations as a result of duress, fraud or mistake.

i. **Paramount title in tenant—(1) Right to acquire title.** Conceding, as are the cases, apparently, that the tenant cannot ordinarily institute a proceeding involving the title to the land so long as he remains in possession,³¹⁸ it is immaterial, as regards his right to do so after relinquishing possession, whether he acquired such title during the tenancy or prior thereto. A tenant has usually the right to acquire a title paramount to that of the landlord, although precluded from immediately asserting it.³¹⁹

³¹⁴ See *Harvin v. Blackman*, 108 La. 426, 32 So. 452. from the rent. *Mostyn v. West Mostyn Coal & Iron Co.*, 1 C. P. Div. 145.

³¹⁵ See ante, §§ 38, 39.

³¹⁶ See ante, § 78 c (3).

³¹⁸ See ante, § 78 c (6).

³¹⁷ It is so decided in *Nissen v. Turner*, 50 Neb. 272, 96 N. W. 778; *Mosher v. Cole*, 50 Neb. 636, 70 N. W. 275. ³¹⁹ *Gable v. Wetherbolt*, 116 Ill. 313, 6 N. E. 453, 56 Am. Rep. 313; *Hodges v. Shields*, 57 Ky. (18 B. Mon.) 828; *Kelley v. Kelley*, 23 Me. 192; *Presstman v. Silljacks*, 52 Md. 647; *Rives v. Nesmith*, 64 Miss. 807, 2 So. 174; *Walker v. Harrison*, 75 Miss. 665, 23 So. 392; *Nodine v.*

But if the fraud consists of false representations as to the title, the tenant may show the lack of title for the purpose of obtaining relief

Occasionally, however, a different view has been taken. In Nebraska it has been decided that a tenant cannot purchase a mortgage paramount to the title of the lessor and enforce it for its full amount, but he will be presumed to have purchased it to protect his possession and will be allowed to enforce it only to the extent of the amount paid for it by him.³²⁰ It is not entirely clear why a distinction should be made between the case of the acquisition by the tenant of a paramount mortgage and of a paramount title, and on the same theory it would seem, in that state, a tenant acquiring an absolute paramount title during his tenancy might be allowed to assert it against the landlord only to the extent of the amount which he has paid for it, and it has been so held where the purchase was at judicial sale and without notice to his landlord.³²¹ In Pennsylvania, likewise, it has been held that the tenant could not, without notice to his landlord, foreclose a paramount mortgage held by him and purchase at the sale, the purpose of the proceeding being evidently to divest the landlord's title.³²² A purchase of a paramount title by the tenant at judicial or execution sale will, no doubt, be set aside if effected by fraud, as when he falsely represented to other intending purchasers that he was buying in behalf of the landlord, and so obtained the property at a greatly inadequate price.³²³ In Kentucky it is decided that a tenant cannot obtain a patent for the premises or for a part thereof.³²⁴

If the tenant is, by the terms of the lease, under an obligation to pay the taxes on the demised premises, he cannot purchase them on a sale for nonpayment of taxes and assert the title so acquired as against his landlord.³²⁵ Whether he is under the same dis-

Richmond, 48 Or. 527, 87 Pac. 775; ³²² Appeal of Matthews, 104 Pa. Pickett v. Ferguson, 86 Tenn. 642, 8 444.

S. W. 386; Spafford v. Hedges, 231 ³²³ Cocks v. Izard, 74 U. S. (7 Ill. 140, 83 N. E. 129; Pierce v. Wall.) 559.

Brown, 24 Vt. 165; Williams v. Gar- ³²⁴ Trabue v. Ramage, 80 Ky. 323; rison, 29 Ga. 503. King v. Hill, 32 Ky. Law Rep. 1192,

³²⁰ Mattis v. Robinson, 1 Neb. 3; 108 S. W. 238.

Thrall v. Omaha Hotel Co., 5 Neb. ³²⁵ Heyden v. Castle, 15 Ont. 257; 295, 25 Am. Rep. 488. Busch v. Huston, 75 Ill. 343; Bur-

³²¹ Lausman v. Drahoss, 10 Neb. gett v. Taliaferro, 118 Ill. 503, 9 N. 172, 4 N. W. 956, 33 Am. Rep. 468. E. 334; Carithers v. Weaver, 7 Kan. The landlord was therefore per- 110; Rowley v. Wilkinson, 8 Kan. App. 435, 57 Pac. 42; Bertram v.

ability in the absence of any agreement on his part to pay the taxes is a question on which the authorities are not in accord. By some decisions it is clearly asserted that he may purchase at tax sale in such case and assert the title so acquired against the landlord.³²⁶ But by perhaps the weight of authority he is regarded as precluded from so doing, owing to his community of interest in the premises with the landlord, and a purchase by him will be regarded as merely a payment of the tax.³²⁷ In Mississippi it is said that he cannot buy at tax sale because he is himself under an obligation to pay the taxes,³²⁸ and in an earlier case in this state it was decided that if a tenant, while indebted to the landlord for rent, buys at a tax sale, it will be presumed that he is paying the taxes out of the rent due, even though they accrued before the time of his occupancy.³²⁹ In Arkansas it was decided that, although the tenant might buy at the tax sale, he would in equity be treated as a trustee for the landlord, and would not be allowed to speculate on his purchase nor to receive more than six per cent. interest on the sums paid for taxes nor penalties and costs on subsequent taxes paid.³³⁰ And in Kansas it was decided that, although the tenant did not expressly agree to pay taxes, if he took possession without agreeing to pay any rent and occupied for eleven years without paying or offering to pay rent,

Cook, 32 Mich. 518; *Haskell v. Putnam*, 42 Me. 244; *Blake v. Howe*, 1 Aiken (Vt.) 306, 15 Am. Dec. 681; *Williamson v. Russell*, 18 W. Va. 612; *Shepardson v. Elmore*, 19 Wis. 424.

³²⁶ *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442; *Ferguson v. Etter*, 21 Ark. 160, 76 Am. Dec. 361; *Brown v. Atlanta Nat. Bldg. & Loan Ass'n*, 46 Fla. 492, 35 So. 403; *Weichselbaum v. Curlett*, 20 Kan. 709; *Uhl v. Small*, 54 Kan. 651, 39 Pac. 178; *Smith v. Newman*, 62 Kan. 318, 62 Pac. 1011, 53 L. R. A. 934; *Higgins v. Turner*, 61 Mo. 249; *Maxwell v. Griftner*, 13 Ohio Cir. Ct. R. 616; *Crosby v. Bonnowsky*, 29 Tex. Civ. App. 455, 69 S. W. 212; *Wright v. Jessup*, 44 Wash. 618, 87 Pac. 930.

³²⁷ *Bailey's Adm'r v. Campbell*, 82 Ala. 342, 2 So. 646; *Curtis v. Smith*, 42 Iowa, 665 (dictum); *Petty v. Mays*, 19 Fla. 652; *Morris v. Apperson*, 11 Ky. Law Rep. 838, 13 S. W. 441; *Smith v. Specht*, 58 N. J. Eq. 47, 42 Atl. 599; *Lyebrooke v. Hall*, 73 Miss. 509, 19 So. 348; *Williams v. Towl*, 65 Mich. 204, 31 N. W. 835.

³²⁸ *Walker v. Harrison*, 75 Miss. 665, 23 So. 392. But if the land was sold to the state before he came into possession, he could buy from the state. *Id.*

³²⁹ *Gaskins v. Blake*, 27 Miss. (5 Cushm.) 675.

³³⁰ *Waggener v. McLaughlin*, 33 Ark. 195.

he could not let the property go to tax sale and become the purchaser thereof.³³¹

(2) **Right to assert title.** It has been decided that the lessee, or one claiming under him, is precluded not only from showing that there is an outstanding paramount title in a third person, but also that there is such a title in himself. Thus it has been decided that one cannot defend an action for rent by showing that at the time of the lease the lessee had paramount title,³³² and no doubt the same view would be taken of an attempt to show that, since the lease, a paramount title has passed to the defendant. So it has been decided that a tenant cannot defend a summary proceeding on the ground that at the time of the lease the lessee had a paramount title,³³³ or that since then such a title has passed to the tenant, the defendant in the proceeding.³³⁴ And like decisions have been made in actions of ejectment as to a paramount title in the lessee at the time of the lease³³⁵ as well as to a title thereafter obtained by him.³³⁶ And, likewise, in ac-

³³¹ Duffit v. Tuhan, 28 Kan. 292.

³³⁵ Abbott v. Cromartie, 72 N. C.

³³² Prettyman v. Walston, 34 Ill. 175; Heyen v. Ward, 67 Ill. App. 472; Morrison v. Bassett, 26 Minn. 235, 2 N. W. 851; Newall v. Wright, 3 Mass. 138, 3 Am. Dec. 98.

292, 21 Am. Rep. 457; Wood v. Turner, 27 Tenn. (8 Humph.) 685.

³³³ Houston v. Farris, 71 Ala. 570; Silvey v. Summer, 61 Mo. 253; Washington v. Moore, 84 Ark. 220, 105 S. W. 253, 120 Am. St. Rep. 29; Bohn v. Hatch, 39 N. Y. St. Rep. 404, 15 N. Y. Supp. 550; Johnson v. Throver, 117 Ga. 1007, 44 S. E. 846. So where the lessor's only color of title was a conveyance from the lessee which was void or voidable. Vancleave v. Wilson, 73 Ala. 387; Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111; Williams v. Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768.

It was recently held in New York that one who entered as lessee could not assert a continued right of possession by reason of his having purchased a paramount mortgage. Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75.

³³⁴ Rowan v. Lytle, 11 Wend. (N. Y.) 616; Emerick v. Tavener, 9 Grat. (Va.) 220, 58 Am. Dec. 217; Hill v. Watkins, 4 Ind. T. 170, 69 S. W. 837; Wilson v. Lyons, 4 Neb. Unoff. 406, 94 N. W. 636.

³³⁶ Peyton v. Stith, 30 U. S. (5 Pet.) 485; Burgess v. Rice, 74 Cal. 590, 16 Pac. 496; Arnold v. Woodard, 4 Colo. 249; Drane v. Gregory's Heirs, 42 Ky. (3 B. Mon.) 619; Griffin v. Sheffield, 38 Miss. (9 George) 359, 77 Am. Dec. 646; Jackson v. Harder, 4 Johns. (N. Y.) 210, 4 Am. Dec. 262; Cornell v. Hayden, 114 N. Y. 271, 21 N. E. 417 (semble); Galloway's Lessee v. Ogle, 2 Bin. (Pa.) 468; White v. Nelles, 11 Can. Sup. Ct. 587 (semble). So in trespass to try title. Henley v. Branch Bank, 16 Ala. 552.

tions for use and occupation,³³⁷ or replevin for goods distrained,³³⁸ the tenant cannot assert paramount title in himself.

The propriety of such a rule in actions for rent and for use and occupation is plainly apparent, the controlling considerations being the same as when the paramount title is in a third person, and the same may be said of an action of replevin for goods distrained. In the case of summary proceedings, the not infrequent statutory provision that no question of title shall be tried in such proceedings would necessarily preclude such a defense. But the applicability of such a rule in connection with an action of ejectment, though supported by the decisions of the strongest courts,³³⁹ is, it is submitted, open to serious question. That the tenant should not be permitted to assert title in a third person in such an action is a most reasonable and necessary rule, since otherwise he would procure the possession, as against the lessor, without any right thereto. But if he has a right to the possession, that is, the superior title, the reason of the rule disappears. The only result of the application of the rule in the latter case is that the tenant is driven to a separate action for the purpose of asserting his title, in disregard of the recognized policy of the courts to avoid circuitry of action.³⁴⁰ This would seem to be to the disadvantage even of the landlord, since the tenant will, in the ordinary case, immediately institute an action to establish his title, with the result of double expense to all parties as well as to the state. The only effect of the relation of landlord and tenant, as regards the action of ejectment, should be, it is conceived, to place upon the tenant the burden of showing his superior title. The views here stated are in accord with a well considered English decision.³⁴¹ In this country, likewise, there are two cases to the

³³⁷ Hatch v. Bullock, 57 N. H. 15. Mackenzie, 5 Law T. (N. S.) 20,

³³⁸ Ward v. City of Philadelphia, 9 Wkly. Rep. 783, 10 C. B. (N. S.; 18 Wkly. Notes Cas. (Pa.) 561. Am. Reprint) 870. It is singular

³³⁹ See ante, notes 335, 336.

³⁴⁰ The maxim "*frustra petis quod statim alteri reddere cogaris*," quoted from Jenkins' Centuries (p. 256, case 49) by Mr. Broom (Maxims, p. 346) in discussing the rule forbidding circuitry of action, seems exactly applicable.

³⁴¹ Accidental Death Ins. Co. v. is the fact that the lessee was prev-

effect that a tenant may, by the purchase of a mortgage prior to the lease, acquire a right of possession which he may assert against the landlord without first relinquishing possession,³⁴² as well as a decision that the tenant acquiring title under foreclosure of such a mortgage may so assert his right.^{342a} In one of these cases^{342b} it is stated, in accordance with the views above expressed, that "whenever by purchasing such (paramount) title, the tenant is entitled to the right of possession, it would be an idle ceremony to require the tenant to surrender up his possession, and then resort to his action of ejectment, when its only effect can be, to put the plaintiff in the same situation he now occupies." In the other two cases, however, no such view is indicated, and the decisions are apparently based on the mistaken idea that a title based on a mortgage made before the lease is reversionary in character and not paramount.³⁴³

In Michigan there are decisions to the effect that in ejectment by the landlord the tenant is not estopped to deny the former's title, not for the reasons above suggested, but because, if he may not do so, a judgment would be rendered in favor of the landlord which would be conclusive on the tenant as against any subsequent assertion of title by the latter;³⁴⁴ and in Texas it is said

iously in possession. The decision is based exclusively on the avoidance of circuitry of action. based on the existence of a special agreement allowing him so to do. See ante, note 215.

³⁴² *Shields v. Lozeau*, 34 N. J. Law, 496, 3 Am. Rep. 256; *Pierce v. Brown*, 24 Vt. 165. In *Willis v. McKinnon*, 35 App. Div. 131, 54 N. Y. Supp. 1079, it was decided by a majority of the court

^{342a} *Spafford v. Hedges*, 231 Ill. 140, 83 N. E. 129. that one who took what purported to be a lease of the entire property

^{342b} *Pierce v. Brown*, 24 Vt. 165. from one of the joint owners thereof might, when sued in ejectment by his lessor, assert a title acquired since the lease from the other joint owner, the decision being apparently placed upon the ground that the lessor assented to such acquisition from the other joint owner.

The statement of Tilghman, C. J., in *City of Philadelphia v. Schuylkill Bridge Co.*, 4 Bin. (Pa.) 283, that "it would have answered no purpose to obtain the possession and be immediately involved in a new suit in which the right must be investigated. The sooner they came to the point the better," would seem to

apply to any case of an action for possession by the landlord, though there the decision that the lessee might assert title in himself was

³⁴³ See ante, § 73 c; post, § 147.

³⁴⁴ *Jochen v. Tibbells*, 50 Mich. 33, 14 N. W. 690; *Shaw v. Hill*, 79 Mich. 86, 44 N. W. 422; *Id.*, 83 Mich. 322, 47 N. W. 247. See *Hubbard v. Shepard*, 117 Mich. 25, 75 N. W. 92, 72

that, for this reason, the rule of estoppel does not apply to an action of trespass to try title and for partition.³⁴⁵ These decisions seem to be open to question as assuming that one can be concluded by a judgment as to matters which he could not litigate in the action in which the judgment was rendered. The general rule is to the contrary,³⁴⁶ and there are occasional direct decisions that a judgment thus rendered in favor of the landlord is not conclusive in a subsequent action by the tenant.³⁴⁷

In New Hampshire a decision, in favor of the right of the tenant to assert a title in himself as against the landlord suing for possession, was based in terms on the common-law rule that an estoppel by deed ceases with the end of the term.³⁴⁸ If this de-

Am. St. Rep. 548. These decisions state that if "the landlord seeks to recover the possession, he can do so under the lease; but if he goes farther and claims the premises in fee, the tenant is not estopped from denying any right claimed by the plaintiff further or greater than that or possession." But it would seem that a judgment establishing in the lessor an estate less than a fee might involve a hardship on the tenant less in degree only than a judgment establishing a fee therein, and an adjudication of a right of possession in him is in effect an adjudication that he has some estate.

³⁴⁵ McKie v. Anderson, 78 Tex. 207, 14 S. W. 576.

³⁴⁶ See 2 Black, Judgments, §§ 610, 655, 659; 23 Cyclopaedia Law & Proc. 1317.

³⁴⁷ In Arnold v. Woodward, 14 Colo. 164, 23 Pac. 444, it is said that a judgment in ejectment for the landlord is not conclusive of want of title in a subsequent suit for possession by the tenant, since he could not assert title in the first suit. And in Linberg v. Finks, 7 Tex. Civ. App. 391, 25 S. W. 789, referred to in Black, Judgments, §

659, it was held that a judgment in favor of the landlord in trespass to try title was not a bar to a subsequent action by the defendants against such landlord to recover the land. This case does not refer to McKie v. Anderson, 78 Tex. 207, 14 S. W. 576, supra.

So it is said that the judgment in an action of unlawful detainer by the landlord against the tenant is conclusive only as to whether there was a lease and as to whether there was a refusal to surrender possession at the end of the term, and that the title was not "and could not, from the nature of the case, be put in issue in that action." Wilson v. Cleaveland, 30 Cal. 192.

³⁴⁸ Carpenter v. Thompson, 3 N. H. 204, 14 Am. Dec. 348. In Page v. Kinsman, 43 N. H. 328, it was decided, on the same theory, in an action for damages for flooding land, that the defendant was not estopped to show a right to flow it by the fact that he had formerly accepted a lease from plaintiff of this right, which lease had expired. But here there could have been no question of an estoppel based on the delivery of possession, and the only possible

cision means that, after the term, the tenant may assert a paramount title in a third person as well as one in himself, in defense to an action by the landlord for possession, it is evidently not in harmony with the decisions generally.³⁴⁹ The result reached was, it is submitted, a correct result, because the paramount title happened to be in the tenant, but the reasoning on which the decision is based, as implying that the tenant could always assert a paramount title in defense to such an action, was defective. It does not appear, indeed, that the doctrine of estoppel by indenture was ever, by the older authorities, applied in connection with a proceeding by the landlord against the tenant to recover possession.

In North Carolina, also, there are decisions which seem, to some extent at least, to depart from the rule usually asserted in this country that in ejectment, or its statutory equivalent, the tenant cannot show that he has a better title than the landlord. It is there said that the rule does not preclude the tenant from showing an equitable title in himself "on such circumstances as under our former system would call for the interposition of a court of equity for his relief, and which relief may now be obtained in the action" at law.³⁵⁰ And, applying this doctrine, it was held that one in possession under a lease from another might, in an action by the lessor for possession, show that, before the lease, the lessor had conveyed the property to him.³⁵¹ In another case it was held that in such an action for possession the lessee might show that a deed from him to the lessor, made before the lease, was intended as a mortgage merely, and might, in that action, have the deed reformed.³⁵² These cases seem to assume that, before the statute allowing equitable defenses at law, equity would have interfered to enjoin an action of ejectment by the landlord, provided the tenant had a legal title superior to his, or an equity in the land entitling him to a conveyance of the legal title. In no other jurisdiction does it appear to have been considered that the tenant, having a superior

basis for an estoppel would have Parker v. Allen, 84 N. C. 466; Hahn
been the lease itself. v. Guilford, 87 N. C. 172.

³⁴⁹ See ante, § 78-c (1).

³⁵¹ Allen v. Griffin, 98 N. C. 120, 3

³⁵⁰ Davis v. Davis, 83 N. C. 71. S. E. 837.

See, also, Turner v. Lowe, 66 N. C. 413; Pate v. Turner, 94 N. C. 47; 135. ³⁵² Forsythe v. Bullock, 74 N. C.

legal title, might obtain protection against the landlord in equity, but not at law. As before indicated, it would seem that the tenant, having a legal right to possession, might properly assert the right at law as well as in equity, even as against one under whom he had entered as tenant.

It has been decided in a Canadian case that a lessee cannot remove a building on the land and defend an action of trover by asserting that the land belonged to him at the time of the lease.³⁵³ The application of the doctrine of estoppel or preclusion under such circumstances seems to involve a decided hardship on the tenant, as in effect transferring to the lessor the title to the building merely because the owner accepted a lease of the land. The fee simple owner of the land and building should, it is submitted, have a right to remove the building, even though he has accepted a lease from another, he having, however, the burden of proving his ownership.

j. Lease by person acting in representative capacity. The application of the rule or rules precluding the tenant from questioning the lessor's title is called for in the case of one making a lease as executor or administrator, and the tenant cannot afterward refuse to pay rent on the ground that the lessor had no authority to make the lease,³⁵⁴ or to relinquish possession after the term on the ground that the lessor had no title.³⁵⁵ It has been decided, however, that the tenant may defend an action for waste by showing that the executor, in making the lease, acted under a naked power, so that the reversion was in the heir, who alone could maintain the action.³⁵⁶ This view was presumably correct, for the reason that a lease made under a power relates back to the date of the power, and is regarded as if made by the donor of the power,³⁵⁷ and the donor's interest had passed to the heir and not to the executor.

³⁵³ *Renalds v. Offitt*, 15 U. C. Q. B. West, 130 N. C. 171, 41 S. E. 65; 221. *Caldwell v. Harris*, 23 Tenn. (4

³⁵⁴ *Christie v. Clarke*, 16 U. C. C. Humph.) 24. *Contra*, *Capper v. P.* 544; *Terry v. Ferguson*, 8 Port. Sibley, 65 Iowa, 754, 23 N. W. 153. (Ala.) 500; *Howe v. Gregory*, 2 Ind. ³⁵⁵ *Bishop v. Lalouette*, 67 Ala. App. 477, 28 N. E. 776; *Steele v. R.* 197; *Rowland v. Dillingham*, 83 App. M. Gilmour Mfg. Co., 77 App. Div. Div. 156, 82 N. Y. Supp. 470.

199, 78 N. Y. Supp. 1078; *Gregory v.* ³⁵⁶ *Page v. Davidson*, 22 Ill. 112.

Michaels, 1 Misc. 195, 20 N. Y. Supp. ³⁵⁷ See 1 *Tiffany*, Real Prop. pp. 877; *Steuber v. Huber*, 107 App. Div. 605, 611. 599, 95 N. Y. Supp. 348; *Shell v.*

It has likewise been decided that one to whom a lease has been made by a receiver cannot deny the authority of the receiver to make it.³⁵⁸

The doctrine that the tenant cannot deny the lessor's title has been applied in connection with leases made by an agent. If one makes a lease and thereafter puts the lessee in possession, the lessee, or one claiming under him, cannot, it has been decided, refuse to relinquish possession on the ground that the lessor had no title but acted in behalf of another, who was the owner of the land,³⁵⁹ and the fact that the lessor described himself in the lease as agent, without, however, naming the principal, has been regarded as giving him no right to assert the fact of agency in defense to an action by the lessor for possession.³⁶⁰ In Canada, however, the view has been asserted that the tenant might refuse to relinquish possession to the lessor on the ground that the latter acted as agent merely in making the lease, provided it appears that the lessor, in putting the lessee in possession, purported to act, not in his own right, but in the right of another, the lessee consequently, in effect, agreeing to relinquish possession to such other and not to the lessor himself.³⁶¹ Such a view seems sound in principle. The lessee having obtained possession by a tacit representation that he will return possession to one other than the nominal lessor, there is no room for the ordinary estoppel to deny the lessor's right to possession.³⁶²

Even though the principal is named, if the lease purports to be the lease of the agent and not of the principal, the tenant cannot, it has been decided, refuse to pay rent to the agent or one

³⁵⁸ *Pouder v. Catterson*, 127 Ind. 434, 26 N. E. 66; *Dancer v. Hastings*, 12 Moore, 34.

³⁵⁹ *Taylor v. White*, 86 Mo. App. 526 (summary proceeding); *Houck v. Williams*, 34 Colo. 138, 81 Pac. 800 (ditto).

³⁶⁰ *Holt v. Martin*, 51 Pa. 499.

³⁶¹ *Baldwin v. Burd*, 10 U. C. C. P. 511. This case cites *Fleming v. Gooding*, 10 Bing. 549, *dicta* in which appear to support it.

³⁶² See ante, § 78 c (1).

The tenant is, it seems, in such

case, precluded from questioning the principal's title. *Fleming v. Gooding*, 10 Bing. 549, which was, however, an action for use and occupation.

In *Wolf v. Holton*, 92 Mich. 136, 52 N. W. 459; *Id.*, 104 Mich. 107, 62 N. W. 174, it was held that if a guardian made a lease of the land of his ward, the lessee could not assert, in defense to an action by the ward for possession after coming of age, that his title was defective.

claiming under him on the ground that the title is in the principal,³⁶³ nor can he defend an action on other covenants upon that ground.³⁶⁴ These decisions are in terms based on the theory of preclusion or estoppel, but they might, it is conceived, quite as well be based on the theory that the covenant being made with the agent, he has a right to sue thereon in accordance with the ordinary rule that an agent can sue upon a contract made with him on behalf of his principal.³⁶⁵⁻³⁶⁸

k. **Attornment by person in possession**—(1) **The rule as usually stated.** There are a large number of cases to the effect that if one already in possession of land takes a lease thereof from another under whom he did not enter, or otherwise attorns to such other, he is precluded, to the same extent as if he had entered under a lease from the latter, from denying his title. This view has most frequently been asserted in connection with actions by the lessor or his transferee to recover possession from the tenant,³⁶⁹ but it has occasionally been asserted in connection

³⁶³ Stott v. Rutherford, 92 U. S. 107; Kendall v. Carland, 59 Mass. (5 Cush.) 74; Melcher v. Kreiser, 28 App. Div. 362, 51 N. Y. Supp. 249. But Niles v. Gonzales, 1 Cal. App. 324, 82 Pac. 212, is apparently *contra*.

³⁶⁴ Stott v. Rutherford, 92 U. S. 107.

³⁶⁵⁻³⁶⁸ Huffcut, Agency (2d Ed.) §§ 207, 208.

³⁶⁹ Vancleave v. Wilson, 73 Ala. 387; Hughes v. Watt, 28 Ark. 153; Saunders v. Moore, 77 Ky. (14 Bush.) 87; McConnell v. Bowdry, 20 Ky. (4 T. B. Mon.) 392; Tison v. Yawn, 1 Ga. 491, 60 Am. Dec. 708; Campau v. Lafferty, 43 Mich. 429, 5 N. W. 648; Carter v. Marshall, 72 Ill. 609; Forgy v. Harvey, 151 Ind. 507, 51 N. E. 1066; Bartlett v. Robinson, 52 Neb. 712, 72 N. W. 1053; Jackson v. Spear, 7 Wend. (N. Y.) 401; Ingraham v. Baldwin, 9 N. Y. (5 Seld.) 45; Isaac v. Clarke, 2 Gill (Md.) 1; Voss v. King, 33 W. Va. 236, 10 S. E. 402; Abbott v. Cromartie, 72 N. C. 292, 21 Am. Rep. 457; Farmer v. Pickens, 83 N. C. 549; Dixon v. Stewart, 113 N. C. 410, 18 S. E. 325; Loring v. Harmon, 84 Mo. 123; Miller v. McBrier, 14 Serg. & R. (Pa.) 382; Williams v. Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768; Tyler v. Davis, 61 Tex. 674; Locke v. Frasher, 79 Va. 409; Jordan v. Katz, 89 Va. 628, 16 S. E. 866; Jones v. Reilly, 174 N. Y. 97, 66 N. E. 649; Lucas v. Brooks, 85 U. S. (18 Wall.) 436; Doe d. Pritchitt v. Mitchell, 1 Brod. & B. 11; Doe d. Marlow v. Wiggins, 4 Q. B. 367; Barkman v. Barkman, 107 Ill. App. 332; Sturges v. Van Orden, 37 Misc. 499, 75 N. Y. Supp. 1007; Piper v. Cassell, 58 C. C. A. 396, 122 Fed. 614; Willis v. Harrell, 118 Ga. 906, 45 S. E. 794; Bullard v. Hudson, 125 Ga. 393, 54 S. E. 132; Wallace v. Ocean Grove Camp Meeting Ass'n, 78 C. C. A. 406, 148 Fed. 672; Doe d. Sands v. Phillips, 3 New Br. (1 Kerr) 533.

In Minnesota the statute (Rev.

with actions for rent or for use and occupation³⁷⁰ as well as distress proceedings.³⁷¹

Under such a rule, a grantor who remains in possession after the grant by virtue of a demise from his grantee cannot, as against the latter, question the validity of the grant.³⁷² And so if a mortgagor, upon the sale of the premises on foreclosure, attorns to the purchaser, he cannot question the validity of the sale.³⁷³ Numerous other applications of the doctrine have occurred, as when a mere trespasser on land accepted a lease from or attorned to one who had threatened to evict him,³⁷⁴ or when one who entered under a demise from one person attorned to or accepted a lease from another,³⁷⁵ and in each case the person in possession was regarded as precluded from questioning the title of the person towards whom he had thus assumed the position of tenant. So it has been recognized in England that one may, on mortgaging land, attorn to the mortgagee and thus disqualify himself from asserting, as against a distress by the mortgagee, that the latter has no legal reversion for the reason that the mortgagor had, at the time of the mortgage, merely an equitable interest.³⁷⁶

Whether the acknowledgment by the person in possession that he stands in the relation of tenancy towards another is by the acceptance of a lease from him,³⁷⁷ by an attornment in express

Laws 1905, § 3329) providing that a tenant shall not deny his landlord's title in an action for possession excepts the case of a lessee who at the time of the lease was in possession of the premises under a claim of title adverse or hostile to that of the lessor.

³⁷⁰ *Prevot v. Lawrence*, 51 N. Y. 219; *Derrick v. Luddy*, 64 Vt. 462, 24 Atl. 1050; *Lyon v. Washburn*, 3 Colo. 201.

³⁷¹ *Hall v. Butler*, 10 Adol. & E. 204; *Morton v. Woods*, L. R. 3 Q. B. 658, L. R. 4 Q. B. 293. See post, § 78 k (3).

³⁷² *Vancleave v. Wilson*, 73 Ala. 387; *Williams v. Wait*, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768.

³⁷³ *Buchanan v. Larkin*, 116 Ala. 431, 22 So. 543; *Granger v. Parker*, 137 Mass. 228.

³⁷⁴ *Bowdish v. City of Dubuque*, 38 Iowa, 341; *Saunders v. Moore*, 77 Ky. (14 Bush) 97; *Kelley v. Kelley*, 23 Me. 192.

³⁷⁵ *Cox v. Cunningham*, 77 Ill. 545; *Ingraham v. Baldwin*, 9 N. Y. (5 Seld.) 45; *Piper v. Cashell*, 58 C. A. 396, 122 Fed. 614. But compare ante, § 19 b (4), at notes 91-94.

³⁷⁶ *Morton v. Woods*, L. R. 3 Q. B. 658, L. R. 4 Q. B. 293. See *Jolly v. Arbuthnot*, 28 Law J. Ch. 547, 4 De Gex & J. 224.

³⁷⁷ *Lucas v. Brooks*, 85 U. S. (18 Wall.) 436; *Vancleave v. Wilson*, 73

terms to him,³⁷⁸ by payment of a nominal sum of money in acknowledgment of the relation,³⁷⁹ or by submission to distress by him,³⁸⁰ would seem to be entirely immaterial. By either course of conduct one acknowledges that he is in the position of tenant, and he is consequently within any rule of preclusion or estoppel ordinarily applicable in connection with such relation. So an attornment sufficient for this purpose may be shown by the payment of rent by the person in possession³⁸¹ though such payment is, as before stated,³⁸² not conclusive of the relation of tenancy.³⁸³ An attornment by one tenant in common has been regarded as insufficient to subject his cotenant to the rule of preclusion.³⁸⁴

(2) **Contrary decisions.** In California, a view different from that ordinarily adopted has been asserted in two cases, in connection with actions to recover possession, to the effect that the rule of preclusion or estoppel does not apply if the lessee was

Ala. 387; *Buchanan v. Larkin*, 116 of the person in possession, if repudiated by him on learning of it, Ala. 431, 22 So. 543; *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448; *Doe d. Ball v. Lively*, 31 Ky. (1 Dana) 60; *Roberts*, 61 Pa. 497.

Dixon v. Stewart, 113 N. C. 410, 18 ³⁸² See ante, § 18.

S. E. 325; *Williams v. Wait*, 2 S. D. ³⁸³ *Gravenor v. Woodhouse*, 1 Bing. 210, 49 N. W. 209, 39 Am. St. Rep. 38; *Fenner v. Duplock*, 2 Bing. 10; 768; *Locke v. Frasher's Adm'r*, 79 Knight v. Cox, 18 C. B. 645; *Doe d. Va. 409; Bullard v. Hudson*, 125 Ga. Shelton v. Carrol, 16 Ala. 148.

393, 54 S. E. 1322 (promise to pay rent). In *Hitchings v. Thompson*, 5 Exch.

³⁷⁸ *Gravenor v. Woodhouse*, 1 Bing. 50, defendants had distrained as transferees of the reversion but 38, 2 Bing. 71; *Hughes v. Watt*, 28 failed to show a transfer to them, Ark. 153; *Bartlett v. Robinson*, 52 and it was held that evidence that Neb. 715, 72 N. W. 1053; *Pearce v. the tenant had paid rent to an agent Nix*, 43 Ala. 183. of defendants who, without disclosing his principals' names, paid over

³⁷⁹ *Doe d. Plevin v. Brown*, 7 Adol. the rent to the latter, was evidence & E. 447. to go to the jury that defendants

³⁸⁰ *Cooper v. Blandy*, 1 Bing. N. C. 45; *Knight v. Cox*, 18 C. B. 645. were the owners of the reversion,

³⁸¹ *Rogers v. Pitcher*, 6 Taunt. the payment by the tenant not being 202; *Doe d. Pritchitt v. Mitchell*, 1 shown to have been made under the Brod. & B. 11; *Doe d. Marlow v. Wiggins*, 4 Q. B. 367; *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448; *Killoren v. Murtaugh*, 64 N. H. 51, 5 Atl. 769; the supposition that the agent represented the former owners of the reversion, or with the intention that the latter should receive it.

Derrick v. Luddy, 64 Vt. 462, 24 Atl. ³⁸⁴ *Sulphine v. Dunbar*, 55 Miss. 1050. Payment of rent by the wife 255.

already in possession.³⁸⁵ In later cases, however, in that state, the rule previously announced has been considerably limited, and it has been decided that while the person in possession accepting a lease may dispute the lessor's title, he cannot do it by averment merely, and must show title in himself or "in those under whom he claims."³⁸⁶ And the rule of that state allowing the person attorning to or accepting a lease from a third person to question the title of the lessor or attornee has been held to have no application to proceedings for unlawful detainer, in which the question of title is never involved,³⁸⁷ unless the acceptance of the lease or attornment was induced by fraud.³⁸⁸ And when one made a deed of land, taking back a lease from the grantee, the instruments providing for a reconveyance upon payment of a debt to secure which the two instruments were executed, it was held that the lessor necessarily had all legal remedies for making the security effective, and the local rule referred to was consequently inapplicable.³⁸⁹

In a few states, other than California, the doctrine that one in possession accepting a lease or attorning is precluded, as fully as one who enters under a lease, from denying the landlord's title, in an action by the latter for possession, is not fully adopted. In Michigan it appears to be the rule that one who has title, as well as possession, at the time of the acceptance of a lease from another, may assert such title as against the latter,³⁹⁰ though he is estopped to deny the latter's title if the title was not in himself at that time,³⁹¹ the theory being that in the former case the person so in possession gains nothing by accepting the lease, while in the latter case he does gain something. But it would seem

³⁸⁵ *Tewksbury v. Magraff*, 33 Cal. 174, 74 Pac. 761, and post, § 78 k (4).
²³⁷; *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129.

³⁸⁶ *De Peralta v. Ginochio*, 47 Cal. 459; *Holloway v. Galliac*, 47 Cal. 474; *Abbey Homestead Ass'n v. Wil- lard*, 48 Cal. 614.

³⁸⁷ *Mason v. Wolff*, 40 Cal. 246.

³⁸⁸ *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111, explaining *David- son v. Ellmaker*, 84 Cal. 21, 23 Pac. 1026. See, also, *Simon Newman Co. v. Lassing*, 141 Cal.

³⁸⁹ *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111, 48 Am. St. Rep. 98.

³⁹⁰ *Michigan Cent. R. Co. v. Bul- lard*, 120 Mich. 416, 79 N. W. 795 (summary proceedings); *Campau v. Lafferty*, 43 Mich. 429, 5 N. W. 648 (ejectment), explaining *Fuller v. Sweet*, 30 Mich. 237, 18 Am. Rep. 122 (use and occupation).

³⁹¹ *Campau v. Lafferty*, 43 Mich. 429, 5 N. W. 648.

that he gains the same thing in both cases, immunity from suit by one having no title, and as to whom, consequently, the title of the person already in possession is immaterial. In Minnesota a somewhat similar view has been adopted, to the effect that the lessee may deny the lessor's title in case he is already in possession, for the reason that he thereby gains nothing, with the qualification that he cannot do so if the instrument of lease is under the seals of both parties,^{391a} on the theory, apparently, that this dispenses with any necessity of consideration. It is difficult to understand how the matter of consideration can come in question in an action for possession, this necessarily involving, not contractual rights, but rights *in rem*. Apart from this there is, it is conceived, the equivalent of a consideration moving from the lessor or attornee in the case of a lease by or attornment to a person already in possession.³⁹²

In Iowa a distinction is suggested in this regard between the acceptance of a lease by one in possession as "a mere trespasser without any shadow of right" and such acceptance by one in possession under color of title.³⁹³ But why mere color of title, derived from a third person, should affect the lessee's rights and liabilities as regards his lessor is not explained. In Kansas it is said that one already in possession to whom a lease is made is not estopped to deny the lessor's title unless he occupied "under and by virtue of the lease," and that this is a question for the jury.³⁹⁴ Whether this means merely that he must have accepted the lease does not clearly appear. In Tennessee there are *dicta* questioning the applicability of the rule of estoppel or preclusion to the case of one already in possession who takes a lease.³⁹⁵

(3) **The theory of the rule.** Although the great weight of authority is as above shown, that one in possession who accepts a lease from another is precluded from questioning the title of that other in an action by the latter for possession, this view cannot be regarded as entirely satisfactory except when the ac-

^{391a} *Sage v. Halverson*, 72 Minn. 294, 75 N. W. 229; *Cleary v. O'Shea*, 72 Minn. 105, 75 N. W. 115, 71 Am. St. Rep. 465.

³⁹² See ante, § 19 c, at note 101, post, at note 404-407.

³⁹³ *Bowdish v. City of Dubuque*, 38 Iowa, 341.

³⁹⁴ *Ireton v. Ireton*, 59 Kan. 92, 52 Pac. 74.

³⁹⁵ *Shultz v. Elliott*, 30 Tenn. (11 Humph.) 183; *Hammons v. McClure*, 85 Tenn. 65, 2 S. W. 37.

tion is one of a character in which the statute prohibits the trial of any question of title. The element of actual estoppel, so clearly apparent when possession is given under the lease,³⁹⁶ is entirely absent when possession is not given, that is, the lessor is, in the latter case, not induced to take any action to his disadvantage by reason of an implied representation by the lessee that he will relinquish the possession on the expiration of the tenancy. It has been said, in a criticism of the California cases above referred to, that were the rule otherwise than that usually enunciated, one might get into possession and then take a lease, "and at the same time be secretly holding, or claiming to hold, an adverse title, * * * and suppress all notice of such adverse claims, with intent to mislead the landlord, and so continue until a convenient time and opportunity arrives, when the evidence bearing on the controversy is lost or destroyed, or beyond the reach of his adversary, or witnesses have perished."³⁹⁷ But this statement assumes that the lessor or attornee has a good title, while the question involved in the decisions which we are discussing is as to the tenant's rights when the lessor has *not* a good title. The lessor or attornee would seem to be fully protected by imposing on the tenant the burden of showing the former's lack of title, and the lessee, rather than the lessor, would suffer by delay in assertion of the claim. So far as there is any misrepresentation in the transaction, it is quite as much on the side of the lessor as on that of the lessee, and the lessor has, it seems, all to gain and nothing to lose thereby. He acquires a right to rent or to recover in use and occupation for land in respect to which he has neither the possession nor the right to possession.³⁹⁸

What has just been said with reference to the doctrine of estoppel in connection with actions for possession might also, it is conceived, be said with reference thereto in connection with actions arising from a distress. But it has in England apparently been decided that if one in possession of land attorns to another as tenant, the attornment vests in such other a reversion "by estoppel," which will support a distress by him, though previously he had no legal title whatever.³⁹⁹ On what this estoppel is based

³⁹⁶ See ante, § 78 c (1).

³⁹⁸ See the opinion of Sanderson,

³⁹⁷ Parrott v. Hungenburger, 9 J., in Franklin v. Merida, 35 Cal. 558, Mont. 526, 24 Pac. 14. And see Bige-

low, Estoppel (5th Ed.) 534.

95 Am. Dec. 129.
³⁹⁹ Jolly v. Arbuthnot, 4 De Gex

does not clearly appear. The express repudiation by the court, in both of the cases referred to, of the view that the tenant was estopped to assert the lessor's lack of title for the reason that such lack appeared on the face of the instrument containing the attornment, would suggest that, while the court had in mind the common-law doctrine of estoppel by deed, it did not regard this as the basis of its decision, that doctrine not applying "when the truth appears."⁴⁰⁰ It would seem then that the decisions must be regarded as based on the doctrine of estoppel *in pais*, but the applicability of such a doctrine, in the ordinary case, for the purpose of supporting distress, is, it is submitted, somewhat difficult to understand. In the particular cases referred to the person to whom the attornment was made loaned money on the strength thereof, the attornment being given as security collateral to a mortgage, but no particular reference is made to this fact, and the expressions of the judges would seem to be to the effect that if one in possession of land attorns to another, for any reason whatever, or without any reason, his mere acceptance of the position of tenant estops him from asserting that the person to whom he attorns has not a reversion sufficient to sustain a distress. In the ordinary case, the person making the attorn-

& J. 224; Morton v. Woods, L. R. 3 Q. B. 293.

⁴⁰⁰ Bigelow, Estoppel, c. 9, § 5.

Previous cases holding that there is no estoppel to deny the existence of the relation when the truth appears from the indenture on which the estoppel is sought to be based are distinguished by Kelly, C. B., in Morton v. Woods, L. R. 4 Q. B. 293, supra, on the ground that "they were either actions of covenant in which the covenant must be enforceable as an obligation at law, or actions of ejectment on a clause of re-entry, where it is perfectly clear there must be the legal estate in the plaintiff." But it would seem also to be "perfectly clear" that by the ordinary rule a legal reversion is necessary to support a distress. The same judge refers to the deci-

sion of Lord Chelmsford in Jolly v. Arbuthnot, 4 De Gex & J. 224, that the fact that the true state of the title appears on the face of the deed does not exclude the estoppel, saying that that, being the decision of the Lord Chancellor on appeal, is a decision of a court of co-ordinate jurisdiction to which the court of exchequer chamber is bound to defer. In Jolly v. Arbuthnot, 4 De Gex & J. 224, a power of distress was expressly given, and so the language of the Lord Chancellor therein to the effect that a tenancy was created seems to have been uncalled for. Whatever weight the decision of the Lord Chancellor on appeal may carry as authority in England, such decision can in other jurisdictions be regarded merely as a decision by a single judge, however

ment cannot well be regarded as having induced the acceptance of the attornment or any other change of position on the part of the person to whom the attornment is made by a tacit undertaking, involved in the making of the attornment, not to assert, as against a distress by such person, a lack of an estate in him sufficient to sustain a distress, and in the absence of such inducement there appears to be no ground for an estoppel. It seems not improbable that the fact that in these particular cases the attornment was evidently made for the purpose of giving a right of distress, as additional security for a mortgage loan, may have disposed the court to recognize an estoppel, as resulting therefrom, which it would not have recognized in the ordinary case of an agreement by one in possession to hold under another. It seems proper that, if one attorns in order to give a right of distress, and induces the making of a loan by so doing, he should not subsequently be allowed to deny the right of distress. Such an attornment clause in connection with a mortgage might in fact be regarded as equivalent to an express grant of a right of distress. This basis for the estoppel would not, however, exist when the attornment is made without any reference to a possible distress, especially if the person to whom it is made does not change his position on the strength thereof.

In the English cases referred to, the person in possession expressly "attorned" to another. In legal effect, as we have before remarked, an attornment is equivalent to an acceptance of a lease,⁴⁰¹ but, nevertheless, the use of the word "attorn" might perhaps, it seems, have an effect as creating a right of distress, when the mere acceptance of a conveyance by way of lease would not have that effect. Unless such a distinction is to be recognized between an attornment in express terms and the acceptance of a lease, the English decisions referred to are not in entire accord with others, to the effect that a lessee cannot distrain upon one to whom he has undertaken to make a sublease, if the so-called sublease is in reality an assignment, as transferring the entire leasehold interest.⁴⁰² If a lessee may assert that there is no reversion in the lessor supporting the right of distress, for the rea-

eminent he may be. The decision in strong court, both below and on appeal. *Morton v. Woods*, L. R. 3 Q. B. 658, peal.

L. R. 4 Q. B. 293, was, however, it ⁴⁰¹ See ante, § 19 c.

must be conceded, by a singularly ⁴⁰² See post, § 151, note 33.

son that the latter's estate at the time of the lease was too small, he should be allowed to assert that there is no reversion in the lessor for this purpose for the reason that the latter had *no* estate at the time of the lease.

So far as actions for rent are concerned, the preclusion of the tenant to assert defects in the lessor's title in defense to such an action would seem to exist in cases in which he was previously in possession, as well as in those in which he entered under the lease. He has in effect agreed to pay the rent for the undisturbed enjoyment of the possession, and, having that, he should pay it. Occasionally it has been asserted that in such case of a lease to one already in possession, or of an attornment by him, there is, if the lessor or attornee has no title, no consideration to support the liability for rent, and that consequently such lack of title may be asserted in defense to a claim for rent.⁴⁰³ Such a consideration would, however, in most jurisdictions, it is conceived, be furnished by the liability upon the covenant for quiet enjoyment which arises from the creation of the relation of landlord and tenant,⁴⁰⁴ that is, the lessor or attornee, by the very act of accepting the position of landlord, furnishes a consideration for the promise to pay rent. Furthermore, even though the lessor has no title to the land, the fact that he goes to the trouble of executing a written lease is, it is conceived, a sufficient consideration to support the promise to pay rent. The case is analogous to that of

⁴⁰³ Fuller v. Sweet, 30 Mich. 237, demanded of the person in possession of the premises that he attorn to him, which he did by accepting a lease, it was held that the person in possession was not thereby precluded, in an action for rent, from attacking the receiver's right to make the lease. The court says that "the receiver, having given no bond, had no legal right to the possession, and the defendant being in possession as of his own right when that demand was made on him, it cannot be said, in law, that in making this lease he took possession under the receiver; all he did was to use words, he did not act."

In Prevot v. Lawrence, 51 N. Y. 219, and Derrick v. Luddy, 64 Vt. 462, 24 Atl. 1050, it is decided that one attorning to another cannot assert the latter's lack of title in defense to a claim for rent. In the first of these case the lease was under the seals of both parties.

In Phillips v. Smoot, 12 D. C. (1 Mackey) 478, where a receiver, without qualifying by giving bond as required by the order appointing him,

⁴⁰⁴ See post, § 79 a.

a promise to pay money for which a sufficient consideration is furnished by the promisee's release of all his rights in the land, although he has no rights therein, "for it puts him to the trouble of making a release."⁴⁰⁵ It does not seem, however, that the making of a mere oral lease or the oral acceptance of an attornment could be regarded as involving such trouble to the lessor or attorney as to furnish a consideration. But even in such case, if the making of the lease or acceptance of the attornment involves, as it usually would involve, a forbearance by the lessor or attorney to assert a claim to immediate possession which is honestly believed by him to exist, this would, in many jurisdictions, be regarded as a sufficient consideration, while in others this would be the case provided his claim could be regarded as reasonably doubtful in fact or in law.⁴⁰⁶ Upon the whole, it seems, in the majority of cases, there could be found some consideration to support a promise by one already in possession to pay rent. Even apart from such promise, one who accepts a lease reserving rent would, at common law, be liable therefor by reason of privity of estate, as distinguished from privity of contract,⁴⁰⁷ and it does not seem that such liability could be affected by the fact that at the time of the making of the lease the lessee was already in possession.

(4) **Fraud in procuring attornment.** There are *dicta* in a number of cases to the effect that fraud or imposition in procuring the acceptance of a lease or an attornment by a person already in possession will render the rule of estoppel or preclusion inapplicable,⁴⁰⁸ as well as express decisions to that effect.⁴⁰⁹ It

⁴⁰⁵ Holt, C. J., *Thorp v. Thorp*, 12 Am. Dec. 708; *Loring v. Harmon*, 84 Mod. 459, quoted in *Pollock, Contracts* (6th Ed.) 459. And see to the same effect *Mullen v. Hawkins*, 141 Ind. 363, 40 N. E. 797; *Kerr v. Lucas*, 83 Mass. (1 Allen) 279; *Sykes v. Chadwick*, 85 U. S. (18 Wall.) 141.

⁴⁰⁶ See Wald's *Pollock, Contracts* (Williston's Ed.) 214, 215; 9 *Cyclopedia Law & Proc.* 342.

⁴⁰⁷ See post, § 171 a.

⁴⁰⁸ *Lyon v. Washburn*, 3 Colo. 201; *Doe d. Ball v. Lively*, 31 Ky. (1 Dana) 60; *Carter v. Marshall*, 72 Ill. 609; *Tison v. Yawn*, 15 Ga. 491, 60

Am. Dec. 708; *Loring v. Harmon*, 84 Mo. 123; *Jackson v. Spear*, 7 Wend. (N. Y.) 401; *Ingraham v. Baldwin*, 9 N. Y. (5 Seld.) 45; *Dixon v. Stewart*, 113 N. C. 410, 18 S. E. 325; *Williams v. Wait*, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768.

⁴⁰⁹ *Doe d. Plevin v. Brown*, 7 Adol. & E. 447; *Gravenor v. Woodhouse*, 1 Bing. 38; *Lyon v. Washburn*, 3 Colo. 201; *Ball v. Lively*, 25 Ky. (2 J. J. Marsh.) 181; *Suddarth v. Robertson*, 118 Mo. 286, 24 S. W. 151; *Young v. Heffernan*, 67 Ill. App. 354; *Brown v. Dysinger*, 1 Rawle

is, however, impossible to derive therefrom any positive criterion as to what constitutes fraud or imposition for this purpose. Conceding the existence of the rule so frequently stated,⁴¹⁰ that one in possession who accepts a lease or attorns is precluded to deny the lessor's or attornee's title, it is apparent that the mere fact that one having no title obtains such acceptance or attornment from the person in possession does not show such fraud or imposition.⁴¹¹ So it has been said that "the mere fact that the tenant has a better title than his landlord does not of itself raise the presumption that the lease was a fraud or accepted by mistake. The lease is not rendered void by proving title in the lessee. To make the law otherwise would be to say that the tenant shall not set up title in himself when he has none, and that the lease shall be no evidence of the landlord's rights except when he can prove them without it."⁴¹²

The fraud necessary for this purpose must have been perpetrated in the course of the creation of the relation of tenancy, and that the person from whom the lease was accepted, or to whom the attornment was made, procured the conveyance, under which he claimed at the time of making the lease, by fraud upon his grantor,⁴¹³ or in fraud of his grantor's creditors,⁴¹⁴ is immaterial in this respect. It has been decided that the fact that the lease accepted by the person in possession, owing to the fraud of the lessor, omitted a provision which had been agreed upon, giving the lessee a right to purchase, did not exclude the estoppel, the fraud

(Pa.) 409; *Baskin v. Seechrist*, 6 Pa. 154; *Evans v. Bidwell*, 76 Pa. 497; *Jenckes v. Cook*, 9 R. I. 520; *Givens v. Mullinax*, 4 Rich. Law (S. C.) 590, 55 Am. Dec. 706; *Cross v. Freeman*, 19 Tex. Civ. App. 428, 47 S. W. 473; *Allison v. Casey*, 63 Tenn. (4 Baxt.) 587; *Shultz v. Elliott*, 30 Tenn. (11 Humph.) 183; *Alderson v. Miller*, 15 Grat. (Va.) 279.

In *Nicrosi v. Philippi*, 91 Ala. 299, 8 So. 561, it is decided that in unlawful detainer proceedings against one who accepted a lease from plaintiff, it cannot be shown that such acceptance was induced by fraud, in view of the statutory provision

(Code 1907, § 4271) that in such proceedings no inquiry into the merits of the title are permissible.

⁴¹⁰ See ante, 78 k (1).

⁴¹¹ It is so stated in *People's Loan & Bldg. Ass'n v. Whitmore*, 75 Me. 117.

⁴¹² *Black, C. J.*, in *Thayer v. Society of United Brethren*, 20 Pa. 60, quoted and approved in *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448.

⁴¹³ *Williams v. Wait*, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768.

⁴¹⁴ *Smith v. McCurdy*, 3 Phila. (Pa.) 488; *Palmer v. Melson*, 76 Ga. 803.

in this case not affecting the operation of the instrument as a lease.⁴¹⁵

So far as regards an action for rent or on any covenant of a lease made to one already in possession, the right to assert fraud as a defense is independent of the validity of the lessor's title. As we have before seen,⁴¹⁶ the fact that the acceptance of a lease was procured by fraud constitutes a defense to an action for rent or upon any covenant, provided the lessee promptly returns what he has procured by reason of the lease, that is, the possession. If, however, the lessee has not obtained possession by the taking of the lease, as when a lease is made to one already in possession, or, as it may be otherwise expressed, an attornment is made by such a person, there is nothing for him to return, and he may consequently assert the fraud in defense to an action for rent or on a covenant while still retaining possession. And this seems the only difference, as regards such an action, between the effect of fraud when the lessee was previously in possession and when he was not. As to the effect of the lessor's lack of title, the fraud may consist of false representations as to title, but, provided this is not the character of the fraud, it is quite sufficient as a defense or ground of rescission without reference to such lack of title, and the validity or invalidity of the lessor's title seems to be perfectly immaterial.

In the case of an action by the lessor for possession, the existence of fraud on the part of the lessor in procuring the acceptance of the lease cannot prevent recovery by him, if the possession was obtained from him by the lessee.⁴¹⁷ If the possession was not obtained from him, the lessee being already in possession, the only possible ground on which the lessor could succeed in the action would be the fact that the lease had been accepted by the defendant, that is, an attornment had been made, and that, as we have seen, is ordinarily sufficient, by the weight of authority, to prevent the defendant from questioning the lessor's title.⁴¹⁸ But if the acceptance of the lease (the attornment) was procured by the fraud of the lessor, it may be disregarded by the lessee (the attornor), and he may consequently question the lessor's title as if the relation of tenancy had never been created between them. In other

⁴¹⁵ *Forgy v. Harvey*, 151 Ind. 507,

51 N. E. 1066.

⁴¹⁷ See ante, § 78 h.

⁴¹⁸ See ante, § 78 k (1).

⁴¹⁶ See ante, § 38 b.

words, in the case of an attornment or acceptance of a lease by one already in possession, as a result of the lessor's fraud, the lessee may question the lessor's title in an action by the lessor to recover possession, although he cannot do so if he obtains possession by virtue of the lease, even though the acceptance of the lease was procured by fraud.

(5) **Attornment under mistake.** There are numerous *dicta* to the effect that the rule of estoppel or preclusion does not apply if the acceptance of the lease or attornment was by mistake,⁴¹⁹ and also a number of decisions to that effect.⁴²⁰ Conceding that a mistake on the part of the lessee or attornor alone will always have such an effect, there are, it would seem, but few cases in which the estoppel could ever operate against one previously in possession, since such a person is not likely to agree to hold under another having no title, unless under the mistaken impression that such other has a valid title, and the effect would be that one in possession who accepts a lease or attorns to another would be precluded from denying such other's title only if, at the time of such acceptance or attornment, he knew of or suspected such lack of title and consented to hold under the other merely to avoid litigation, however unfounded this might be. The decisions just cited in which this exception has been applied

⁴¹⁹ See *Farris v. Houston*, 74 Ala. 162; *Lyon v. Washburn*, 3 Colo. 201; *Tison v. Yawn*, 15 Ga. 491, 60 Am. Dec. 708; *Carter v. Marshall*, 72 Ill. 609; *Dixon v. Stewart*, 113 N. C. 410, 18 S. E. 325; *Jackson v. Spear*, 7 Wend. (N. Y.) 401; *Ingraham v. Baldwin*, 9 N. Y. (5 Seld.) 45; *Isaac v. Clarke*, 2 Gill (Md.) 1; *Loring v. Harmon*, 84 Mo. 123. (ble); *Pacific Mut. Life Ins. Co. v. Stroup*, 63 Cal. 150; *Anderson v. Smith*, 63 Ill. 126; *Shearer v. Winston*, 33 Miss. (4 George) 149; *Child v. Chappell*, 9 N. Y. (5 Seld.) 246 (semble); *Petterson v. Sweet*, 13 Ill. App. (13 Bradw.) 255; *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416, 79 N. W. 635; *Givens v. Mullinax*, 4 Rich. Law (S. C.) 590, 55 Am. Dec. 706; *Berridge v. Glassey* (Pa.) 7 Atl. 749 (semble); *De Wolf v. Martin*, 12 R. I. 533; *Shultz v. Elliott*, 30 Tenn. (11 Humph.) 183; *Washington v. Conrad*, 21 Tenn. (2 Humph.) 562; *Hammons v. McClure*, 85 Tenn. 65, 2 S. W. 37; *Swift v. Dean*, 11 Vt. 323, 34 Am. Dec. 693; *Queen v. Hall*, 6 Can. Exch. 145.

In *Wiggin v. Wiggin*, 58 N. H. 235, it is said that "a tenant who accepts a lease under an entire misapprehension of its purport and effect is not estopped to deny the title of his landlord." Just what is meant by this does not clearly appear.

⁴²⁰ *Pearce v. Nix*, 34 Ala. 183; *Cain v. Gimon*, 36 Ala. 168 (sem-

would seem to support this view, they being ordinarily cases in which the person attorning or accepting a lease was relieved from the operation of the ordinary rule on the ground that he had acted under a mistake as to the rights either of himself or of the person whom he acknowledged as landlord. But it is somewhat difficult to harmonize this view with the numerous decisions⁴²¹ upholding the estoppel against one previously in possession, since, as just suggested, it seems that, in accepting the position of tenant, he must ordinarily have done so under a mistake as to the rights of the person whom he acknowledged as landlord.⁴²² In Massachusetts it appears to have been clearly decided that the fact that the attornment was under the erroneous supposition that the title was in the person to whom it was made does not enable the person attorning to dispute the other's title.⁴²³

The cases above cited appear to be to the effect that the mistake of the lessee or attornor, alone, as to the lessor's title, is sufficient, in this connection, without any question as to whether the lessor or attornee was also under the same mistake or knew of the other's mistake. The general rule seems to be, though the cases are by no means clear or consistent, that a mistake as to a private right of ownership is sufficient to entitle one of the parties to a transaction to relief, either if the mistake was mutual, or if such party alone acted under a mistake and the other party knew that he was so acting.⁴²⁴ It does not seem that the cases above cited can be said to be in harmony with such a rule, or to be the reverse, since they do not, in fact, discuss the nature of the mistake entitling a lessee to relief as against his lessor.

The decisions in England as to the exclusion of the rule of estoppel or preclusion by reason of the acceptance of a lease or attornment under mistake are quite as vague and unsatisfactory as those in this county. The rule there appears to be that when one who has entered under a lease subsequently attorns to or takes a lease from a person other than the original lessor, under the

⁴²¹ See ante, § 78 k (1).

⁴²³ *Hawes v. Shaw*, 100 Mass. 187.

⁴²² See, to the effect that the mere fact that the person attorning has the superior title does not itself show that the attornment was under mistake, cases cited ante, notes 409, 410.

See, also, *Bowdish v. City of Dubuque*, 38 Iowa, 341; *Bank of Montreal v. Gilchrist*, 6 Ont. App. 659.

⁴²⁴ See *Pollock, Contracts* (6th Ed.) 473, 476; *Kerr, Fraud & Mistake* (3d Ed.) 433 et seq., 442, 449;

impression that the reversionary estate is still existent and has passed to such other, although as a matter of fact such estate has come to an end,⁴²⁵ or, if still existent, is not vested in such other,⁴²⁶ he may show the true state of the title as against such other. And so it has been held that an agreement by a sublessee, upon the expiration of the sublessor's interest, to pay rent to a person under whom such sublessor had held, which agreement was made under the mistaken impression that such person's interest had not expired, did not preclude him, as against such person, from showing that the latter had no longer any title.⁴²⁷ On the other hand it was said that the tenant cannot show that the person to whom he paid the rent, under the impression that such person was the assignee of the reversion, was not such assignee, but he must also show who is the real assignee and that the latter has such title as would entitle him to a verdict in ejectment, and, accordingly, it was held that the tenant could not refuse to continue paying rent to one named as devisee in the will of the lessor on the ground that the will had been questioned as not being properly executed.⁴²⁸ And in another case, it was decided that a tenant who, on the lessor's death, agreed to hold of one named as devisee in the lessor's will, could not show that the will was void for mental incapacity.⁴²⁹

A distinction may perhaps be suggested between the English cases above referred to, in which the attornment was under the mistaken belief that the person to whom it was made was either the assignee of the reversion or one originally in privity with the owner of the reversion, and a case in which the person attorning mistakenly credited the person to whom he attorned with a superior title in no way connected with that of the lessor. It does not appear that the estoppel has ever, in England, been excluded owing to a mistake of the latter character, and in one case where

20 Am. & Eng. Enc. Law (2d Ed.) 818, 819.

⁴²⁵ Fenner v. Duplock, 2 Bing. 10.

⁴²⁶ Rogers v. Pitcher, 6 Taunt. 202; Gregory v. Doidge, 3 Bing. 474; Knight v. Cox, 18 C. B. 645 (semble); Doe d. Higginbotham v. Barton, 11 Adol. & El. 307.

⁴²⁷ Claridge v. Mackenzie, 4 Man. & G. 143.

⁴²⁸ Carlton v. Bowcock, 51 Law T. (N. S.) 659.

⁴²⁹ Doe d. Marlow v. Wiggins, 4 Q. B. 367.

In this case Patteson, J., says: "There was no mistake of facts in this case. T. was devisee, whether the will was sustained or not." The other judges do not mention "mistake."

a lessee had attorned to B on his lessor's *bona fide* statement that B had convinced him that he, B, was the real owner of the property, it was held that the lessee was precluded from showing that a third person was owner.⁴³⁰

Conceding that, in the particular case, there is such a mistake as to invalidate the attornment or acceptance of the lease by one in possession, the effect is, it seems, the same as when the attornment or acceptance of the lease is procured by fraud,⁴³¹ that is, to relieve the lessee from his contractual liabilities without respect to whether the lessor's title is valid or invalid, and to enable the lessee, in an action by the lessor for possession, to defend on the ground that there is an outstanding paramount title.

1. **Persons subject to the rule of preclusion.** Not only is the original lessee ordinarily precluded from denying the validity of the lessor's title at the time of making the lease, but all persons claiming or holding by, through or under the lessee are also so precluded.⁴³² Were this not so, it is plain, the rule of preclusion would be of little benefit to the landlord.

In accordance with this principle, the assignee of the lessee is precluded to the same extent as the lessee himself from denying the lessor's title.⁴³³ And the fact that the assignment purports

⁴³⁰ Hall v. Butler, 10 Adol. & E. v. Dove, 7 Or. 467; Thomson v. 204. And see Doe d. Jackson v. Peake, 7 Rich. Law (S. C.) 353; Wilkinson, 3 Barn. & C. 413. Adams v. Shirk, 55 C. C. A. 25, 117

⁴³¹ See ante, at notes 416-418.

Fed. 801.

⁴³² Russell v. Irwin's Adm'r, 38 Ala. 44; Blakeney v. Ferguson, 20 Ark. 547; Rose v. Davis, 11 Cal. 133; Standley v. Stephens, 66 Cal. 541, 6 Pac. 420; Owen v. Brookport, 208 Ill. 35, 69 N. E. 952; Sexton v. Carley, 147 Ill. 269, 35 N. E. 471; Doty v. Burdick, 83 Ill. 473; Ratcliff v. Bellfonte Iron Works Co., 87 Ky. 559, 10 S. W. 365; Chambers v. Pleak, 36 Ky. (6 Dana) 436, 32 Am. Dec. 78; Newman v. Mackin, 21 Miss. (13 Smedes & M.) 383; Den d. Harker v. Gustin, 12 N. J. Law (7 Halst.) 42; Springs v. Schenck, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552; Genin v. Ingersoll, 2 W. Va. 558; Jones

⁴³³ Morris v. Wheat, 11 App. D. C. 201; Ballance v. Peoria, 180 Ill. 29, 54 N. E. 428; Byrnes v. Douglass, 23 Nev. 83, 42 Pac. 788; White v. Barlow, 72 Ga. 887; Den d. Lunsford v. Alexander, 20 N. C. (3 Dev. & B. Law) 166; Earle v. Hale, 31 Ark. 470; Leshey v. Gardner, 3 Watts & S. (Pa.) 314, 38 Am. Dec. 764; Derrick v. Luddy, 64 Vt. 462, 24 Atl. 1050; Stagg v. Eureka Tanning & Currying Co., 56 Mo. 317; Rector v. Gibbon, 111 U. S. 276, 28 Law. Ed. 427; McWhorter v. Stein (Ala.) 39 So. 617; Jones v. Todd, 22 U. C. Q. B. 37; Cahuac v. Scott, 22 U. C. C. P. 551.

to transfer a fee simple interest is immaterial in this connection.⁴³⁴ According to at least one decision, it is immaterial that the transferee by a conveyance purporting to convey a fee simple has no notice that his grantor is merely a tenant under a lease,⁴³⁵ while there is another decision to the contrary.⁴³⁶ The question is one which would arise when one who has a good title in fee simple attorns to, or takes a lease from, another, and subsequently conveys in fee simple to one who purchases on the strength of the fee simple title without knowledge of the attornment or lease, and also when one in possession under a lease procures the paramount title in fee, and then conveys to another who purchases without notice of the lease. Occasion for any difficulty in this regard would be to a great degree eliminated by adopting the view, which apparently obtains in England, and also perhaps in some other jurisdictions, that, in an action for possession by a landlord against his tenant, the latter is not estopped to assert a paramount title in himself.⁴³⁷

An heir of the tenant, who, on the latter's death, continues the possession of the tenant, standing solely on his right, is subject to the rule of preclusion,⁴³⁸ as is one who undertakes to defend an ejectment suit as being the landlord of the original defendant therein.⁴³⁹

A subtenant, like an assignee, is ordinarily precluded from questioning the title of the head landlord.⁴⁴⁰

⁴³⁴ *Rose v. Davis*, 11 Cal. 133; And see to the same effect *Miller Phillips v. Rothwell*, 7 Ky. (4 v. South, 12 Ky. Law Rep. 351, 14 Bibb) 33; *Lane's Lessee v. Osment*, S. W. 361. The fact that the possessor is taken under the tenant seems to be the material consideration, rather than the fact of heirship. An heir, as such, has no title to leasehold property.

⁴³⁵ *Doe d. Knight v. Smythe*, 4 Lane's Lessee v. Osment, 17 Maule & S. 347; *Doe d. Manvers v. Tenn.* (9 Yerg.) 86. There is at least a dictum to that effect in *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682.

⁴³⁶ *Thompson v. Clark*, 7 Pa. 62. And see *White v. Barlow*, 72 Ga. 887.

⁴³⁷ See ante, § 78 i.

⁴³⁸ *Lewis v. Adams*, 61 Ga. 559.

⁴³⁹ *Doe d. Knight v. Smythe*, 4 Maule & S. 347; *Doe d. Manvers v. Tenn.* (9 Yerg.) 86. There is at least a dictum to that effect in *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682.

In *Isler v. Floy*, 66 N. C. 547, it is decided that this principle is modified by the adoption of a statute requiring or permitting all persons claiming title to be made parties.

⁴⁴⁰ *Barwick v. Thompson*, 7 Term R. 488; *Patten v. Deshon*, 67 Mass.

A licensee of the lessee, or of one claiming under the lessee, is likewise precluded to the same extent as is the lessee from denying the title of the landlord in defense to an action by the latter for possession.⁴⁴¹ There is a modern English decision, however, to the effect that one making use of the premises by the tenant's license is not precluded from denying the landlord's title as a means of showing the invalidity of a distress made by the landlord on the goods of such licensee, in an action for damages on account of the conversion of such goods.⁴⁴² Conceding that ordinarily the tenant is precluded from denying the landlord's title for the purpose of invalidating a distress,⁴⁴³ it is not apparent why one on the premises by his license should not also be so precluded. If such third person replevies the goods he is, by force of the statute of 11 Geo. 2, c. 19,⁴⁴⁴ precluded from asserting a lack of title in the lessor as against the landlord's avowry,⁴⁴⁵ and other forms of proceeding, involving the legality of the distress, such as an action for conversion, might well be regarded as within the equity of the statute.

The rule of preclusion has also been applied as against one who obtained possession from the tenant under summary proceedings,

- (1 Gray) 325; *Stewart v. Miles*, 166 Mo. 174, 65 S. W. 754; *Den d. Lunsford v. Alexander*, 20 N. C. (3 Dev. & B. Law) 166; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322; *Stewart v. Keener*, 131 N. C. 486, 42 S. E. 935; *Graham v. Moore*, 4 Serg. & R. (Pa.) 467; *Milhouse v. Patrick*, 6 Rich. Law (S. C.) 353; *Newman v. Mackin*, 21 Miss. (13 Smedes & M.) 383; *Reed v. Shepley*, 6 Vt. 602; *Beck v. Minnesota & Western Grain Co.*, 131 Iowa, 62, 107 N. W. 1032, 7 L. R. A. (N. S.) 930.
- Graves*, 80 Ala. 416; *Fordyce v. Young*, 39 Ark. 135.
- ⁴⁴¹ *Stewart v. Miles*, 166 Mo. 174, 65 S. W. 754; *Doe d. Kluge v. Lachenour*, 34 N. C. (12 Ired. Law) 180; *Dills v. Hampton*, 92 N. C. 565. A member of the lessee's family who aids in paying the rent is said to be estopped. *Hodgkin v. McVeigh*, 86 Va. 751, 10 S. E. 1065.
- ⁴⁴² *Tadman v. Henman* [1893] 2 Q. B. 168.
- ⁴⁴³ See ante, § 78 c (5).
- ⁴⁴⁴ See ante, § 78 c (5).

A sublessee is precluded from denying the title of his immediate lessor to the same extent as an original lessee. *Burnett v. Rich*, 45 Ga. 211; *Coburn v. Palmer*, 62 Mass. (8 Cush.) 124; *Stoops v. Devlin*, 16 Mo. 162; *Tilyou v. Reynolds*, 108 N. Y. 558, 15 N. E. 534; *Wright v. Sullivan v. Stradling*, 2 Wils. 108; *Smith v. Aubrey*, 7 U. C. Q. B. 90. In both of these cases the person whose goods were seized under the distress and who was held to be precluded from questioning the landlord's title was a person other than the tenant.

based on a lease by him to the tenant subsequent to that under which the tenant entered, he in effect holding possession under the tenant as regards the original landlord.⁴⁴⁶

A tenant's wife who lives upon the land with her husband, and whose entry thereon is by reason of her husband's right of possession, would seem to be within the rule of preclusion or estoppel, and it has been so decided.⁴⁴⁷ And it has likewise been decided that the rule extends to a husband who enters in right of his wife.⁴⁴⁸ Were it otherwise, any rule of estoppel or preclusion could, in the case of a married tenant, be rendered practically nugatory. In one case, however, it has been held that the wife of the tenant may attack the title of the landlord.⁴⁴⁹

The surety of the lessee for the payment of rent is precluded to the same extent as the lessee to deny the lessor's title, when sued upon his contract of suretyship.⁴⁵⁰

The rule of preclusion, it has been held, may be asserted to its full extent against one who, claiming a title paramount to that of the lessor, instead of bringing an action to assert his rights, procures possession from the tenant and then undertakes to assert his claim in an action by the landlord for rent or possession.⁴⁵¹ So far as an action for possession is concerned, how-

⁴⁴⁶ *Cox v. Cunningham*, 77 Ill. 545; *Ballance v. Fortier*, 8 Ill. (3 Gilm.) 291.

⁴⁴⁷ *Russell v. Irwin's Adm'r*, 38 Ala. 44; *Taylor v. Eckford*, 19 Miss. (11 Smedes & M.) 21.

A widow of the tenant remaining in possession is estopped. *Love v. Dennis*, Harp. Law (S. C.) 70; *Denn d. Bufferlow v. Newson*, 12 N. C. (1 Dev. Law) 208.

⁴⁴⁸ *Hagar v. Wikoff*, 2 Okl. 580, 39 Pac. 281.

⁴⁴⁹ *Shew v. Call*, 119 N. C. 450, 26 S. E. 33, 56 Am. St. Rep. 678. The theory of the decision is that the wife is not bound because she is not in privity with her husband. "Privity" is such an elastic term that it is frequently difficult to say whether it exists or not. One who obtains possession from her husband

is, according to the cases before referred to, sufficiently in privity with him for the application of the rule in question in an action by the landlord for possession. She is as much in privity with him as an ordinary licensee, it would seem (ante, at note 441). It is submitted that the character of the proceeding involved in this case, a proceeding by the wife to cancel a deed, did not call for the application of any rule of estoppel or preclusion. Ante, § 78 c (6).

⁴⁵⁰ *Oliver v. Gary*, 42 Kan. 623, 22 Pac. 733; *Ewing v. Cottman*, 43 Wkly. Notes Cas. (Pa.) 525.

⁴⁵¹ *Doe d. Bullen v. Mills*, 2 Adol. & E. 17; *Doe d. Haden v. Burton*, 9 Car. & P. 254; *White v. Nelles*, 11 Can. Sup. Ct. 587; *Doe d. Miller v. Tiffany*, 5 U. C. Q. B. 79; *Kepley v.*

ever, the person so in possession might, it is submitted, be allowed to prove his paramount title in that action rather than be required to bring another action for the purpose. He would, in either case, have the burden of proving his title, and, this being so, it would seem to be immaterial to the landlord whether he does so as plaintiff or defendant.^{451a}

The fact that the lessee, or one claiming under him, is *non sui juris*, is evidently no reason for allowing him, after the expiration of the term, to retain the possession which was acquired under the lease on the ground of defects in the lessor's title.⁴⁵² That is, he is precluded from questioning such title to the same extent as any other tenant. The liability of such a person for rent, elsewhere considered,⁴⁵³ is presumably likewise independent of the question of the lessor's title.

m. **Persons entitled to assert the rule of preclusion—**

(1) **Transferees of reversion.** The lessee, or the person in possession under the lessee,⁴⁵⁴ is precluded from asserting defects in the lessor's title as against a transferee of the lessor to the same extent as against the lessor himself,⁴⁵⁵ and this is so not only when the reversion is transferred by voluntary act, but also when it passes by sale under judicial process or decree,⁴⁵⁶ or by

Scully, 185 Ill. 52, 57 N. E. 187; *Roxbury v. Huston*, 39 Me. 312; *Gallagher v. Connell*, 23 Neb. 391, 36 N. W. 566; *Bertram v. Cook*, 32 Mich. 518; *Cox v. Cunningham*, 77 Ill. 545; *Fleming v. Mills*, 182 Ill. 464, 55 N. E. 373; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322; *Swan v. Busby*, 5 Tex. Civ. App. 63, 24 S. W. 303; *Stewart v. Roderick*, 4 Watts & S. (Pa.) 188, 39 Am. Dec. 71; *Jones v. Tatham*, 20 Pa. 398; *Pulford v. Whicher*, 76 Wis. 555, 45 N. W. 418.

^{451a} See ante, § 78 i (2).

⁴⁵² In *Wilson v. James*, 79 N. C. 349, it was decided to be immaterial that the lessee, being a slave, was unable to contract.

⁴⁵³ See ante, § 21.

⁴⁵⁴ See ante, § 78 l.

⁴⁵⁵ *Henley v. Branch Bank*, 16 Ala.

552; *Brunson v. Morgan*, 84 Ala. 598, 4 So. 589; *Christy v. Pulliam*, 17 Ill. 59; *McFarlane v. Kirby*, 28 App. D. C. 391; *Brenner v. Bigelow*, 8 Kan. 496; *Granger v. Parker*, 137 Mass. 228; *Benedict v. Morse*, 51 Mass. (10 Metc.) 323; *Den d. Lunsford v. Alexander*, 20 N. C. (3 Dev. & B. Law) 166; *People v. Angel*, 61 How. Pr. (N. Y.) 157; *Hackney v. McIninch*, 79 Neb. 128, 112 N. W. 296; *Whalin v. White*, 25 N. Y. 462; *Rogers v. Hill*, 3 Ind. T. 562, 64 S. W. 536; *Funk's Lessees v. Kincaid*, 5 Md. 404; *Bohn v. Hatch*, 39 N. Y. St. Rep. 404, 15 N. Y. Supp. 550; *Barton v. Learned*, 26 Vt. 102.

⁴⁵⁶ *Thomson v. Peake*, 7 Rich. Law (S. C.) 353; *Murphy v. Teter*, 56 Ind. 545; *Boynton v. Jackway*, 10 Paige (N. Y.) 307; *Siglar v. Malone*, 22 Tenn. (3 Humph.) 16.

inheritance.⁴⁵⁷ And as against a subsequent lessee of the same landlord, suing for possession upon the termination of the prior tenancy, the prior tenant is precluded from questioning the lessor's title at the time of the first lease.⁴⁵⁸

The rule of preclusion has also been applied in favor of an administrator of the lessor in behalf of whom an action, instituted by the intestate against the tenant, has been continued,⁴⁵⁹ and in favor of the administrator as against the lessee of his intestate, where the statute authorized him to sue on the intestate's lease,⁴⁶⁰ and as against a lessee of the widow of the intestate.⁴⁶¹ And the administrator *de bonis non* has been allowed to assert the rule as against one who entered under a lease from the administrator, made on behalf of the estate.⁴⁶²

Though the tenant is precluded from denying the lessor's title as against a transferee of the reversion to the same extent as he is precluded from denying it as against the lessor himself, he is not precluded from denying that one claiming the rights of a reversioner is such, owing to the fact that, though he formerly had the reversion, he has disposed thereof,⁴⁶³ or that he never acquired it.⁴⁶⁴

(2) **Mortgagees.** In jurisdictions where the common-law rule that a mortgagee has the legal title is still recognized, the tenant is no doubt precluded from denying the lessor's title as against one to whom the reversion has been mortgaged, to the same extent as against one claiming under an absolute conveyance,⁴⁶⁵ while he may, as against the mortgagor, show that the legal title has passed to the mortgagee.⁴⁶⁶ But such is not the

⁴⁵⁷ *Blantire v. Whitaker*, 30 Tenn. 34 Pac. 315; *Pearce v. Pearce*, 83 Ill. (11 Humph.) 313; *Morris v. Wheat*, 11 App. D. C. 201; *Williams v. McAliley*, Cheves Law (S. C.) 200; *Miller v. South*, 12 Ky. Law Rep. 351, 14 S. W. 361; *Weeks v. Birch*, 69 Law T. (N. S.) 759; *Smith v. Hardwick*, 28 Ky. Law Rep. 615, 89 S. W. 731.

⁴⁵⁸ *Gage v. Campbell*, 131 Mass. 566; *Ball v. Chadwick*, 46 Ill. 28; *Rennie v. Robinson*, 1 Bing. 147.

⁴⁵⁹ *Ronaldson v. Tabor*, 43 Ga. 230.

⁴⁶⁰ *State v. Votaw*, 13 Mont. 403,

34 Pac. 315; *Pearce v. Pearce*, 83 Ill.

App. 77.

⁴⁶¹ *Clarke v. Clarke*, 51 Ala. 498. In *Bishop v. Lalouette's Heirs*, 67 Ala. 197, it is apparently decided that the estoppel exists in favor of heirs as against one claiming under a lease by the administrator.

⁴⁶² *Norwood v. Kirby's Adm'r*, 70 Ala. 397.

⁴⁶³ See post, § 78 n.

⁴⁶⁴ See post, § 78, o.

⁴⁶⁵ See post, § 146 e.

⁴⁶⁶ *Niles v. Ransford*, 1 Mich. 338, 51 Am. Dec. 95.

case in jurisdictions where the mortgagee has merely a lien and not the legal title,⁴⁶⁷ and the tenant may, it has been decided, show that one claiming under a conveyance in terms absolute is in fact a mortgagee and so not entitled to the possession upon the expiration of the term.⁴⁶⁸ In one state, in which equitable defenses are allowed, it was decided that, in an action by the transferee under an absolute conveyance of the reversion, it could be shown by the tenant that the conveyance was made merely as security, and that the debt secured had been paid, so that such transferee had no longer any interest in the reversion.⁴⁶⁹

Although, in the particular jurisdiction, a mortgage passes the legal title, one claiming under a mortgage prior to the lease is not a transferee of the reversion in any sense, but is a claimant under a paramount title,⁴⁷⁰ and he cannot, in suing the lessee for possession, assert that the latter is estopped or precluded to deny his title.⁴⁷¹

(3) **Persons non sui juris.** It would seem that the fact that the lessor is *non sui juris*, a married woman, an infant, or an insane person, would be a reason for the application, with the greatest strictness, of the ordinary rule of preclusion, so as to protect the interests of one who is, in the eye of the law, unable to protect them himself, and in some cases it has been applied in favor of such a person.⁴⁷² In one or two cases, however, the courts have refused to apply the rule in favor of such a person on the theory

⁴⁶⁷ *Brenner v. Bigelow*, 8 Kan. 496. it was decided that the defendant in

⁴⁶⁸ *Tilleny v. Knoblauch*, 73 Minn. 108, 75 N. W. 1039. an action of unlawful detainer, admitting himself to be in possession

⁴⁶⁹ *Despard v. Walbridge*, 15 N. Y. 374. But in *Farris v. Houston*, 74 Ala. 162, it was decided that a lessee under a lease from plaintiff, could not allege that plaintiff was a slave and consequently *non sui juris* at the time of making the lease.

against an action for rent by the mortgagee by showing that the mortgage debt had been extinguished by the rents and profits of the land. In *Grant v. White*, 42 Mo. 285, it was held that when a married woman made a lease without her husband's consent, of her own property, the lessee was estopped, in an unlawful detainer proceeding by her, to assert the invalidity of the lease. It does not appear how the invalidity of the lease could affect her right to recover possession. See

⁴⁷⁰ See ante, § 73 a (1).

⁴⁷¹ *Holmes v. Turner's Falls*, 142 Mass. 590, 8 N. E. 646.

⁴⁷² *Russell v. Erwin's Adm'r*, 38 Ala. 44.

In *Helmes v. Stewart*, 26 Mo. 529, post, § 273 a (3).

that "an estoppel must be mutual," and that, since the lessor is not in such case bound by the lease, the lessee is not precluded from questioning the latter's title.⁴⁷³ This doctrine, that estoppels must be mutual, was asserted by the early authorities in the case of estoppel by record and by deed,⁴⁷⁴ and it was accordingly held that a lessee was not estopped by the fact that the lease was by indenture, if the lessor, as being a married woman or infant, was not also estopped.⁴⁷⁵ But it seems clear that such a rule has no application to the modern doctrine of estoppel *in pais*, of which the asserted "estoppel of a tenant to deny his landlord's title," based on his entry into possession or his acceptance of a lease, must be considered a branch. An estoppel *in pais* is almost invariably based on representations or conduct by one party to the transaction only, and, consequently, is binding on him alone.

n. **Tenant may show transfer of the reversion—(1) To third person.** After having assumed liability for rent or for use and occupation, the lessee cannot, as we have seen, repudiate such liability on the ground that the lessor's title is defective,⁴⁷⁶ nor can he, after obtaining possession under the lease, refuse on that ground to relinquish possession at the proper time to the lessor.⁴⁷⁷ But the lessor may transfer his reversion to another, thereby giving to such other the right to the rent as well as to the possession, and the lessee may show, as against a claim for rent or possession by the lessor, that the latter, having transferred the reversion, is no longer entitled to assert such claim. Were this not the case, the lessee, or person claiming under him, might be liable to separate suits for possession, or for rent, by both the original lessor and by a transferee of the latter, and be without any defense to either, since, as we have seen,⁴⁷⁸ the transferee of the lessor is entitled to the benefit of any rule of preclusion or estoppel to the same extent as the lessor himself.

⁴⁷³ *Crockett v. Althouse*, 35 Mo. App. 404. In *Schenck v. Stumpf*, 6 Mo. App. 381, this doctrine was applied as against a married woman making a lease of her sole and separate estate; distinguishing *Grant v. White*, 42 Mo. 285, *supra*, on the ground that there the title was really in the husband, and the wife

was to be regarded as executing the lease merely as his agent.

⁴⁷⁴ Co. Litt. 352 a.

⁴⁷⁵ Bac. Abr., Leases (o); *James v. Landon*, Cro. Eliz. 37; *Brereton v. Evans*, Cro. Eliz. 700.

⁴⁷⁶ See ante, § 78c (3) (4).

⁴⁷⁷ See ante, § 78 c (1) (2).

⁴⁷⁸ See ante, § 78 m (1).

This principle, that the tenant may show a conveyance of the reversion as against a claim set up by the original lessor as landlord, is quite frequently asserted in the form of a statement that, though the tenant is estopped to assert defects in the lessor's title, he may show that it has "expired,"⁴⁷⁹ a form of expression which is somewhat misleading in this connection. Understanding the word "title" in this connection to mean property rights, a transfer by the lessor of all his rights in the premises does no doubt bring *his* title to an end, and accordingly it involves the expiration of his title, but those rights still exist in his transferee, and it may be considered that there is in such case a transfer of the lessor's title rather than an expiration thereof. After the transfer of the lessor's interest, or asserted interest, the tenant is precluded, to the same extent as before, from alleging that the lessor did not have title at the time of the lease, but this has not the remotest bearing on his right to show that his lessor's interest has, since the making of the lease, passed to another. Singularly enough, however, the judicial assertion of a right in the tenant thus to show a transfer of the reversion, as against the person who made the transfer, seems to have been quite frequently called for, and it has accordingly been in a number of cases decided that a lessee, or one claiming under him, may, when sued by the lessor, for rent or for possession, show that the lessor has voluntarily transferred the reversion to another,⁴⁸⁰ or that the reversion has passed from the lessor by judicial process or decree, as, for instance, by sale under execution,⁴⁸¹ or on foreclosure of a

⁴⁷⁹ See *Farris v. Houston*, 74 Ala. St. John v. Quitzow, 72 Ill. 334; 162; *Robertson v. Biddell*, 32 Fla. Gregory's Heirs v. Crab's Heirs, 41 304, 13 So. 358; *St. John v. Quitzow*, 72 Ill. 334; *Kinney v. Laman*, Carter, 42 Mich. 497, 4 N. W. 211; 8 Blackf. (Ind.) 350; *Casey v. Gregory*, 52 Ky. (13 B. Mon.) 505, 56 Am. Y. Supp. 1070; *West Shore Mills Co. Dec. 581*; *Giles v. Ebsworth*, 10 Md. v. Edwards, 24 Or. 475, 33 Pac. 987; 333; *Lane v. Young*, 66 Hun, 563, 21 Sparks v. Walton, 4 Phila. (Pa.) 72; N. Y. Supp. 838. *Ryers v. Farwell*, 9 Barb. (N. Y.)

⁴⁸⁰ *Doe d. Marriott v. Edwards*, 5 615; *Lawrence v. Miller*, 3 N. Y. Barn. & Adol. 1065; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666, 22 Am. Super. Ct. (1 Sandf.) 516; *Chase v. Dearborn*, 21 Wis. 57; *Allen v. Hall*, Dec. 557; *Hoag v. Hoag*, 35 N. Y. 66 Neb. 84, 92 N. W. 171. ⁴⁸¹ *Randolph v. Carlton*, 8 Ala. 469; *Winn v. Strickland*, 34 Fla. 610, 606; *Nellis v. Lathrop*, 22 Wend. (N. Y.) 121; *Gunn v. Sinclair*, 52 Mo. 447; *Franklin v. Palmer*, 50 Ill. 202;

mortgage,⁴⁸² or under condemnation proceedings,⁴⁸³ or that the landlord's interest has been sold for taxes.⁴⁸⁴ So, in jurisdictions where a mortgage has the effect of transferring the legal title, the lessee may show that, since the making of the lease, the lessor has mortgaged the premises, and that, consequently, not he, but the mortgagee, is entitled to assert the rights of a landlord.⁴⁸⁵ And not only may the tenant show, as against the lessee, that he has transferred the reversion, but he may show as against a transferee of the reversion that he, in turn, has retransferred to another.⁴⁸⁶

Occasionally it is said that the tenant may show the transfer of the former landlord's title to a third person, and his own attornment to such transferee as against the former landlord.⁴⁸⁷ But ordinarily no necessity of attornment is suggested, and, in view of the rule, usually embodied in a statutory provision,^{488, 489} that no attornment is necessary on a transfer of the reversion, it is evident that the absence of an attornment is in most jurisdictions immaterial in this regard.

(2) **To himself.** As the tenant may show, as against one suing as landlord, that the reversion formerly existing in the latter has been transferred to a third person, so he may show that it has been transferred to himself, with the result that there is no longer any outstanding reversion. And it is immaterial, for this purpose, whether the reversion has come to him by means of a transfer voluntarily made by the former owner,⁴⁹⁰ by a sale

327; *Rhyne v. Guevara*, 67 Miss. 139, 6 So. 736; *Lancashire v. Mason*, 485 Doe d. Marriott v. Edwards, 5 Barn. & Adol. 1065.

75 N. C. 455; *Casey v. Gregory*, 52 486 Doe d. Marr v. Watson, 4 U. Ky. (13 B. Mon.) 505, 56 Am. Dec. C. Q. B. 398.

581. 487 *Franklin v. Palmer*, 50 Ill. 202;

482 *Wolf v. Johnson*, 30 Miss. (1 Sherman v. Spalding, 126 Mich. 561, George) 513. 85 N. W. 1129; *Pentz v. Kuester*, 41

483 *Lodge v. Martin*, 31 App. Div. Mo. 447.

13, 52 N. Y. Supp. 385; *Corrigan v.* 488, 489 See post, § 146 f.

Chicago, 144 Ill. 537, 33 N. E. 746, 21 490 *Casey v. Gregory*, 52 Ky. (13 B. Mon.) 505, 56 Am. Dec. 581; *Har-*

L. R. A. 212. *din v. Forsythe*, 99 Ill. 312; *Silvery*

484 *Keys v. Forrest*, 90 Md. 132, 45 Atl. 22; *Sherman v. Spalding*, 126 v. Summer, 61 Mo. 253; *Shields v.*

Mich. 561, 85 N. W. 1129; *Jenkinson* Lozear, 34 N. J. Law, 496 (mort- v. Winans, 109 Mich. 524, 67 N. W. gage to lessee); *Aurand v. Wilt*, 9

549. Pa. 54; *Elliott v. Smith*, 23 Pa. 131;

under judicial process, as in the case of an execution sale,⁴⁹¹ or a tax sale.⁴⁹²

There is a decision to be found that, in an action for rent, the tenant can defend by showing that the plaintiff has merely contracted to convey the reversion to the tenant's wife.⁴⁹³ And in another case he was allowed to defend in ejectment by showing that a court of equity had decreed that the plaintiff convey the reversion to him.⁴⁹⁴ These decisions seem to involve the assertion of an equitable defense in an action at law, and would presumably not be followed in all jurisdictions. In one state it has been decided that although a tenant has contracted for the purchase of the reversion, he is presumed to continue in possession under the lease, so as to be estopped to deny the lessor's title, until the contrary is shown.⁴⁹⁵

(3) **Effect of sale under lien.** When the tenant asserts, as against the landlord, a title in himself or in another obtained by a voluntary conveyance, there is ordinarily no difficulty in determining whether this is a title paramount to that of the lessor or merely the lessor's reversionary title. But when the title thus asserted by the tenant is one which has passed out of the lessor by a forced sale, the question is somewhat more difficult. If the charge or lien under which the sale is made is *prior* in time to the lease, it seems clear that the purchaser will have a paramount title.⁴⁹⁶ A title thus passing by sale under a lien prior to the lease is equivalent to a title directly conveyed by the lessor prior to the lease, and to assert such outstanding title involves an attack upon

Van Etten v. Van Etten, 69 Hun, 499, 23 N. Y. Supp. 711; Wade v. 106 Ky. 572, 51 S. W. 152; Bowser South Penn Oil Co., 45 W. Va. 380, v. Bowser, 29 Tenn. (10 Humph.) 32 S. E. 169. 49; Reed v. Munn (C. C. A.) 148

⁴⁹¹ Casey v. Gregory, 52 Ky. (13 Fed. 737. See Pickett v. Ferguson, B. Mon.) 505, 56 Am. Dec. 581; 86 Tenn. 642, 8 S. W. 386.

Nellis v. Lathrop, 22 Wend. (N. Y.) 121; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Hetzel v. Barber, 69 N. Y. 1; Elliott v. Smith, 23 Pa. 131; Ryder v. Mansell, 66 Me. 167; Camley v. Stanfield, 10 Tex. 546, 60 Am. Dec. 219; Tewksbury v. Magraff, 33 Cal. 237; Higgins v. Turner, 61 Mo. 249; Tilghman v. Little, 13 Ill. 239; Franklin v. Pal-

⁴⁹² Higgins v. Turner, 61 Mo. 249. ⁴⁹³ Robertson v. Biddell, 32 Fla. 304, 13 So. 358.

⁴⁹⁴ Swann v. Wilson, 8 Ky. (1 A. K. Marsh.) 99.

⁴⁹⁵ Schields v. Horbach, 49 Neb. 262, 68 N. W. 524.

⁴⁹⁶ See ante, §§ 47, 73 c; post, §

the lessor's title as it existed at the time of the lease. On the other hand, a sale under a lien *subsequent* to the lease transfers the reversion, and this the tenant has a perfect right to assert as against one out of whom the reversion was thus divested.⁴⁹⁷ The decisions on the subject do not, however, it must be conceded, recognize this distinction.⁴⁹⁸ Ordinarily, the time of the sale only seems to be considered, the title of the purchaser being regarded as paramount if the sale occurred before the making of the lease, and as not paramount, and as merely representing the reversionary interest of the lessor, and so capable of assertion by the tenant, if the sale occurred after the lease.⁴⁹⁹

⁴⁹⁷ See post, § 146 e.

⁴⁹⁸ In *Pierce v. Rollins*, 60 Mo. App. 497, this distinction is in effect recognized, it being decided that the exception, in the local statute making an attornment to stranger void, of an attornment to or in pursuance of a sale under execution or deed of trust, must refer to a sale under a deed of trust (mortgage) whereby the purchaser is placed in privity with the landlord's title and not under a deed of trust paramount to such a title. This decision seems, however, to be opposed to the decision of the higher court of the same state in *Freeman v. Moffit*, 119 Mo. 280, 25 S. W. 87, holding that the lessee of a purchaser under a second deed of trust may attorn to a purchaser at a subsequent sale under a prior deed of trust, and that he may thereafter defend an action of ejectment by one claiming as transferee of the lessor.

⁴⁹⁹ So it is said in several cases that the lessee could assert a title in himself or a third person obtained by means of a sale of the premises for the reason that the sale was after the making of the lease (*Bowser v. Bowser*, 27 Tenn. (8 Humph.) 23; *Wood v. Turner*, 27 Tenn. (8 Humph.) 685; *Camley v.*

Stanfield, 10 Tex. 546, 60 Am. Dec. 219; *Texas Land Co. v. Turman*, 53 Tex. 619) instead of basing his right to assert such title on the fact that the sale was made under a judgment or execution which was not a lien until after the lease.

In *Smith v. Crosland*, 106 Pa. 413, the tenant was allowed to assert that the title was in a third person by reason of a sale to him under execution which had been levied on the land before it had passed to the lessor, the sale under the execution being made after the lease, and it was apparently, in effect, said to be immaterial whether the sale was made under a judgment against the landlord rendered after the lease or was under a judgment which was a lien at the time of the lease. There is a similar decision and dictum in *Carson v. Crigler*, 9 Ill. App. (9 Bradw.) 83.

In *Ryder v. Mansell*, 66 Me. 167, it was held that the lessee might, in an action for rent, set up a title procured by foreclosure of a mortgage made prior to the lease, the theory being that this showed the expiration of the lessor's title. It showed, on the contrary, it is submitted, merely that a paramount title had vested in the tenant.

The idea that the time of the sale is the important consideration, and that the tenant may assert a title procured by such sale if made after the lease, is no doubt the result of a tendency to assimilate such a sale, and the conveyance made in accordance therewith, to the case of a conveyance voluntarily made by the lessor after the lease, which is, however, entirely different. Unless a title obtained by sale under a lien takes effect as of the time of the lien, a lien could be rendered valueless by a subsequent conveyance or long time lease at a low rent, made by the owner of the land, and if it does take effect as of that time, it must be paramount as regards a title acquired by a subsequent conveyance or lease.

Applying the distinction above asserted, it would seem that a tenant should be precluded from asserting, as against his landlord, a title acquired by one upon a sale of the land for taxes, provided the taxes were a lien upon the land at the time of the making of the lease, while not precluded from asserting such a title if the taxes became a lien after the date of the lease. This view has, however, never been judicially asserted.^{500, 501}

o. Tenant may show nontransfer of the reversion. Though the tenant is precluded from questioning the lessor's title as against one who, by reason of the transfer to him of the reversion, has become the landlord in place of the lessor,⁵⁰² the tenant is in no way precluded from denying that a person asserting the rights of a transferee of the reversion is in fact such transferee.⁵⁰³ Were the rule otherwise, any person could, by

^{500, 501} In *Jenkinson v. Winans*, 109 Mich. 524, 67 N. W. 549, it is decided that the tenant may show, in summary proceedings against him, that the landlord's title has been extinguished by tax sale and that he has attorned to the purchaser. It does not appear whether the taxes were a lien at the time of the lease.

In *O'Donnell v. McIntyre*, 118 N. Y. 156, 23 N. E. 455, it is decided that one acquiring a tax title to real property is not in privity with the former owner, and that consequently an attornment to him is void as being to a stranger. The fact that the taxes were a lien prior to the lease is not referred to in either the opinion of the court or the dissenting opinion, and the former is plainly to the effect that the purchaser is a stranger for this purpose even though the taxes were not a lien till after the lease.

⁵⁰² See ante, § 78 m (1).

⁵⁰³ *Doe d. Plevin v. Brown*, 7 Adol. & E. 447; *Doe d. Grundy v. Clarke*, 14 East, 488 (semble); *Tewksbury v. Magraff*, 33 Cal. 237; *Schott v. Burton*, 13 Barb. (N. Y.) 173; *Gillett v. Mathews*, 45 Mo. 307; *Dunshee v. Grundy*, 81 Mass. (15 Gray) 314;

means of a false allegation that he was the transferee of the lessor, assert the rights of a landlord against the tenant. Consequently, the tenant may show that the reversion had been previously conveyed by the lessor to another, so that nothing passed by the alleged conveyance to the person asserting the rule of preclusion,⁵⁰⁴ or that the alleged conveyance was not sufficient in form or execution to pass the reversion,⁵⁰⁵ or that one claiming the reversion by reason of a sale under execution was not the owner of the reversion owing to defects in the sale.⁵⁰⁶ And as against one claiming as heir of the lessor, the tenant may show that the lessor had devised the premises to another.⁵⁰⁷

So the tenant may show that the original lessor was only a tenant at will and that consequently he had no power to make the transfer under which the person asserting the rights of a landlord makes claim,⁵⁰⁸ and a tenant at will may show, as against one claiming possession under a subsequent lease from the same lessor, that the latter, being himself merely a tenant at will, could not make a lease to another.⁵⁰⁹ And it has been decided that, as against one claiming as purchaser under a sale upon foreclosure of a mortgage subsequent to the lease, the tenant may show that, owing to the failure to make the holder of a later mortgage a party to the foreclosure proceeding, a purchaser at foreclosure of this later mortgage was entitled to the rent and not the prior purchaser.⁵¹⁰ It is on the same principle, it seems, that the tenant may show that the conveyance of the reversion was for a limited period only, which period has expired.⁵¹¹ But the tenant cannot show that the transfer of the reversion to the person asserting the rights of a landlord was voidable, pro-

Bergman v. Roberts, 61 Pa. 497; 507 Despard v. Walbridge, 15 N. Y. Rogers v. Hill, 3 Ind. T. 562, 64 S. 374. W. 536.

508 Palmer v. Bowker, 106 Mass. 317.

504 Funk's Lessee v. Kincaid, 5 Md. 404; Ansley v. Longmire, 4 New Br. (2 Kerr) 321, contra, cannot be supported. 509 Hilbourn v. Fogg, 99 Mass. 11. See Streeter v. Isley, 147 Mass. 141, 16 N. E. 776.

505 Schott v. Burton, 13 Barb. (N. Y.) 173; Funk's Lessee v. Kincaid, 5 Md. 404. 510 Walker v. Fisher, 117 Mich. 72, 75 N. W. 144.

506 Pickett v. Breckenridge, 39 Mass. (22 Pick.) 297, 33 Am. Dec. 403. 511 Fryer v. Coombs, 11 Adol. & E. 745.

vided it was not void. For instance, it has been decided that he cannot show that the transfer was in fraud of the lessor's creditors,⁵¹² or, as against one claiming under a purchase of the reversion at execution sale, that the sale was voidable for the reason that such person was the administrator of the execution plaintiff.⁵¹³

Even though the tenant has attorned to one claiming to be the transferee of the reversion, he may thereafter, by some decisions, deny that such person is the transferee, if the attornment was made in the mistaken belief that he was the transferee.⁵¹⁴

In one case it was decided that the tenant against whom, at the expiration of the term, ejectment was brought by one claiming under a conveyance from the lessor and her reputed husband, could not show that the conveyance was invalid because the lessor was at the time of the conveyance married to another man, since the evidence of this marriage showed that it was before the lease, and, if the lessor was then married, she had no title authorizing her to make the lease.⁵¹⁵ It is difficult to see, however, why the tenant should not have been allowed to show the invalidity of the conveyance to the plaintiff, even though incidentally the evidence showed lack of title in the lessor at the time of the lease, since the fact that such lack of title appeared from the evidence, or even from the admissions of the lessor, would not have enabled the tenant to deny the title of the lessor as it existed at the time of the lease.⁵¹⁶

There has been considerable discussion as to whether, when the lessor has no title, the tenant may, in defense to an action by the lessor's transferee upon a covenant of the lease, assert that, because the lessor had no title, there was no reversion with which the covenant would run. This matter is discussed in a subsequent chapter.⁵¹⁷

p. Duration of the preclusion or estoppel—(1) Relinquishment of possession by tenant. The estoppel or preclusion of the

⁵¹² See *Steen v. Wardsworth*, 17 Mich. 72, 75 N. W. 144. See ante, Vt. 297; *Steadman v. Jones*, 65 N. C. at notes 425-428.

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⁵¹⁵ *Funk's Lessee v. Kincaid*, 5

⁵¹³ *Murphy v. Teter*, 56 Ind. 545. Md. 404.

⁵¹⁴ *Doe d. Higginbotham v. Barton*, 11 Adol. & E. 307; *Hoskins v. 268.*

Helm, 14 Ky. (4 Litt.) 309, 14 Am. ⁵¹⁷ See post, § 149 b (8).

Dec. 133; *Walker v. Fisher*, 117

tenant to deny the landlord's title continues, it is frequently said, until he relinquishes possession.⁵¹⁸ This statement is, in connection with actions by the landlord for possession, undoubtedly true; that is, so long as the tenant, having entered under the lease, or under one holding under the lease, remains in possession, his estoppel to assert a paramount title as a defense to such an action continues, without reference to whether the term of the tenancy created by the lease has come to an end.⁵¹⁹ Otherwise, it is plain, the rule excluding such a defense in an action by the landlord for possession would have practically no application, since such action is almost invariably brought after the expiration of the term. The statement is likewise correct when understood in the sense that, if by holding over he otherwise subjects himself to liability for rent or for use and occupation, defects in the lessor's title no more relieve him from such liability than from liability on account of the holding during the term originally named,⁵²⁰ his liability being based on an express undertaking to that effect, or on an undertaking implied in fact from the circumstances of his occupation. But if the statement

⁵¹⁸ *Davis v. Williams*, 130 Ala. 530, Dec. 605; *Doe d. Manton v. Austin*, 30 So. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55; *Clemm v. Wilcox*, 15 Ark. 102; *Bryan v. Winburn*, 43 Ark. 28; *Rogers v. Boynton*, 57 Ala. 501; *Doe d. Newton v. Roe*, 33 Ga. 163; *Fusselman v. Worthington*, 14 Ill. 135; *Hardin v. Forsythe*, 99 Ill. 312; *Sexton v. Carley*, 147 Ill. 269, 35 N. E. 471; *Phillips v. Rothwell*, 7 Ky. (4 Bibb) 33; *Norton v. Sanders*, 31 Ky. (1 Dana) 14; *Binney v. Chapman*, 22 Mass. (5 Pick.) 124; *Towne v. Butterfield*, 97 Mass. 105; *Ryerson v. Eldred*, 18 Mich. 12; *Pate v. Turner*, 94 N. C. 47; *Jackson v. Harper*, 5 Wend. (N. Y.) 246; *Longworth's Lessee v. Wolfinger*, Wright (Ohio) 216; *Porter v. Mayfield*, 21 Pa. 263; *Milhouse v. Patrick*, 6 Rich. Law (S. C.) 350; *Wilson v. Smith*, 13 Tenn. (5 Yerg.) 379; *Casey v. Hanrick*, 69 Tex. 44, 6 S. W. 405; *Greeno v. Munson*, 9 Vt. 37, 31 Am.

⁵¹⁹ *Shelton v. Eslava*, 6 Ala. 230; *Miller v. Turney*, 13 Ark. 385; *Tewksbury v. Magraff*, 33 Cal. 237; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Grizzard v. Roberts*, 110 Ga. 41, 35 S. E. 291; *Miller v. Lang*, 99 Mass. 13; *Settle v. Henson*, Morris (Iowa) 111; *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258; *Pence v. Williams*, 14 Ind. App. 86, 42 N. E. 494; *Harrison v. Marshall*, 7 Ky. (4 Bibb) 524; *Falkner v. Beers*, 2 Doug. (Mich.) 117; *Jackson v. Stiles*, 1 Cow. (N. Y.) 575.

⁵²⁰ See *Robinson v. Holt*, 90 Ala. 115, 7 So. 441; *Knowles v. Innman*, 16 Colo. 385, 26 Pac. 823; *Love v. Law*, 57 Miss. 596; *Longfellow v. Longfellow*, 54 Me. 240; *Osgood v. Dewey*, 13 Johns. (N. Y.) 240; *Kiernan v. Terry*, 26 Or. 494, 38 Pac. 671.

referred to is to be understood as meaning that, after the tenant has relinquished possession, he can assert defects in the lessor's title in defense to an action to enforce the stipulation as to rent, it must be regarded as erroneous. If he could do so, the rule excluding such a defense in an action for rent would be to a great extent nugatory. Nor can he, it would seem clear, defend an action by the landlord for waste, or in trover for wood cut, by showing defects in the lessor's title, merely because, after he committed the waste, he relinquished possession of the land. That the rule of estoppel or preclusion ceases with the relinquishment of possession has been asserted in connection with decisions that after such relinquishment, upon the expiration of the term, the tenant may proceed to assert his title to the land, as by an action of ejectment,⁵²¹ a proceeding to have an absolute conveyance from him to the lessor declared a mortgage,⁵²² or a proceeding for partition.⁵²³ We have before suggested the question whether the latter two classes of proceedings might not properly be instituted by the tenant even before his relinquishment of possession, since the landlord's defenses thereto cannot be adversely affected by the fact that the plaintiff is in possession holding as his tenant.⁵²⁴

As a result of the frequent assertion, by inference at least, that the rule of estoppel or preclusion ceases to operate upon the relinquishment of possession, it has been attempted in a number of cases to prove a relinquishment of possession legally sufficient to satisfy such a doctrine although the tenant was still in actual possession. It has in this connection been decided that a sufficient relinquishment or "surrender" of possession for this purpose does not result from a mere notice to the landlord of intention to hold adversely to him,⁵²⁵ nor from the mere manual surrender of the written instrument of demise.⁵²⁶ Nor is it sufficient

⁵²¹ *Smith v. Mundy*, 18 Ala. 182, 52 Am. Dec. 221; *Rives v. Nesmith*, 523 *Henning v. Warner*, 109 N. C. 406, 14 S. E. 317.

⁵²⁴ See ante, § 78 c (6).
⁵²⁵ *Longfellow v. Longfellow*, 61 Me. 590; *Graham v. Moore*, 4 Serg. & R. (Pa.) 467.

⁵²⁶ *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448.

⁵²² *Zimmerman v. Marchland*, 23 Ind. 474.

that the tenant relinquishes possession for a short time, without notice to the landlord, and without giving him an opportunity to resume possession, the tenant again taking possession by collusion with a third person.⁵²⁷ And even when the tenant did in such case notify the landlord, he was regarded as still in possession under the latter, if he immediately took a lease from an adverse claimant before the landlord had an opportunity to re-enter.⁵²⁸ The relinquishment of the possession of part was held not to justify a showing of lack of title to the balance.⁵²⁹

It has been decided that one who takes a lease, for a definite term, of a right in the nature of an easement, such as a right to use water or to flow land, is not estopped, after the expiration of the agreed term, to assert any rights which he may have in such connection, without reference to the expired lease.⁵³⁰ Such an incorporeal thing is incapable of actual possession, and the lessee, not having obtained possession of anything by reason of the lease, is free from an obligation to return possession as a prerequisite to asserting his rights.

(2) **Eviction under paramount title.** The preclusion of the tenant to deny the title under which he entered comes to an end upon his eviction from the premises under a paramount title.⁵³¹ And he may after the eviction re-enter and defend against the claim of his former landlord for the possession.⁵³² As elsewhere stated,⁵³³ such an eviction is a defense to a claim for subsequent rent.

We have had occasion, in another connection,⁵³⁴ to refer to cases in which it is asserted that an attornment by a tenant to

⁵²⁷ Littleton v. Clayton, 77 Ala. 571; Juneman v. Franklin, 67 Tex. 411.

⁵²⁸ Boyer v. Smith, 3 Watts (Pa.) 449.

⁵²⁹ Longfellow v. Longfellow, 54 Me. 240.

⁵³⁰ Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Page v. Kinsman, 43 N. H. 328. In the latter case the decision is based upon the common-law rule that an estoppel by indenture of lease expires with the lease. See ante, at note 195.

⁵³¹ See post, § 186 a.

⁵³² Foster v. Morris, 10 Ky. (3 A. K. Marsh.) 609; Gilliam v. Moore, 44 N. C. (Bush. Law) 95. See Farris v. Houston, 74 Ala. 162; Tewksbury v. Magraff, 33 Cal. 237. So he may show such eviction and entry under a lease from the holder of the paramount title as against a distress by the former landlord. Hopcraft v. Keys, 9 Bing. 613.

⁵³³ See post, § 182 e (2).

⁵³⁴ See ante, § 19 b (3).

a stranger is absolutely invalid as against the landlord, even though such stranger has title paramount to that of the landlord, a proposition which is in effect equivalent to a statement that the tenant is precluded from denying his landlord's title even though he, the tenant, has attorned to a stranger having paramount title. There are, on the other hand, decisions to the effect that if the tenant, upon demand by the owner of the paramount title for possession or for the payment to him of rent, and without waiting to be actually evicted, attorns to such paramount title, there is a constructive eviction which, like any other eviction, constitutes a defense to the claim for rent thereafter accruing,⁵³⁵ and which constitutes a breach of the covenant for quiet enjoyment.⁵³⁶ Such an attornment to the paramount title upon threat of suit for possession has also been regarded as a sufficient defense to an action of ejectment by the landlord.⁵³⁷ In

⁵³⁵ *Morse v. Goddard*, 54 Mass. (13 229, 47 N. E. 294, an action of ejectment, it is said that the rule precluding a tenant from denying his landlord's title does not apply as against a tenant who, having gone into possession under a lease, afterwards, on ascertaining that his landlord had no right to lease, abandons that possession and attorns to the true owner. But it had previously been held that a tenant could not show, as against his landlord asserting a right to possession, that he, the tenant, had attorned to one who had acquired the title at tax sale during the tenancy, such an attornment being to a stranger and therefore void under the statute. *O'Donnell v. McIntyre*, 118 N. Y. 156, 23 N. E. 455. See as to this case and the apparently contrary case of *Jenkinson v. Winans*, 109 Mich. 524, 67 N. W. 549, ante, note 500.

As against an objection first made at the trial, it was held that an averment in a pleading that the tenant was compelled to, and did, attorn to the owner of the premises, sufficiently alleged such an enforced attornment. *Johnson v. Sackrisson*, 78 Minn. 107, 80 N. W. 858.

⁵³⁶ *Rawle, Covenants for Title*, § 134 et seq. See post, § 79 d (3).

⁵³⁷ *Merryman v. Bourne*, 76 U. S. (9 Wall.) 592. And see *Palmtag v. Doutrick*, 59 Cal. 154, 53 Am. Rep. 245; *Gallagher v. Bennett's Heirs*, 38 Tex. 291. And see the discussion in 6 Am. Law Rev. 28.

In *De Forest v. Walters*, 153 N. Y. and executes a lease to the sub-

effect opposed to the cases thus recognizing the right of the tenant to assert a paramount title to which he has attorned under compulsion, are not only the quite numerous cases asserting that an attornment by a tenant to a stranger is absolutely invalid as against the landlord, but also a number of cases in which it is decided that even the rendition of a judgment for possession in favor of the paramount claimant does not justify the tenant in attorning to him.⁵³⁸ The English cases do not clearly show whether, in that jurisdiction, an enforced attornment to the paramount title is a constructive eviction letting in evidence of such title,⁵³⁹ though it is conceded that such is the case when the paramount title consists of a mortgage prior to the lease.⁵⁴⁰ The doctrine referred to, that the tenant, attorning to the paramount title in order to avoid actual eviction, is in effect constructively evicted, and is entitled to assert this as against his landlord, seems almost a corollary of the rule that he may assert such eviction when he relinquishes possession upon demand by the owner of such title. There is no substantial difference between an attornment under such circumstances and a relinquishment of possession to the paramount claimant and the subsequent acceptance of a lease from him. The landlord is not injured by the application of such a doctrine, since the tenant has, as when he relinquishes possession on demand,⁵⁴¹ the burden of showing that the title asserted as paramount is actually paramount. The chief objection to the doctrine would seem to be its apparent inconsistency with the various statutes invalidating an attornment by a tenant to a stranger.⁵⁴² For the most part neither the cases asserting its cor-

tenant, the latter can assert such holding under him as against the sublessor's action to recover possession.

⁵³⁸ See post, at notes 546, 547.

⁵³⁹ The dicta in *Delaney v. Fox*, 2 C. B. (N. S.) 768, an action involving possession, are adverse to giving such an effect to the attornment except in the case of an attornment to a paramount mortgagee, and the case of the *Mayor of Poole v. Whitt*, 15 Mees. & W. 577, an action for rent, is there questioned in this regard. The subsequent case of *In re Emery*,

4 C. B. (N. S.) 423, involved the question whether one leaving the premises did so under compulsion from the paramount owner so as to enable him to assert an eviction, and not that of the effect of an enforced attornment to the paramount owner.

⁵⁴⁰ See statement by Willes, J., in *Delaney v. Fox*, 2 C. B. (N. S.) 768, supra, and cases cited ante, § 73 a (3) (6).

⁵⁴¹ See post, § 186 a (2), notes 184, 185.

⁵⁴² See ante, § 19 f (1).

rectness, nor those in effect denying it, make reference to the provisions of these statutes as bearing on the question.

Occasionally the question has arisen as to the effect of an attornment by the tenant to the owner of the paramount title after the latter has procured a judgment for possession against him. If an attornment upon demand without judgment is a sufficient showing of eviction, in accordance with the authorities above referred to, such an attornment after judgment would seem, *a fortiori*, to be sufficient for this purpose. It has so been decided, in some cases, that the tenant may yield possession or attorn to a claimant under paramount title who has procured a judgment for possession against him and assert this in defense to an action by his former landlord,⁵⁴³ but in others his right so to yield to the judgment seems to be based upon the consideration whether a writ of execution has been issued thereunder.⁵⁴⁴ And in some, it is decided, that he cannot yield to such judgment and thereafter defend against his landlord unless he notified the latter of the action for possession and gave him an opportunity to defend.⁵⁴⁵ The judgment in the action against the tenant, in the absence of notification to the landlord, would, ordinarily at least, not be conclusive against the landlord as to the paramount nature of the title asserted therein, and the tenant would have the burden of

⁵⁴³ *Mecham v. McKay*, 37 Cal. 154; *Clapp v. Coble*, 21 N. C. (1 Dev. & B. Eq.) 177; *Pleak v. Chambers*, 35 Ky. (5 Dana) 61; *Gore v. Stevens*, 31 Ky. (1 Dana) 201, 25 Am. Dec. 141; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370. He cannot, it is decided, yield to a judgment in ejectment after it has become inoperative owing to the expiration of the fictitious demise laid in the declaration. *Pleak v. Chambers*, 35 Ky. (5 Dana) 61. As to the effect of a reversal of the judgment, see *Wheelock v. Warschauer*, 34 Cal. 265; *Ross v. Kernan*, 31 Hun (N. Y.) 164.

⁵⁴⁴ *Foss v. Van Driele*, 47 Mich. 201, 10 N. W. 199; *Ross v. Dysart*, 33 Pa. 452. In *Coughanor v. Blood-*

good, 27 Pa. 285, it was decided that where the claimant of a paramount title, after recovering a judgment in ejectment against the tenant, issues a writ of *habere facias possessionem*, and the tenant then agrees to hold under him and accepts a new lease from him, such new lease is valid, and the tenant's relation to his former landlord is dissolved, but that such dissolution does not continue after such writ and the return thereon are set aside, the tenant's relation to his former landlord then reviving.

⁵⁴⁵ *Lowe v. Emerson*, 48 Ill. 160; *Wheelock v. Warschauer*, 21 Cal. 309; *Douglas v. Fulda*, 45 Cal. 592; *Williams v. McMichael*, 64 Ga. 445 (semble).

showing, that the judgment plaintiff had the paramount title,⁵⁴⁶⁻⁵⁴⁸ but it is not clear why the tenant's failure to notify the landlord of the action by the paramount owner should preclude the tenant from attorning to the latter after the judgment. The fact that the judgment was obtained by collusion with the tenant may perhaps render it inoperative as a justification for the attornment,⁵⁴⁹ though it would seem that, even in that case, if the judgment plaintiff has actually paramount title, the bringing of the action would be a sufficient demand by him for possession, under the authorities before cited, to justify the attornment. The tenant is not, it seems, justified in yielding possession or attorning merely because the holder of the paramount title has recovered judgment for the land against his landlord and not against him,⁵⁵⁰ though if a writ is issued to enforce such judgment he may yield possession or attorn without awaiting its forcible execution,⁵⁵¹ the issuance of such writ constituting in effect a demand for possession.

The mere rendition of a decree affecting the title of the property, but not directed at the possession thereof, does not effect an eviction of the tenant which he can assert against the landlord,⁵⁵² even, it would seem, though the tenant is a party thereto and relinquishes the possession.⁵⁵³ Such a decree involves no element

⁵⁴⁶⁻⁵⁴⁸ See Rawle, Covenants, § 123 et seq.; Black, Judgments, § 389. It was so in effect decided in *Pate v. Turner*, 94 N. C. 47. default is immaterial if successful resistance could not have been made.

⁵⁴⁹ In *Pate v. Turner*, 94 N. C. 47, the fact that the judgment was obtained by collusion seems to be regarded as rendering it a nullity for the purpose of the attornment. But there, as is expressly stated, no paramount title in the judgment plaintiff was shown, and the decision is in effect merely that the judgment is not conclusive that the judgment plaintiff had paramount title. ⁵⁵⁰ *Hochenauer v. Hilderbrant*, 6 Colo. App. 199, 40 Pac. 470; *Hayes v. Ferguson*, 83 Tenn. (15 Lea) 1, 54 Am. Rep. 398; *Pittsburgh & St. L. R. Co. v. Columbus, C. & I. C. R. Co.*, 8 Biss. 456, Fed. Cas. No. 11, 197. And see *Eddy v. Coffin*, 149 Mass. 463, 21 N. E. 870, 14 Am. St. Rep. 441; *Murray, Caldwell & Co. v. Pennington*, 3 Grat. (Va.) 91. *Lunsford v. Turner*, 28 Ky. (5 J. J. Marsh.) 104, is apparently to the contrary.

That the judgment was rendered by confession does not, it has been held, show collusion. *Pleak v. Chambers*, 35 Ky. (5 Dana) 61. ⁵⁵¹ *Ross v. Dysart*, 33 Pa. 452; *Montanye v. Wallahan*, 84 Ill. 355; *Mack v. Patchin*, 29 How. Pr. (N. Y.) 20.

In *Mills v. Peed*, 53 Ky. (14 B. Mon.) 146, it is said that the fact that the judgment was rendered by ⁵⁵² *Leopold v. Judson*, 75 Ill. 536. ⁵⁵³ In *Murray, Caldwell & Co. v.*

of a demand for possession. On the same principle, there is no eviction when, after a sale of the landlord's interest under a judgment or mortgage prior to the lease, the landlord takes a lease from the purchaser, thus protecting the possession of the tenant.⁵⁵⁴ But it has apparently been held that the recovery of a judgment against the tenant for damages by the holder of the paramount title, in an action of trespass or otherwise, is of itself an eviction.⁵⁵⁵

The mere fact that the owner of the paramount title has called upon the tenant to pay the rent to him, if not followed by an attornment to such person, has been decided not to constitute an eviction entitling the tenant to assert such paramount title.⁵⁵⁶

It is sometimes said that the tenant, in yielding possession or attorning to the holder of the paramount title, must act in good faith and be free from fraud or collusion.⁵⁵⁷ What is meant by this does not clearly appear, since if the title of the third person is paramount and is actually asserted, the tenant cannot well be guilty of fraud or collusion in yielding thereto. Perhaps it is merely another mode of saying what we say elsewhere,⁵⁵⁸ that the tenant cannot assert an eviction when his attornment to the paramount title was entirely voluntary.

Pennington, 3 Grat. (Va.) 91, it was decided that if the tenant yielded possession to the sheriff under a decree rendered in a suit to which the tenant was not a party, directing the sheriff to lease the premises to the highest bidder but not authorizing him to take possession, there was no eviction.

⁵⁵⁴ Pelton v. Place, 71 Vt. 430, 46 Atl. 63.

⁵⁵⁵ McAlester v. Landers, 70 Cal. 79, 11 Pac. 505; Williams v. Shaw, 4 N. C. 630 (Term, 197).

⁵⁵⁶ See cases cited ante, § 73 a (6), notes 120-122.

⁵⁵⁷ Camp v. Scott, 47 Conn. 366; Ross v. Dysart, 33 Pa. 452; Morse v. Goddard, 54 Mass. (13 Metc.) 177, 46 Am. Dec. 728.

In Messinger v. Union Warehouse

Co., 39 Or. 546, 65 Pac. 808, it was held that the fact that a decree was entered in another suit showing the title to be in others than the lessor did not necessarily show that a subsequent attornment by the lessee to such others was not collusive, that it was for the jury whether it was so, and that the fact that such persons employed counsel for the tenant for the purpose of a suit between him and the lessor was some evidence of collusion. Though the question of collusion is thus stated to be for the jury, the court says that what constitutes collusion in this connection is problematical, and makes no attempt to explain what is meant thereby.

⁵⁵⁸ See post, § 186 a (2), at notes 188-190.

(3) **Expiration of the lessor's estate.** There are some decisions,⁵⁵⁹ and a number of *dicta*,⁵⁶⁰ to the effect that the tenant, though precluded from asserting that the lessor had no title at the time of the lease, is not precluded from asserting that the lessor's title has expired by its own limitation.

As before stated, the rule that a tenant may show, as against his lessor, that the latter has transferred his interest, is frequently spoken of as an application of a general rule that the tenant may show the expiration of his landlord's title,⁵⁶¹ and such a statement is sometimes coupled with the statement now under discussion that he may show that the title has expired by its own limitation. There seems, however, not the slightest connection between the two rules. In the one case the expression "expiration of title" can refer only to the cessation of the lessor's personal ownership of a still existent interest by the transfer of such interest to another, while in the other case it refers to the cessation of the interest itself.

In some of the cases in which the right of the tenant to show the expiration of the lessor's title is asserted, the decisions may well be based on the theory of "constructive eviction,"⁵⁶² there having been an actual assertion of his right by the person entitled to which the tenant yielded, agreeing to hold under him.⁵⁶³ These

⁵⁵⁹ See post, notes 564-581.

⁵⁶⁰ Langford v. Selmes, 3 Kay & J. 220; Randolph v. Carlton, 8 Ala. 606; Lane v. Young, 66 Hun, 563, 21 N. Y. Supp. 838; Newell v. Gibbs, 1 Watts & S. (Pa.) 496; Jenkinson v. Winans, 109 Mich. 524, 67 N. W. 549; Chaffin v. Brockmeyer, 33 Mo. App. 92; Prestman v. Silljacks, 52 Md. 647; Robinson v. Troup Min. Co., 55 Mo. App. 662; Russell v. Allard, 18 N. H. 222; Robertson v. Biddell, 32 Fla. 304, 13 So. 358; St. John v. Quitzow, 72 Ill. 334; Kinney v. Leman, 8 Blackf. (Ind.) 350.

⁵⁶¹ See ante, § 78 n (1).

⁵⁶² See ante, § 78 p (2); post, § 186 a (2).

⁵⁶³ Hill v. Saunders, 4 Barn. & C. 529; Neave v. Moss, 1 Bing. 360; Hopcraft v. Keys, 9 Bing. 613; Les-

see of Devacht v. Newsam, 3 Ohio 57; Chaffin v. Brockmyer, 33 Mo. App. 92. So in Wells v. Mason, 5 Ill. (4 Scam.) 84, where the termination of the lessor's life estate was regarded as a defense to a claim for rent, the tenant had actually been expelled by the remainderman. In Doe d. Higginbotham v. Barton, 11 Adol. & E. 307, likewise, while the right of the lessee of a mortgagor to show, in ejectment by the latter, that the mortgagee had demanded rent of him, was in terms based on the theory that such demand might show a termination of the lessor's title, this seems to be merely a mode of expression for what we term a constructive eviction.

In Hill v. Saunders, 4 Barn. & C.

cases we will leave out of consideration, directing our attention exclusively to those which apply the rule asserted in favor of the tenant, even though the person entitled upon the expiration of the lessor's estate has made no claim to the possession. We will first consider the cases involving actions of ejectment or other possessory actions by the landlord against the tenant, and then the cases involving a claim for rent.

In an English case,⁵⁶⁴ quite frequently referred to in this connection, where an action of ejectment was brought by a lessor for years, himself holding under a lease for years, against his lessee, who was holding over, apparently as tenant from year to year, it was said⁵⁶⁵ that "it was certainly competent to the defendant to show that the lessor's title had expired; and that he had no right to turn him out of possession," but the case was decided in favor of the lessor on another point. This *dictum* was applied in another case, likewise without discussion,⁵⁶⁶ and in two or three other cases the tenant was allowed, on the same theory, to show that the lessor had a life estate only, as against one asserting rights as heir or devisee of the lessor.⁵⁶⁷ In one English case, however, there are *dicta* apparently to a contrary effect, that the lessor's title continues good as against the lessee until he relinquishes possession,⁵⁶⁸ and it appears that, in that jurisdiction, the tenant cannot ordinarily show the expiration of the lessor's estate as a ground for not issuing a writ of possession, if the expiration occurs after the commencement of the action for possession.⁵⁶⁹

The view above referred to, that in an action by the lessor, or by one claiming in his right, to recover possession of the premises,

529, two of the former judges seem to base their decision in favor of the lessee on the presence of such constructive eviction. In *Mountnoy v. Collier*, 1 El. & Bl. 630, it was left undecided whether the expiration of the landlord's title could be shown in defense to an action for use and occupation, in the absence of any submission by the tenant to the assertion of a claim by the paramount owner.

⁵⁶⁴ *England v. Slade*, 4 Term R. 682.

⁵⁶⁵ Per Kenyon, C. J., in *England v. Slade*, 4 Term R. 682.

⁵⁶⁶ *Doe d. Jackson v. Ramsbotham*, 3 Maule & S. 516.

⁵⁶⁷ *Doe d. Strode v. Seaton*, 2 Crompt. M. & R. 728; *Patterson v. Smith*, 42 U. C. Q. B. 1; *Heckart v. McKee*, 5 Watts (Pa.) 385.

⁵⁶⁸ See *Gibbins v. Buckland*, 1 Hurl. & C. 736. Compare *Buckland v. Gibbins*, 32 Law J. Ch. 391, and the case next cited.

⁵⁶⁹ See *Knight v. Clarke*, 15 Q. B. Div. 294.

the tenant can show in defense that the estate which the lessor had at the time of the lease has expired by its own limitation, is not entirely satisfactory, it would seem. It might be suggested, in opposition thereto, that the same reasons which preclude the tenant from asserting that the lessor or his transferee is not entitled to a return of possession, on the ground that the lessor had no estate at the time of the lease, would seem to preclude him from making such assertion on the ground that the lessor had merely a limited estate, which has expired. To allow the tenant to retain possession as against his landlord, because another has a better right to possession, when such other has not asserted such right, would seem to furnish equal opportunity for the exercise of bad faith, whether such right in a third person had its commencement before or after the making of the lease. By the acquisition of possession under the lease, the lessee might be regarded, not as admitting merely that the lessor has some interest in the land, however small, but as admitting that he has such an interest as will entitle him to the return of the premises upon the expiration of the period named in the lease.^{569a}

In only one of the cases to which we have referred, as asserting the right of the tenant to aver the expiration of the lessor's title, in connection with an action for possession, is any reason given for such a view, and in that case,⁵⁷⁰ which involved a lease by indenture, it is based exclusively on the old rule that there is no estoppel when an interest passes.⁵⁷¹ It has been well said that such a rule, applied literally and in respect to lessees, "would bar the estoppel in every case of a valid demise, and the tenant would be at liberty to put the landlord to proof of title, simply because

^{569a} In *Newell v. Gibbs*, 1 Watts & S. (Pa.) 496, it is said that the proposition that the tenant may show the termination of the lessor's title "is perhaps to be taken with this qualification, that it must appear that the defense is made at the instance, or at least with the knowledge, of the original lessor, or owner of the demised premises." This is nearly equivalent to a statement that such a defense is good when there has been an attornment to the paramount title constituting a constructive eviction.

There is, in *Fortier v. Ballance*, 10 Ill. (5 Gilm.) 41, a dictum to the effect that the tenant cannot show the expiration of the lessor's estate in a summary proceeding by a landlord. And see *Henderson v. Henderson*, 136 Iowa, 564, 114 N. W. 178.

⁵⁷⁰ *Doe d. Strode v. Seaton*, 2 Crompt. M. & R. 728.

⁵⁷¹ See ante, § 76, at note 160.

that title was good.”⁵⁷² Furthermore, it may be remarked, this rule was asserted in the old books only in connection with leases by indenture, and only for the purpose of excluding the ordinary rule that if, after making a lease for years, one acquires an estate in the land, the lease will operate thereon, and it appears doubtful whether it had any operation except when the lessor, at the time of the making of the lease, had a life estate in the land.⁵⁷³ The inapplicability of that rule to limit the operation of the estoppel, created by the acquisition of the possession from the lessor, without reference to the form of the lease, is evident.⁵⁷⁴ Moreover, such an estoppel, based on the form of the lease, could have no application to an action for possession after the expiration of the term, for the reason that the estoppel then ceases to have any operation.⁵⁷⁵

Conceding that the tenant may show, in defense to an action against him for possession, that the estate in the lessor at the time of the lease has expired by its own limitation, there is no such right in him to show that it had expired previously to the making of the lease.⁵⁷⁶

It has been decided in one case in this country⁵⁷⁷ that the tenant may, in defense to an action for rent, show that the lessor had an estate *pur autre vie* only, and that this expired before the accrual of the rent claimed, it being said that, “so far as the estoppel of the tenant to deny his landlord’s title is an estoppel *in pais*, it arises out of his having entered into possession under that title at the beginning of the lease; and he does not deny that the landlord had a title at that time, by alleging and proving that it has since expired,”⁵⁷⁸ and that “so far as it is an estoppel by deed, it arises

⁵⁷² See 6 Am. Law Rev. at p. 22. This article does not, however, question the applicability of the rule in this connection for the purpose of enabling the tenant to show the expiration of the lessor’s estate.

⁵⁷³ See ante, § 76.

⁵⁷⁴ In *Weeks v. Birch*, 69 Law T. (N. S.) 759, it was decided that the doctrine that there is no estoppel when an interest passes did not enable the lessee to assert, as against an action for possession by the lessor, that the lessor had only an undivided interest in the land.

⁵⁷⁵ See ante, at note 195.

⁵⁷⁶ *London & N. W. R. Co. v. West*, L. R. 2 C. P. 553; *Syme v. Sanders*, 4 Strob. Law (S. C.) 196.

⁵⁷⁷ *Lamson v. Clarkson*, 113 Mass. 348, 18 Am. Rep. 498. There is a slight suggestion in accordance with this view in *Guthmann v. Vallery*, 51 Neb. 824, 71 N. W. 734.

⁵⁷⁸ Citing *Hilbourn v. Fogg*, 99 Mass. 11; *Grundin v. Carter*, 99

out of the execution of the indenture; and some interest, as the tenant admits, having passed by the deed, he is not estopped to show what the quantity and duration of that interest was, and that it expired before the rent accrued, which the landlord now seeks to recover." So far as concerns the statement thus made in reference to estoppel *in pais*, we have endeavored, in a former part of this chapter,⁵⁷⁹ to show that the preclusion of the tenant to assert a lack of title in the lessor as a defense to a claim for rent is not properly based on an estoppel growing out of his acquisition of possession, but is a result of the fact that he has assumed a personal liability therefor, from which lack of title in the lessor does not relieve him so long as it does not affect his possession under the lease; and adopting this view, the expiration of the lessor's estate evidently cannot, so long as there is no eviction of the tenant, affect his liability for rent. So far as concerns the statement in reference to estoppel by indenture, of the authorities cited in support thereof, only two appear fully to support it, those being English cases⁵⁸⁰ in which it was decided that the lessee, when sued on a covenant for repairs in an indenture of lease, could show that the lessor had a life estate only, which had expired.⁵⁸¹ As opposed to the view that the tenant can show, in defense to an action for rent, that the lessor's estate has expired, reference may be made to the statement found in several of the old books that if a man seised in right of his wife leases for a term of years, and the wife dies, without having had issue by him, he has a right of action against the lessee for rent incurred after the death of the wife until the heir enters;⁵⁸² as well as to the statement of Lord

Mass. 15, which, however, merely notes 567, 570). *Langford v. Selmes*, 3 Kay & J. 220, 226, also cited, contain dicta to the effect that a tenant may show that his landlord's title has expired. tains a dictum merely.

⁵⁷⁹ See ante, § 78 c (3).

⁵⁸¹ *Brudnell v. Roberts*, 2 Wils.

143; *Blake v. Foster*, 8 Term R. 487.

⁵⁸⁰ The authorities cited are *Treport's Case*, 6 Coke, 15 (ante, note 162); *Smaleman v. Aigburrow*, 3 Bulst. 272, 275 (post, note 582); *Brudnell v. Roberts*, 2 Wils. 143 (post, note 581); *Blake v. Foster*, 8 Term R. 487 (post, note 581); *Doe d. Strode v. Seaton*, 2 Crompt. M. & R. 728 (an action of ejectment, ante, notes 567, 570). *Langford v. Selmes*, 3 Kay & J. 220, 226, also cited, contain dicta to the effect that a tenant may show that his landlord's title has expired. tains a dictum merely.

⁵⁸² *Bro. Abr.*, Dette, pl. 7; *Avowry*,

pl. 123; *Bac. Abr.*, Leases (C);

Dixon v. Harrison, Vaughan, 46.

The case of Smaleman v. Aigbur-

row, 3 Bulst. 272; s. c., sub. nom.,

Smalman v. Agburrow, 1 Rolle, 442,

is cited in *Lamson v. Clarkson*, 113

Mass. 348, 18 Am. Rep. 49, to the

effect that the lessee may show the

Holt, before referred to,⁵⁸³ that defendant in debt for rent cannot give in evidence *nil habuit in tenementis* without having been evicted, "if the plaintiff had been in possession, though but as tenant at will." Furthermore, there is an English *nisi prius* case⁵⁸⁴ to the effect that the defendant in an action for use and occupation cannot show that the lessor's title has expired, unless he disclaims holding under him, and has commenced a fresh holding under the owner of the paramount title. There are occasional decisions in this country which are opposed to the view that the lessee can relieve himself of his obligation for rent by showing that his lessor's estate has come to an end.⁵⁸⁵

expiration of the lessor's estate. In the report in 1 Rolle, 442, it is indeed said that "it was agreed by the whole court that if the husband leases for years the land of the wife rendering rent, and then the wife dies, that the husband will not have debt for rent incurred afterwards, since the reversion is gone, according to 9 Hen. 6." But by the report in 3 Bulst. 272, Dodderidge, J., says that by 11 Hen. 6, if the husband makes a lease of the land of his wife by indenture, and the wife dies, the husband shall have an action of debt for the rent upon the indenture before the heir enters, yet the estate is gone from the husband" though he further says that if the husband and wife join in the lease, the husband cannot sue for rent after the wife's death. The citation 9 Hen. 6 presumably refers to 9 Hen. 6, 43 b, which is cited by Brooke in support of his position, and which, so far as dicta go, seems to support it. See, however, for a different reading of this case, 1 Dyer, 28 b, 29 a. The case of *Smalman v. Agburrow* did not involve this question, but merely the question whether, if a married woman is joint tenant with another person and they, with her husband, join in

a lease, and she then dies, the lease survives. *Blake v. Foster*, 8 Term R. 487, note 581, ante, seems opposed to the view of Brooke.

⁵⁸³ *Chettle v. Pound*, 1 Ld. Raym. 746. See ante, note 182.

⁵⁸⁴ *Balls v. Westwood*, 2 Camp. 11, per Lord Ellenborough. This case is questioned by Erle, J., in *Mountnoy v. Collier*, 1 El. & Bl. 630, but there the lessee had attorned to the paramount title. In *Claridge v. Mackenzie*, 4 Man. & G. 151, it is said by Tindal, C. J., that Lord Ellenborough subsequently altered his opinion, "for in *Doe d. Lowden v. Watson*, 2 Starkie, 230, that learned judge held that a defendant in ejectment who had paid rent to the lessor of the plaintiff might show that his landlord, pending the term, had sold his interest in the premises; that is, in effect, the tenant was allowed to show an alteration in his landlord's title." There is an obvious distinction between the two cases of the expiration of the lessor's estate and his transfer of such estate, as we have before remarked. See ante, at 561.

⁵⁸⁵ In *Tilyou v. Reynolds*, 108 N. Y. 558, 15 N. E. 534, there was a lease to plaintiff for ten years which, before its termination, certain offi-

The view that the tenant may show that the lessor's estate has expired has been occasionally asserted in actions arising out of a distress levied after such expiration.⁵⁸⁶ So, in a recent English

cials of the lessor town undertook to renew for another ten years. After such renewal, but before the end of the original lease, plaintiff subleased to defendant for ten years, and it was held that defendant could not, in defense to a claim for rent accruing during the second ten-year period, assert that the renewal was invalid, and that consequently the lessor's title had expired. The court cites *Balls v. Westwood*, 2 Camp. 11, supra, and distinguishes *Lamson v. Clarkson*, 113 Mass. 348, 18 Am. Rep. 498, supra, partly on the ground that there the reversioner had notified the tenant to pay rent to his landlord, and partly on the ground that "there the event on which the plaintiff's entire title depended occurred after the defendant took possession, and by setting it up he denied nothing which he had once admitted," while in the principal case the defendant "admitted the plaintiff's title to be good, the whole title, the title for the extended term." As to these grounds of distinction, the mere notice by the reversioner to the tenant not to pay rent, without any actual payment of rent or attornment to the reversioner, seems insufficient of itself to relieve the tenant from liability to his landlord, it not amounting to a constructive eviction (ante, § 73 a (6), and it is perhaps difficult to see any distinction between the tenant's right to assert that the landlord's title has terminated because the life by which it is measured has come to an end and because the term of years by which it is measured has

come to an end. If by taking possession he admits that the landlord's title is good as against its possible expiration in one way, he would seem to do so as against its possible expiration in the other. If there is any distinction between the two cases, it would seem that the liability for rent should rather survive when the lessor's estate terminates by reason of the fact that it is a life estate and that the life has come to an end, since in that case there is, in contemplation of law, a legal reversion, which does not exist when a tenant for years makes a lease for a term to endure beyond the period of his own estate.

In *Ashton v. Golden Gate Lumber Co.* (Cal.) 58 Pac. 1, it was decided that so long as the tenant remains in undisputed and unquestioned possession, no claim or demand for rent having been made by the reversioner or remainderman, the termination of the landlord's title is no defense to rent; distinguishing *Lamson v. Clarkson*, 113 Mass. 348, on the ground that there a demand for rent was made.

In *Fordyce v. Young*, 39 Ark. 135, where a lessee under a lease containing a clause of renewal had made a sublease to commence on the date of the expiration of the head lease, it was held that the lessee's failure to obtain a renewal and consequent lack of title after the expiration of his original term could not be asserted by the sublessee in defense to a claim for rent.

⁵⁸⁶ *Claridge v. Mackenzie*, 4 Man. & G. 143; *Prestman v. Silljacks*, 52

case,⁵⁸⁷ it was decided that a sublessee might show that the relation of tenancy no longer existed, for the purpose of a distress by his landlord, owing to the fact that the original lessor had entered for a breach of condition. This seems to accord in result with the views which we have suggested⁵⁸⁸ as to the basis of the rule of the tenant's preclusion to deny the lessor's title in such a proceeding. When the lessor has, at the time of the lease, a limited estate, he has, it is evident, no estate in fee simple by wrong, and after his estate comes to an end there is no reversion to support the distress. This view of the question has, however, never been judicially asserted.

(4) **Repudiation of tenancy.** The fact that the tenant has repudiated the tenancy and so put the statute of limitations in motion⁵⁸⁹ does not affect the operation of the rule or rules precluding the tenant from denying the landlord's title.⁵⁹⁰ Were this not so, it is evident, such rule or rules could be avoided at will by a tenant merely by the assertion that he no longer holds under the landlord. But the cases are to the effect that if the tenant holds possession for the statutory period after his repudiation of the tenancy, and so obtains a valid title, this title may be asserted by him against the landlord without first relinquishing possession.⁵⁹¹ This does not involve a denial by him of the validity of the title of the lessor as it existed at the time of the lease, but is in effect an assertion that the title has passed, since the lease, out of the lessor.

Md. 647. In the latter case, indeed, 43; *Peyton v. Stith*, 30 U. S. (5 Pet.) 485.

there appears to have been no reversion in the first instance, the so-called lease being an attempted conveyance in fee by one having an estate for years.

⁵⁸⁷ *Sergeant v. Nash, Field & Co.* [1903] 2 K. B. 304.

⁵⁸⁸ See ante, § 178 c (5).

⁵⁸⁹ See ante, § 4.

⁵⁹⁰ *Clemm v. Wilcox*, 15 Ark. 102 (semble); *Shelton v. Eslava*, 6 Ala. 230; *Henley v. Branch Bank*, 16 Ala. 552; *Duke v. Harper*, 14 Tenn. (6 Yerg.) 280, 27 Am. Dec. 462; *Willison v. Watkins*, 28 U. S. (3 Pet.)

⁵⁹¹ *Willison v. Watkins*, 28 U. S. (3 Pet.) 43; *Catlin v. Decker*, 38 Conn. 262; *Morton v. Lawson*, 40 Ky. (1 B. Mon.) 45; *South's Heirs v. Marcum*, 22 Ky. Law Rep. 641, 58 S. W. 527; *Meridian Land & Industrial Co. v. Ball*, 68 Miss. 135, 8 So. 316; *Greenwood v. Moore*, 79 Miss. 201, 30 So. 609; *Lea's Lessee v. Netherton*, 17 Tenn. (9 Yerg.) 315; *Voss v. King*, 33 W. Va. 236, 10 S. E. 54; *Tewksbury v. Magraff*, 33 Cal. 237 (dictum).

CHAPTER VIII.

COVENANTS FOR QUIET ENJOYMENT AND OF POWER TO DEMISE.

§ 79. Covenant for quiet enjoyment.

- a. Implication of covenant.
- b. Duration of implied covenant.
- c. Persons whose acts may constitute breach.
 - (1) Lessor acting for himself or through others.
 - (2) Persons claiming "under" lessor.
 - (3) Persons claiming under paramount title.
 - (4) Sovereign authority.
- d. Acts constituting breach.
 - (1) Necessity of eviction.
 - (2) Acts on adjoining premises.
 - (3) Assertion of paramount title.
 - (4) Wrongful acts.
 - (5) Acts prior to lease.
 - (6) Exclusion from possession.
 - (7) Miscellaneous classes of acts.
- e. Persons entitled to the benefit of the covenant.
- f. Persons bound by the covenant.
- g. Damages recoverable for breach.

80. Covenant of power to demise.

§ 79. Covenant for quiet enjoyment.

a. **Implication of covenant.** A formal instrument of lease ordinarily contains an express covenant on the part of the lessor for quiet enjoyment by the lessee, but, according to the weight of authority, even though such a covenant is not expressed, it will be implied.¹ This doctrine, it has been well said,² seems to

¹ In *Knapp v. Town of Marlboro*, 90 Vt. 282, it is said that a covenant for quiet enjoyment is implied from a covenant that the lessee shall "hold, use, occupy, possess and en-joy the premises without interrup- tion," but this appears to be a cov- enant implied in fact, in effect an express covenant for quiet enjoy- ment. In *Ellis v. Welch*, 6 Mass.

flow as a natural consequence from the original character of a demise for years, as being not a conveyance but merely a covenant that the lessee should enjoy the land, a breach of which entitled him to the recovery of damages.³ The cases bearing upon the question of such implication of the covenant are as follows:

By a number of quite early authorities it is stated that from the presence of the words "demisi" or "concessi" the law will imply a covenant by the lessor on which he may be subjected to liability by the lessee in case the latter is evicted,⁴ and the same effect was given to the English equivalents of these words, to-wit; "demise" and "grant."⁵ And by the later cases it is assumed without question that the words give rise to an implication of a covenant for quiet enjoyment.⁶ On the question, however, whether a covenant of quiet enjoyment will be implied in the absence of the words "demise" or "grant" the cases are not in accord. In two states in this country it has been decided that it will not be implied in such a case, and that words of letting other than "demise," such as "let" or "lease," are not sufficient for this purpose.⁷ In other states, however, a different view is taken,

246, 4 Am. Dec. 122, it is said that a covenant that the lessee shall "hold and occupy" during the term constitutes a general covenant for quiet enjoyment.

A clause whereby the lessor, "for himself, his heirs and assigns," "against all persons whatsoever lawfully claiming the same, shall and will, during the term, warrant and defend" the premises, was held to operate as an express covenant for quiet enjoyment. *Williams v. Burrell*, 1 C. B. 402.

² 2 Pollock & Maitland, Hist. Eng. Law, 106, note.

³ See ante, § 12 a.

⁴ *Andrews' Case*, Cro. Eliz. 214; *Spencer's Case*, 5 Coke, 16; *Coleman v. Sherwyn*, 1 Show. 79, 1 Salk. 137.

⁵ *Style v. Hearing*, Cro. Jac. 73; *Nokes' Case*, 4 Coke, 81; *Deering v. Farrington*, 1 Mod. 113, Freem. 367.

⁶ *Burnett v. Lynch*, 5 Barn. & C.

589, 609; *Mostyn v. West Mostyn Coal & Iron Co.*, 1 C. P. Div. 145; *Budd-Scott v. Daniell* [1902] 2 K. B. 351; *Iggulden v. May*, 9 Ves. Jr. 330; *Barney v. Keith*, 4 Wend. (N. Y.) 502; *Stott v. Rutherford*, 92 U. S. 107; *Folts v. Huntley*, 7 Wend. (N. Y.) 210; *Ware v. Lithgow*, 71 Me. 62; *Groome v. Ogden City Corp.*, 10 Utah, 54, 37 Pac. 90; *Lanigan v. Kille*, 97 Pa. 120, 39 Am. Rep. 797; *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744.

⁷ *Lovering v. Lovering*, 13 N. H. 517; *Mershon v. Williams*, 63 N. J. Law, 398, 44 Atl. 211.

In *Barneycastle v. Walker*, 92 N. C. 198, it is said that there is no "implied contract" that the lessor will not molest the lessee in his possession, but there is an "implied condition" to that effect on breach of which the lessee is discharged, citing *Taylor, Landl. & Ten.* § 386,

and any words of leasing are regarded as sufficient,⁸ while in numerous cases it is stated or assumed that on every lease of land a covenant for quiet enjoyment is to be implied.⁹ So it is said by a writer of the highest authority on this branch of the law that "in the absence of words of leasing, as for instance where the lease is by parol, it is well settled that the law will imply a covenant for quiet enjoyment from the mere relation of landlord and tenant."¹⁰

In England there has at times been considerable uncertainty as to whether there is any implication of a covenant for quiet enjoyment in the absence of the words "demise" or "grant." The most recent decision is to the effect that the particular words of leasing referred to have no peculiar effect different from that of other words of leasing, and that an undertaking for quiet enjoyment as against the acts of the lessor and those claiming under him is to be implied from the mere relation of landlord and tenant.¹¹

which furnishes not the slightest support for the statement.

⁸ *Maule v. Ashmead*, 20 Pa. 482 ("lease"); *Young v. Hargrave's Adm'r*, 7 Ohio (pt. 2) 63 ("lease and rent"); *Black v. Gilmore*, 9 Leigh (Va.) 448, 33 Am. Dec. 253 ("lease and rent"); *Hamilton v. Wright's Adm'r*, 28 Mo. 199 ("lease").

⁹ *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545; *Abrams v. Watson*, 59 Ala. 524; *Duff v. Wilson*, 69 Pa. 316; *Ross v. Dysart*, 33 Pa. 452; *City of New York v. Mable*, 13 N. Y. (3 Kern.) 160, 64 Am. Dec. 538 (semble); *Vernam v. Smith*, 15 N. Y. 332 (semble); *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Gazzolo v. Chambers*, 73 Ill. 75; *Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279; *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. 1082; *Edwards v. Perkins*, 7 Or. 149; *Hanley v. Banks*, 60 Okl. 79, 51 Pac. 664; *Barnes v. Wilson*, 116 Pa. 303, 9 Atl.

437; *Maxwell v. Urban*, 22 Tex. Civ.

App. 565, 55 S. W. 1124; *Eldred v.*

Leahy, 31 Wis. 546; *Shaft v. Carey*,

107 Wis. 273, 83 N. W. 288 (sem-

ble); *Owens v. Wight*, 5 McCrary,

642, 18 Fed. 865; *McDowell v. Hy-*

man, 117 Cal. 67, 48 Pac. 984; *Hoag-*

land v. New York, C. & St. L. R. Co.,

111 Ind. 443, 12 N. E. 83; *Riley v.*

Hale, 158 Mass. 240, 33 N. E. 491;

Herpolsheimer v. Funke, 1 Neb.

Unoff. 471, 95 N. W. 688; *Geer v.*

Boston Little Circle Zinc Co., 126

Mo. App. 173, 103 S. W. 151.

¹⁰ Rawle, *Covenants for Title*, §

274, citing *Bandy v. Cartwright*, 8

Exch. 913; *Carson v. Godley*, 26 Pa.

117, 67 Am. Dec. 404; *Ross v. Dys-*

art, 33 Pa. 453; *Dexter v. Manley*, 58

Mass. (4 Cush.) 14.

¹¹ *Budd-Scott v. Daniell* [1902] 2

K. B. 351, following *Bandy v. Cart-*

wright, 8 Exch. 913, and *Hall v. City*

of London Brewery Co., 2 Best & S.

737, and disapproving dicta contra

in *Baynes & Co. v. Lloyd & Sons*

It is proper to remark that some of the cases containing the statement that a covenant for quiet enjoyment is to be implied in the case of every lease involved merely the liability of a tenant for rent after eviction,¹² and it would seem from the introduction of the reference to the liability for rent that the court may, in such cases, have been under the impression that the suspension of such liability after eviction is due to the fact that there is such an implied covenant. The tenant's liability for rent, however, is suspended upon his eviction, independently of whether the eviction constitutes a breach of any covenant for quiet enjoyment. For instance, if there is an express covenant against disturbance by the lessor or those claiming under him, this, as hereafter stated, limits the effect of the implied covenant, so that there is in such case no covenant against disturbance by one having paramount title, and yet such disturbance, if it amounts to an eviction, will no doubt suspend the right to rent. And so it was apparently decided in New York that, though in a so-called "lease in fee," that is, a conveyance in fee subject to rent, there was no express covenant for quiet enjoyment, and none could, under the local statute, be implied,¹³ the eviction of the lessee was a good defense to an action for rent.¹⁴ And in Missouri it has been said that "a tenant without covenants would have the same redress against his landlord for illegal acts that he would have against strangers, and moreover would be entitled to all those defenses which the law allows to tenants in actions for the nonpayment of rent which grow out of an eviction or the wrongful acts of landlords."¹⁵

In a few states there are to be found statutory provisions that no covenant shall be implied in any conveyance of real estate,¹⁶

[1895] 2 Q. B. 610. *Jones v. Lavington* [1903] 1 K. B. 256 decides that an implied covenant does not extend to a disturbance by paramount title. See *Markham v. Paget* [1908] 1 Ch. 697, and post, at note 51.

¹² See *Ross v. Dysart*, 33 Pa. 452; *Hayner v. Smith*, 63 Ill. 430; *Field v. Herrick*, 10 Ill. App. (10 Bradw.) 591; *Maxwell v. Urban*, 22 Tex. Civ. App. 565, 55 S. W. 1124.

¹³ See post, at note 16.

¹⁴ *Carter v. Burr*, 39 Barb. (N. Y.) 59.

¹⁵ *Maeder v. City of Carondelet*, 26 Mo. 112.

¹⁶ *Michigan* Comp. Laws 1897, § 8959; *Bell. & C. Ann. Codes & St.* 1899, § 2734; *Wyoming* Rev. St. 1898, § 2204. In *Minnesota* (Rev. Laws 1905, § 3342) the statute applies in terms to "any conveyance." The present New York law (Real

and the question whether a lease is a conveyance of real estate within such a provision has occasioned considerable difficulty. In Oregon it has been decided that a lease is not within the scope of the provision,¹⁷ and there is an explicit decision to that effect in New York,¹⁸ but in view of the language of later cases in that state, it appears questionable whether such covenant for quiet enjoyment can be implied in any lease for more than three years, another statutory provision being to the effect that the term "real estate" shall include all chattels real except leases for a term not exceeding three years.¹⁹ And in Wisconsin it has been decided that such a prohibition of an implication of a covenant in a conveyance of real estate applied to a lease for five years, in view of a statutory provision that the term "conveyance" includes all instruments creating interests in real estate except wills and leases for not more than three years.²⁰ It is possible that, by the application of the doctrine that a lessor cannot derogate from his grant, hereafter referred to,²¹ the effect of such a statute might be in some cases avoided. That is, though a covenant could not be implied against a disturbance of the lessee by the lessor, it might be considered that such a disturbance involved a derogation from the grant.

Prop. Law 1896, § 216) says "conveyance of real property," not "conveyance of real estate," as formerly.

¹⁷ *Edwards v. Perkins*, 7 Or. 149.

¹⁸ *City of New York v. Mabie*, 13 N. Y. (3 Kern.) 151, 64 Am. Dec. 538.

¹⁹ In the case of *Koeber v. Somers*, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512, the following statement as to the New York cases on the subject is made: "In some cases *City of New York v. Mabie* has been cited merely to support the proposition that implied covenants exist in leases for less than three years. *Vernam v. Smith*, 15 N. Y. 327; *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Vann v. Rouse*, 94 N. Y. 401. In others it is assumed that no lease for years,

though exceeding three, is within the statute excluding such covenants. *Graves v. Berdon*, 26 N. Y. 498; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Grover J.*, in *Burr v. Stenton*, 43 N. Y. 462, 464. While in others, including the latest utterance we have found on the subject, the statute is, without argument, assumed to exclude implied covenants from leases longer than three years. *Church, C. J.*, in *Burr v. Stenton*, 43 N. Y. 462; *Coffin v. City of Brooklyn*, 116 N. Y. 159, 22 N. E. 227." A conveyance in fee subject to rent, a so called "lease in fee," is evidently within the statutory provision. *Carter v. Burr*, 39 Barb. (N. Y.) 59.

²⁰ *Koeber v. Somers*, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512.

²¹ See post, § 128, at notes 33-38.

The implied covenant has been regarded as excluded by an express covenant by the lessor to aid the lessee in keeping possession.²² It may likewise be excluded by an express provision for its exclusion.²³ And though it is said to be "restrained" by an express covenant of a qualified character,²⁴ it seems that the effect of such an express covenant is absolutely to exclude the implied covenant, since it is no longer operative for any purpose.

b. Duration of implied covenant. An implied covenant, as distinguished from an express covenant, will not, it has been held, endure longer than during the continuance of the estate out of which the lease is granted.²⁵ If, for instance, one having an estate for life makes a lease for years and dies before the expiration of the lease, whereupon the lessee is evicted by the remainderman, the lessee cannot assert any liability against the personal representatives of the lessor under the covenant.²⁶ In one state, however, it has been decided that this rule has no application when the life tenant might have made a good lease for the whole term, as when he has a power of disposition after his death.²⁷ On the principle above stated it has been decided in England that a tenant from year to year under a tenant for years has no right of action on the implied covenant, on account of an eviction by the chief landlord after the expiration of the original term.²⁸

c. Persons whose acts may constitute breach—(1) Lessor acting for himself or through others. The covenant for quiet enjoyment protects the lessee against interference with his enjoyment by the acts of the lessor himself,²⁹ and acts by others under

²² O'Connor v. City of Memphis, 75 Tenn. (7 Lea) 219.

²³ Maeder v. City of Carondelet, 26 Mo. 112.

²⁴ See post, at notes 52, 53.

²⁵ Adams v. Gibney, 6 Bing. 656; Penfold v. Abbott, 32 Law J. Q. B. 67; Hyde v. Dean & Canons of Windsor, Cro. Eliz. 552; Baynes & Co. v. Lloyd & Sons [1895] 2 Q. B. 610; Cheiny v. Langley, 1 Leon. 179; Bragg v. Wiseman, 1 Brownl. & G. 22; City of Brookhaven v. Baggett, 61 Miss. 383; McClowny v. Croghan's Adm'r, 1 Grant Cas. (Pa.) 311.

²⁶ Swan v. Stransham, 3 Dyer, 257 b, Benl. & D. 150.

²⁷ Hamilton v. Wright's Adm'r, 28 Mo. 199.

²⁸ Penfold v. Abbott, 32 Law J. Q. B. 67; Schwartz v. Locket, 61 Law T. (N. S.) 719.

²⁹ See McDowell v. Hyman, 117 Cal. 67, 48 Pac. 984; Berrington v. Casey, 78 Ill. 317; Kansas Inv. Co. v. Carter, 160 Mass. 421, 36 N. E. 63; Herpolsheimer v. Funke, 1 Neb. Unoff. 471, 95 N. W. 688.

the direct authority of the lessor are constructively his acts for this purpose.³⁰ So it has been decided that the building of a wall on part of the premises by a third person, under authority from the lessor, who supposed such part not to be included in the lease, constituted a breach of the covenant,³¹ and a like decision was made when the adjoining owner, by authority from the lessor, entered on the leased premises to erect a party wall, and, this being necessarily an interference with the lessee's enjoyment, the fact that such authority was granted on condition that the excavation should not cause damage to the lessee was regarded as immaterial.³² But the acts of third persons cannot be regarded as authorized by the lessor and therefore constructively his acts so as to impose liability under the covenant merely because they were the unforeseen results of a course of action on his part, but they must, it seems, be directly authorized by him.³³ The authority from the lessor to a third person doing the act complained of as a breach may, apparently, be given before or after the making of the lease.³⁴ It appears to have been decided that the lessor is liable as if he had himself interfered with the lessee's possession, when he procures one, to whom he has leased adjoining premises, to institute a proceeding to prevent the use of the premises for the purpose for which the lease was made.³⁵

(2) **Persons claiming "under" lessor.** The covenant for quiet enjoyment may be general in terms, to the effect that the lessee shall quietly enjoy the premises, or it may be expressly restricted to the acts of the lessor or of those persons who claim through or under him, it being then referred to as a "qualified" or "limited" covenant. A general covenant for quiet enjoyment is not, it seems, restrained by a qualified covenant for title in the same instrument unless an express intention appears to that

³⁰ *Levitzky v. Canning*, 33 Cal. 299; *City of New York v. Mabie*, 13 N. Y. (3 Kern.) 151, 64 Am. Dec. 538; *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *Harmont v. Sullivan*, 128 Iowa, 309, 103 N. W. 951; *Seaman v. Browning*, 1 Leon. 157.

³¹ *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522.

³² *Collins v. Lewis*, 53 Minn. 78, 54 N. W. 1056.

³³ *Surget v. Arighi*, 19 Miss. (11 Smedes & M.) 87, 49 Am. Dec. 46, where a mob "moved by exasperation" against the lessor expelled the lessee.

³⁴ *Anderson v. Oppenheimer*, 5 Q. B. Div. 602.

³⁵ *Williams v. Getman*, 114 App. Div. 282, 99 N. Y. Supp. 977.

effect, or unless the covenants are inconsistent,³⁶ nor does a restricted or qualified covenant for quiet enjoyment control a covenant for title absolute in terms unless the language shows that the purpose of the two covenants was the same, or unless they are otherwise connected by the language of the instrument.³⁷

A number of cases have arisen in England as to the construction of the language of a qualified covenant against the acts of the lessor and persons claiming by, from, or under him, and the result of these cases seems to be that it includes persons whose rights were derived from the lessor, although they were derived before and not after the making of the lease. Thus it has been held that a person claiming under a settlement previously made by the lessor,³⁸ or the appointee under a power previously executed by him,³⁹ is within these words, as is, apparently, one to whom the lessor has previously leased the same⁴⁰ or adjacent⁴¹ premises. And so a recovery of dower by the widow of the covenantor has been held to involve a breach of such a covenant.⁴² But a claim made by one adversely to him, as when the disturbing act was a distress for a tax due from the lessor before the lease, has been held not to be by one claiming "under" him,⁴³ and such words in a sublease have been regarded as giving the sublessee no right of action against the sublessor when the superior landlord re-entered on the premises subleased for the sublessor's breach of a covenant of the original lease, in failing to pay rent and repair adjoining premises covered by such lease but not by the sublease,⁴⁴ though a different view was taken when the head landlord's re-entry was by reason of the sublessor's act in consenting to judgment for possession in favor of the

³⁶ Rawle, Covenants for Title, § Div. 547; Harrison v. Muncaster 291; Sheets v. Joyner, 11 Ind. App. [1891] 2 Q. B. 680.

205. 38 N. E. 830.

⁴² Anonymous, Godb. 333; Sheppard's Touchstone, 171.

³⁷ Rawle, Covenants for Title, §§ 289, 290; Browning v. Wright, 2 Bos. & P. 13.

⁴³ Stanley v. Hayes, 3 Q. B. 105.

³⁸ Hurd v. Fletcher, 1 Doug. 43; Evans v. Vaughan, 4 Barn. & C. 261.

This is so, *a fortiori*, if the taxes became due before the lessor owned the property. See West v. Spaulding, 52 Mass. (11 Metc.) 556; Rundell v. Lakey, 40 N. Y. 513; Ingalls v. Cooke, 21 Iowa, 560, cited Rawle, Covenants (5th Ed.) p. 124, note 1.

³⁹ Calvert v. Sebright, 15 Beav. 156.

⁴⁰ Ludwell v. Newman, 6 Term R. 458; Rolph v. Crouch, L. R. 3 Exch. 44.

⁴⁴ Kelly v. Rogers [1892] 1 Q. B.

⁴¹ Sanderson v. Berwick, 13 Q. B. 910.

former, he having in fact no right of re-entry under the circumstances.⁴⁵

Where the covenant of an under lease was against disturbance by "the acts, means or procurement" of the lessor or of persons claiming under him, it was held that a re-entry by the superior landlord for breach by the under lessee's tenant of a covenant of the head lease as to the use of the premises was not within the covenant,⁴⁶ and where one took a lease for ninety-nine years from a tenant in tail and his son, the fact that his subtenant was evicted by the remainderman after the termination of the tenancy in tail was not regarded as constituting a "neglect or default" on the part of the sublessor, within a covenant for quiet enjoyment against himself and all persons claiming under him or by his neglect or default.⁴⁷ But when the covenant in the under lease provided against any interruption by the sublessor or of any other person "by his means, procurement or consent," it was decided that re-entry by the superior landlord by reason of the underlessor's default in payment of rent was a breach of the covenant,⁴⁸ and when one purchasing land took a conveyance to himself and his wife and to the heirs of himself, and subsequently leased it, an eviction by his widow was regarded as a breach of the covenant against interruption on the part of the lessor "or of any other person by or through his means, title, or procurement."⁴⁹

(3) **Persons claiming under paramount title.** An express covenant in general terms for quiet enjoyment is broken by an eviction by one having a paramount title,⁵⁰ while a qualified covenant, if limited to the acts of persons claiming "under" the lessor only, is obviously not broken by an eviction by one whose title is not derived, directly or indirectly, from the lessor.

In England the view has been adopted that the implied covenant for quiet enjoyment, like the qualified covenant there in use, applies to the acts of the lessor and those claiming under him only.⁵¹ In this country, on the contrary, there seems to be no

⁴⁵ *Cohen v. Tannar* [1900] 2 Q. B. 609.

⁴⁶ *Spencer v. Marriott*, 1 Barn. & C. 457; *Dennett v. Atherton*, L. R. 7 Q. B. 316.

⁴⁷ *Woodhouse v. Jenkins*, 9 Bing. 431.

⁴⁸ *Stevenson v. Powell*, 1 Bulst. 182.

⁴⁹ *Butler v. Swinnerton*, Cro. Jac. 656.

⁵⁰ See post, § 79 d (3).

⁵¹ *Jones v. Lavington* [1903] 1 K. B. 253. And see, for intimations to

suggestion that the operation of the implied covenant is in any way more limited than that of an express covenant stated in general terms, or that it does not apply to the acts of persons claiming under paramount title. The implied covenant for quiet enjoyment may, however, be in effect qualified in this regard by the language of an express covenant of the same character, on the principle *expressum facit cessari tacitum*. Thus, if there is an express covenant against the acts of the lessor and of those claiming under him, no covenant will be implied against the acts of a third person having paramount title.⁵² And so the covenant may be limited by express provisions in the lease so as not to apply to the acts of a particular person or class of persons.⁵³

(4) **Sovereign authority.** A general covenant for quiet enjoyment is not broken by a disturbance by acts of the sovereign authority.⁵⁴ Thus the fact that the tenant is evicted by the municipality owing to the taking of the land for a street does not give any right of action on the covenant, since compensation for his loss of the term is obtainable otherwise.⁵⁵ And it has been decided that he has no right of recovery even when the eviction is by a public corporation which acquired the reversion and then instituted the condemnation proceedings against the leasehold

this effect, Sheppard's Touchstone, Grotenkemper, 1 Cin. R. (Ohio) 88; 165; Holder v. Taylor, Hob. 12; O'Connor v. City of Memphis, 75 Andrews' Case, 1 Leon. (pt. 2) 104; Tenn. (7 Lea) 219.

Hall v. City of London Brewery Co., 53 So in O'Connor v. Daily, 109 2 Best. & S. 737; Budd-Scott v. Daniel [1902] 2 K. B. 351. There is, in Mass. 235, it was held that a provision in the lease that "in case the land is sold the lessees may carry away their improvements" showed a dictum that the implied covenant applies to an interference by one claiming under paramount title. an understanding that the lessor might sell, and consequently no See remarks of Swinfen Eady, J., covenant of quiet enjoyment could in Markham v. Paget [1908] 1 Ch. be implied as against a dispossession by the purchaser. And see McCormick v. Millburn & Stoddard Co., 697, as to Andrews' Case, 1 Leon. 57 Minn. 6, 58 N. W. 600. (pt. 2) 104.

⁵² Nokes' Case, 4 Coke, 81; Merrill v. Frame, 4 Taunt. 329; Line v. Stephenson, 5 Bing. N. C. 183; 129.

Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350; Burr v. Stenton, 43 N. Y. 462; Groome v. Ogden City Corp., 10 Utah, 54, 37 Pac. 90; Tooker v. Ellis v. Welch, 6 Mass. 246, 4 Am. Dec. 122; Frost v. Earnest, 4 Whart. (Pa.) 86; Pabst Brew. Co. v. Thorley, 127 Fed. 439.

⁵⁴ Rawle, Covenants for Title, §

⁵⁵ Ellis v. Welch, 6 Mass. 246, 4 Am. Dec. 122; Frost v. Earnest, 4 Whart. (Pa.) 86; Pabst Brew. Co. v. Thorley, 127 Fed. 439.

interest.⁵⁶ Likewise the fact that the municipal authorities remove the building on the premises in the interest of public safety⁵⁷ does not involve a breach of the covenant. It has been decided, however, that if the municipal authorities merely order the lessor either to make the building safe or to remove it, he is liable under the covenant if he takes it down when he might have made it safe.⁵⁸ An entry by the lessor to make repairs is not a breach if this is under a municipal order.⁵⁹

It has been decided that an interference by the lessor with the tenant's enjoyment is a breach of the covenant, even though such interference was required by an ordinance, if such ordinance is invalid.⁶⁰ But in another case, the fact that the opening of a street over the demised premises was under an unconstitutional statute was held not to render the lessor liable for removing the building thereon, he having done so under a municipal order.⁶¹

Somewhat analogous to the above decisions, relieving the lessor from liability under his covenant for acts done under sovereign authority, is a decision, rendered in Pennsylvania, that the exercise by the owner of adjoining property of the right there given him by statute to remove a partition wall for the purpose of erecting another wall does not involve a breach of the covenant, although it does involve an interference with the tenant's enjoyment.⁶²

A covenant for quiet enjoyment in a lease of a theatre does not protect the tenant against interference by the public authorities owing to the tenant's attempted use of scenery of a particular character in violation of an ordinance.⁶³

d. Acts constituting breach—(1) Necessity of eviction.

⁵⁶ *Goodyear Shoe Mach. Co. v. Boston Terminal Co.*, 176 Mass. 115, 57 N. E. 214; *Manchester, S. & L. R. Co. v. Anderson* [1898] 2 Ch. 394. ⁵⁸ *lessor's failure to make it safe. Lindwall v. May*, 111 App. Div. 457, 97 N. Y. Supp. 821.

⁵⁹ *Coddington v. Dunham*, 35 N. Y. Super. Ct. (3 Jones & S.) 412.

⁵⁷ *Noyes v. Anderson*, 8 N. Y. Super. Ct. (1 Duer) 342; *Connor v.*

Bernheimer, 6 Daly (N. Y.) 295; ⁶⁰ *Eldred v. Leahy*, 31 Wis. 546.

Achlers v. Rehlenger, 1 City Ct. R. (N. Y.) 79. ⁶¹ *Dunn v. Mellon*, 147 Pa. 11, 23 Atl. 210, 30 Am. St. Rep. 706.

⁶² *Barns v. Wilson*, 116 Pa. 303, 9 Atl. 437.

⁵⁸ *Kansas Inv. Co. v. Carter*, 160 Mass. 421, 36 N. E. 63. So where ⁶³ *Kiernan v. Bush Temple of the building was destroyed by the Music Co.*, 229 Ill. 494, 82 N. E. municipal authorities owing to the 410.

The extent or character of the interference with enjoyment necessary to constitute a breach of the covenant is a question on which the cases do not present any harmonious rule. There are decisions and *dicta* in this country to the effect that an eviction of the tenant, either total or partial, is necessary for this purpose.⁶⁴ Under such a view, it seems, having regard to the nature of an eviction,⁶⁵ there cannot be any breach of the covenant unless the lessor is either actually ousted from part or the whole of the premises, or unless he vacates them in whole or in part as a result of the acts complained of. In some cases, however, in which there is stated to be an eviction constituting a breach of the covenant, it does not appear that the lessor's possession of the premises, as distinct from his right of enjoyment, had been in any way affected.⁶⁶ Equivalent, it seems, to the statement that an eviction is necessary to constitute a breach of the covenant, is the statement, occasionally made, that a "mere trespass" by the landlord, without any assertion of title, actual or constructive, is not sufficient for the purpose.⁶⁷

⁶⁴ *Boreel v. Lawton*, 90 N. Y. 293, which constituted a breach of the covenant, though the lessees, so far as appears, remained in possession. 43 Am. Dec. 170; *Rhineland v. Martin*, 23 Abb. N. C. 267, 7 N. Y. Supp. 154; *Levy v. Bend*, 1 E. D. And in *Brown v. Holyoke Water Smith (N. Y.)* 169; *Reynolds v. Mel-drum*, 33 N. Y. St. Rep. 664, 11 N. Y. Supp. 568; *George A. Fuller Co. v. Manhattan Const. Co.*, 44 Misc. 219, 88 N. Y. Supp. 1049; *Greenwood v. Wetterau*, 84 N. Y. Supp. 287; *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N. E. 509; *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; *Levitzky v. Canning*, 33 Cal. 299. And see *Skally v. Shute*, 132 Mass. 367; *Roth v. Adams*, 185 Mass. 341, 70 N. E. 445.

⁶⁵ *Boreel v. Lawton*, 90 N. Y. 293, which constituted a breach of the covenant, though the lessees, so far as appears, remained in possession. 43 Am. Dec. 170; *Rhineland v. Martin*, 23 Abb. N. C. 267, 7 N. Y. Supp. 154; *Levy v. Bend*, 1 E. D. And in *Brown v. Holyoke Water Smith (N. Y.)* 169; *Reynolds v. Mel-drum*, 33 N. Y. St. Rep. 664, 11 N. Y. Supp. 568; *George A. Fuller Co. v. Manhattan Const. Co.*, 44 Misc. 219, 88 N. Y. Supp. 1049; *Greenwood v. Wetterau*, 84 N. Y. Supp. 287; *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N. E. 509; *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; *Levitzky v. Canning*, 33 Cal. 299. And see *Skally v. Shute*, 132 Mass. 367; *Roth v. Adams*, 185 Mass. 341, 70 N. E. 445.

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⁶⁷ *Lloyd v. Tomkies*, 1 Term R. 671; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; *Edgerton v. Page*, 20 N. Y. 281; *City of New York v. Mabie*, 13 N. Y. (3 Kern.) 151, 64 Am. Dec. 538. In *Penn v. Glover*, Cro. Eliz. 421, a cov-

⁶⁵ See post, chapter XVII.

⁶⁶ So in *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125, it is said that there was a constructive eviction by the overflow of water from adjoining premises

⁶⁷ *Lloyd v. Tomkies*, 1 Term R. 671; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; *Edgerton v. Page*, 20 N. Y. 281; *City of New York v. Mabie*, 13 N. Y. (3 Kern.) 151, 64 Am. Dec. 538. In *Penn v. Glover*, Cro. Eliz. 421, a cov-

The theory that an eviction is necessary to constitute a breach of the covenant is ignored in several decisions in this country, acts apparently falling short of an eviction being regarded as sufficient for the purpose. So it has been said that the lessor, without being guilty of an actual physical disturbance of the tenant's possession, may so interfere with his enjoyment as to be liable in damages.⁶⁸ And the mere bringing of an action against the lessee by the lessor to recover the premises, accompanied by a denial of the former's right to possession, has been regarded as a breach.⁶⁹ In another state it has been decided that the making of an excavation on the premises under authority of the landlord constituted a breach of the covenant, without mention of any necessity of an eviction or of a vacation of the premises by the tenant.⁷⁰ Even in Massachusetts, where the necessity of an eviction has been positively asserted,⁷¹ it has apparently been held that there was a breach of the covenant when the lessor interfered with the lessee's water power, though there was no vacation of the premises by the latter.⁷² And it was there said that the mere

enant by a lessee not to "molest" quiet enjoyment, though in the Virginia case it is said to be an action of covenant. In *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N. E. 509, the bringing of a suit by the landlord to eject the tenant was held not to be a breach of the covenant, since the tenant remained in possession, and hence there was no eviction.

⁶⁸ *Boyer v. Commercial Bldg. Inv. Co.*, 110 Iowa, 491, 81 N. W. 720, citing *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175, in which latter case, however, the interference appears to have been a breach of an express covenant against building near the premises

⁶⁹ *Levitzky v. Canning*, 33 Cal. 299. In *Hubble v. Cole*, 88 Va. 236, 13 S. E. 441, 13 L. R. A. 441, 13 L. R. A. 311, 29 Am. St. Rep. 716, and *Madox v. Humphries*, 24 Tex. 195, it is decided that the action of the lessor in wrongfully obtaining an injunction against the lessee's use of the premises gives a right to damages, but it is not stated that the recovery is on the covenant for

quiet enjoyment, though in the Virginia case it is said to be an action of covenant. In *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N. E. 509, the bringing of a suit by the landlord to eject the tenant was held not to be a breach of the covenant, since the tenant remained in possession, and hence there was no eviction.

⁷⁰ *Collins v. Lewis*, 53 Minn. 78, 54 N. W. 1056.

⁷¹ *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N. E. 509.

⁷² *Dexter v. Manley*, 58 Mass. (4 Cush.) 14; *Brown v. Holyoke Water-Power Co.*, 152 Mass. 463, 25 N. E. 966, 23 Am. St. Rep. 844. In the latter case there was apparently a mere breach of a contract to furnish power, the lessor removing the belt which transmitted the power from his own premises, and this was said

erection, by authority of the lessor, of a chimney in such a way as to cut off light and air "necessary for the beneficial use of" the premises leased was "a substantial interruption of plaintiff's right to quiet enjoyment."⁷³

Whatever may be the rule in the various states in this country as to the necessity of eviction to constitute a breach of the covenant for quiet enjoyment, it is apparently settled by the later cases in England that there no such requirement exists, it being said to be a question for the jury in each case whether the covenant has been broken.⁷⁴ There the action of the lessor in notifying the lessee's tenant not to pay rent to the lessee is, at least if acted on, regarded as a breach.⁷⁵

(2) **Acts on adjoining premises.** The acts alleged to constitute a breach of the covenant for quiet enjoyment by the lessor or one claiming under him are frequently acts done, not upon the leased premises, but upon adjoining property. What classes of acts on adjoining premises are sufficient to constitute a breach, apart from any question of the necessity of an eviction, does not clearly appear from the cases.

It has in one state been decided that if the landlord allows the premises to be flooded by water flowing from adjoining premises controlled by him, there is a breach of the covenant,⁷⁶ and in England it was held that the escape of water upon the demised premises as a result of a proper use, by another tenant of the same lessor, upon adjoining premises, of insufficient drains constructed by the lessor, was a breach of a covenant against disturbance by the lessor or by persons lawfully claiming under him.⁷⁷ In another jurisdiction it has been decided that a flow of water from adjoining premises, not resulting in the relinquishment of possession by the tenant, does not constitute a breach.⁷⁸

to be "an eviction from an important part of the premises let." As before remarked (ante, § 24 a, at note 331), a contract to furnish power cannot properly be regarded as a lease.

⁷³ Case v. Minot, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 563. In this case it was held that there was an implied grant of the right to such necessary light and air.

⁷⁴ See Sanderson v. Mayor of Berwick-upon-Tweed, 13 Q. B. Div. 547; Budd-Scott v. Daniell [1902] 2 K. B. 351.

⁷⁵ Edge v. Boileau, 16 Q. B. Div. 117.

⁷⁶ York v. Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

⁷⁷ Sanderson v. Mayor of Berwick-upon-Tweed, 13 Q. B. Div. 547.

⁷⁸ Edgerton v. Page, 20 N. Y. 281.

In one state the action of the lessor in making improvements upon the adjoining premises, with the effect of cutting off the water supply, injuring the lessee's furniture, and so impeding ingress and egress as to cause the lessee's lodgers to leave, has been regarded as involving a breach of the covenant, without reference to whether the lessor was guilty of negligence.⁷⁹

A permanent obstruction by the lessor of a right of way appurtenant to the leased premises has been regarded as a breach of the covenant,⁸⁰ but a merely temporary obstruction, rendering the access to the premises for the time less convenient, in the course of the making of improvements in the neighborhood, is not within the covenant.⁸¹ In two states, the closing of a door leading out of the demised premises to adjoining premises owned by the lessor, the effect of which was to interfere with the lessee's business, was regarded as a breach,⁸² and there is a case to the effect that a breach occurs as against a tenant of offices in a building, if the lessor or his agent locks the outside door of the building each evening at six o'clock.⁸³ The same view has been taken of the placing of an obstruction by the lessor in front of a show window belonging to the leased premises.⁸⁴

It has been decided that the lessee of an office in a building has no right of action on the covenant merely because the landlord changes the balance of the building into a hotel, thus rendering the leased room unsuitable for the lessee's business.⁸⁵ And a like decision has been made with reference to the lessor's failure to keep adjoining premises in repair, the lessee retaining possession.⁸⁶

As previously indicated,⁸⁷ acts on adjoining premises, inter-

In *Vann v. Rouse*, 94 N. Y. 401, W. 288. See *Coulter v. Norton*, 100 Mich. 389, 59 N. W. 163, 43 Am. St. Rep. 458, and see post, §§ 128, 135. a breach, the tenant vacated as a result of the overflow.

⁸³ *MacLennan v. Royal Ins. Co.*, 39

⁷⁹ *McDowell v. Hyman*, 117 Cal. U. C. Q. B. 515.

67, 48 Pac. 984.

⁸⁴ *Herpolsheimer v. Funke*, 1 Neb.

⁸⁰ *Morris v. Edgington*, 3 Taunt. Unoff. 471, 95 N. W. 688.

24; *Andrews v. Paradise*, 8 Mod. 318. ⁸⁵ *Tucker v. Du Puy*, 210 Pa. 461,

⁸¹ *Manchester S. & L. R. Co. v. Anderson* [1898] 2 Ch. 395. 60 Atl. 4. But see post, § 131, notes 50-53.

⁸² *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. Unoff. 340, 96 N. W. 487; ⁸⁶ *Roth v. Adams*, 185 Mass. 341, 70 N. E. 445.

Shaft v. Carey, 107 Wis. 273, 83 N. ⁸⁷ See ante, at note 72.

fering with the "power" which the lessor agreed to furnish to the lessee, have, in one state, been regarded as involving a breach of the covenant for quiet enjoyment. And it has even been asserted that, when the means of supplying heat to an apartment is exclusively within the landlord's control, a failure to furnish heat involves a breach of the covenant.^{87a}

In England the lessor is not liable as for a breach of the covenant because he, or one claiming under him, does acts on adjoining premises, in the reasonable use thereof, which interfere with the tenant's enjoyment of the demised premises, unless such interference could have been foreseen as a result of such acts, and accordingly it was held that he was not liable because of a rush of water from adjoining premises, which he could not, in the exercise of reasonable care, have foreseen,⁸⁸ nor because his use of the adjoining premises interfered with a particular use of the leased premises by the lessee, which he, the lessor, had no reason to anticipate.⁸⁹ It has, furthermore, in that jurisdiction, been stated that there must be a "direct interference" with the tenant's enjoyment,⁹⁰ and it was held that the causing of a noise or vibration on adjoining premises, so as to interfere with the comfortable occupation by the tenant, did not involve a breach of the covenant,⁹¹ even though legally a nuisance and actionable as such,⁹² or as a derogation from the lessor's grant.⁹³

In a recent case in England⁹⁴ an important limitation upon the right of recovery under the covenant, on account of the use made by the landlord of adjoining premises to the injury of the lessee,

^{87a} *Jackson v. Paterno*, 58 Misc. 208, 108 N. Y. Supp. 1073. the lease erected a building on adjoining property owned by him at the

⁸⁸ *Harrison Ainslie & Co. v. Mun-caster* [1891] 2 Q. B. 680. Compare *McDowell v. Hyman*, 117 Cal. 67, 48 Pac. 984, where it is said that the question of negligence in doing the acts complained of is immaterial. time of the lease with the result that the chimney on the leased premises smoked, there was a breach of the covenant for quiet enjoyment.

⁸⁹ *Robinson v. Kilvert*, 41 Ch. Div. 88. ⁹¹ *Jenkins v. Jackson*, 40 Ch. Div. 71; *Hudson v. Cripps* [1896] 1 Ch. 265; *Jaeger v. Mansions Consolidated*, 87 Law T. (N. S.) 690.

⁹⁰ *Davis v. Town Properties Inv. Corp.* [1903] 1 Ch. 797, per *Romer & Cozens-Hardy*, L. J. J., doubting. ⁹² See *Grosvenor Hotel Co. v. Hamilton* [1894] 2 Q. B. 836.

for this reason, *Tebb v. Cave* [1900] 1 Ch. 642, where it was held by *Buckley, J.*, that if the lessor after making ⁹³ See post, § 131, at note 33.

⁹⁴ *Davis v. Town Properties Inv. Corp.* [1903] 1 Ch. 797.

is asserted, to the effect that, while the covenant applies to acts done on the adjoining premises by the lessor by reason of any interest which he had therein at the time of the making of the lease, he cannot be precluded by the covenant from subsequently acquiring the adjoining premises and using them as any other owner. To hold otherwise, it is said, would give the covenant the effect of a grant by the lessor of easements over adjoining premises which he had at the time no power to grant. And even if the lessor himself could be so restricted by the covenant as regards the adjoining premises, it is said, one to whom he transferred the reversion could not be so bound with regard to *his* use of the adjoining premises, acquired by him from a third person, since the obligation as to such premises would be a personal one upon the lessor, and would not run with the land demised.⁹⁵

In determining whether a particular class of acts by the lessor on adjoining premises, resulting in an interference with the lessee's enjoyment, constitutes a breach of the covenant, the circumstances at the time of the lease are to be considered, it is said, and if the lessee at that time knew of the purpose of the lessor to do such acts,⁹⁶ or, it seems, had reason to know thereof,⁹⁷⁻⁹⁹ he cannot assert any liability under the covenant on account thereof.

(3) **Assertion of paramount title.** A covenant for quiet enjoyment, though it does not apply to the wrongful acts of persons other than the landlord,¹⁰⁰ does protect the lessee against the lawful acts of such persons, unless it is so restricted or qualified as to exclude them, that is, it applies to the acts of persons having a paramount title.¹⁰¹ So if the lessee is evicted by one having a prior lease,¹⁰² or by a purchaser at a sale under a mortgage

⁹⁵ See post, § 149 b (3).

⁹⁶ *Robson v. Palace Chambers Co.*, 14 Times Law R. 56. See *Potts v. Smith*, L. R. 6 Eq. 311.

⁹⁷⁻⁹⁹ Where the lease was renewed, the lessee could not, it was held, thereafter assert a breach of the covenant for quiet enjoyment on the ground of oppressive heat due to the operation by the lessor of a boiler on adjoining premises, when it was operated in the same way during the original lease. *Chicago Warehouse & Mfg. Co. v. Illinois Pneumatic Tool Co.*, 35 Ill. App. 144.

¹⁰⁰ See post, § 79 d (4).

¹⁰¹ See *Chestnut v. Tyson*, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101; *Kane v. Mink*, 64 Iowa, 84, 19 N. W. 852; *Holbrook v. Young*, 108 Mass. 83; *King v. Bird*, 148 Mass. 572, 20 N. E. 196; *Peters v. Grubb*, 21 Pa. 455, and other cases cited in the next succeeding notes.

¹⁰² See post, § 186 a (1), at note 171.

prior to the lease,¹⁰³ he has a right of action on the covenant.

The mere existence of an outstanding paramount title is not, it is evident, a breach of the covenant, since this involves no disturbance of the tenant's enjoyment.¹⁰⁴ There are decisions, however, to the effect that a recovery in trespass against the tenant by the owner of the paramount title constitutes a breach.¹⁰⁵ And when a lessee made a sublease in violation of his covenant, the grant of an injunction against the retention of possession by the sublessee was regarded as a breach of the sublessor's covenant.¹⁰⁶

Even before an action is brought by the holder of the paramount title, the tenant may, upon the assertion of such title, yield possession,¹⁰⁷ or in some way attorn,¹⁰⁸ to the claimant, but in such case he has the burden of showing that the person to whom he yielded possession or to whom he attorned actually had a paramount title.¹⁰⁹ But in case an action is brought against the tenant by the claimant of the paramount title, the tenant may give notice to the lessor to come in and defend the action, and if he does this, a judgment in such action is conclusive in his favor

¹⁰³ *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. 1082; *Market Co. v. Lutz*, 4 Phila. (Pa.) 322.

¹⁰⁴ *Dwinell v. Brown*, 65 Ga. 438, 38 Am. Rep. 792; *Lynch v. Sauer*, 16 Misc. 1, 37 N. Y. Supp. 666; *Mason v. Lenderoth*, 88 App. Div. 38, 84 N. Y. Supp. 740. It has been quite frequently so decided with reference to a covenant in a conveyance in fee. *Waldron v. McCarty*, 3 Johns. (N. Y.) 471; *Kerr v. Shaw*, 13 Johns. (N. Y.) 236; *Howard v. Doolittle*, 10 N. Y. Super. Ct. (3 Duer) 464; *Boothby v. Hathaway*, 20 Me. 251; *Coble v. Wellborn*, 13 N. C. (2 Dev. Law) 388.

¹⁰⁵ *McAlester v. Landers*, 70 Cal. 79; *Rolph v. Crouch*, L. R. 3 Exch. 44. And see *Blodgett v. Jensen*, 2 Neb. Unoff. 543, 89 N. W. 399. In the first of the above cited cases, reference is made to *Williams v. Shaw*, 4 N. C. 630 (Term 197), where such a de-

cision was made with reference to a covenant in a conveyance in fee.

¹⁰⁶ *Griesheimer v. Bothman*, 105 Ill. App. 585.

¹⁰⁷ *King v. Bird*, 148 Mass. 572, 20 N. E. 196; *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. 1082; *Moffat v. Strong*, 22 N. Y. Super. Ct. (9 Bosw.) 57; *Carpenter v. Parker*, 3 C. B. (N. S.) 206. So where the subtenant yielded possession in good faith to the head landlord on the latter's assertion of a forfeiture for breach of condition in the head lease. *Geer v. Boston Little Circle Zinc Co.*, 126 Mo. App. 173, 103 S. W. 151.

¹⁰⁸ *Cane v. Mink*, 64 Iowa, 84, 19 N. W. 852; *Holbrook v. Young*, 103 Mass. 83. See ante, § 78 p (2), and post, § 186 a (2).

¹⁰⁹ *Stiger v. Monroe*, 109 Ga. 457, 34 S. E. 595. See *Rawle, Covenants for Title*, § 136, and post, § 186 a (2).

as to the validity of the title of the adverse claimant.¹¹⁰ In the absence of such notice, the judgment in favor of the adverse claimant, though evidence of eviction, is not, it seems, evidence of eviction under title paramount as against the covenantor.¹¹¹

It has been held, on a construction of the particular instrument of lease, that a covenant for quiet enjoyment of the demised premises extended to a part of a building constructed under the bed of a street under a revocable license from the city, so as to render the lessor liable upon a revocation of the license.^{112a}

(4) **Wrongful acts.** Acts interfering with the lessee's enjoyment, done by the lessor himself or by his direction, constitute a breach of the covenant, although they are tortious in their nature, and even though the covenant provides against "lawful" disturbance only.¹¹²

As regards persons other than the lessor and persons acting directly under his authority, the covenant, although general in its terms, applies to their lawful acts only, that is, it does not protect the lessee against the acts of a third person who interferes with his enjoyment without any title to justify such interference.¹¹³ The lessee has his remedy by action against the wrongdoer, and it is not regarded as in accordance with the intention of the parties that the lessor should be made answerable for the acts of strangers which he could neither foresee nor prevent.¹¹⁴ This rule applies even though the covenant is in terms

¹¹⁰ *Chestnut v. Tyson*, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101; *Stiger v. Monroe*, 109 Ga. 457, 34 S. E. 595; *Chestnut v. Tyson*, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101; *Rawle, Covenants for Title*, § 117 et seq.

¹¹¹ *Sheets v. Joyner*, 11 Ind. App. 205, 38 N. E. 830; *Rawle, Covenants for Title*, § 123.

^{111a} *Pabst Brew. Co. v. Thorley*, 76 C. C. A. 85, 145 Fed. 117.

¹¹² 2 *Platt, Leases*, 313; *Corus v. —*, Cro. Eliz. 544; *Penning v. Plat*, Cro. Jac. 383; *Crosse v. Young*, 2 Show. 425; *Lloyd v. Tomkies*, 1 Term R. 671; *Hanley v. Banks*, 6 Okl. 79, 51 Pac. 664.

¹¹³ *Rawle, Covenants for Title*, § 127; *Hayes v. Bickerstaff*, Vaughan, 118; *Tisdale v. Essex*, Hob. 34; *Play-*

ter v. Cunningham, 21 Cal. 229; *Stiger v. Monroe*, 109 Ga. 457, 34 S. E. 595; *Chestnut v. Tyson*, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101; *Gazzolo v. Chambers*, 73 Ill. 75; *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *Lamsing v. Van Alstyne*, 2 Wend. (N. Y.) 561, note; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, 38 Am. Dec. 637; *Hyde v. Wilmore*, 14 Misc. 340, 35 N. Y. Supp. 681; *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708; *McNairy v. Hicks*, 62 Tenn. (3 Baxt.) 378; *Sedberry v. Verplanck* (Tex. Civ. App.) 31 S. W. 242; *Underwood v. Birchard*, 47 Vt. 305.

¹¹⁴ The reasons for the rule as stated by Vaughan, C. J., in connection with the leading case of *Hayes*

against the act of the lessor "or of any other person whatsoever."¹¹⁵

In two cases only, and those of unusual occurrence, is the lessor liable under his covenant for the wrongful acts of a third person, these being, firstly, when the covenant is in terms against the acts of such particular person, who is named in the covenant,¹¹⁶ and, secondly, when it clearly appears from the express language of the covenant, that it was intended that the covenantor should be liable for the wrongful acts of third persons,¹¹⁷ as when it is against all claiming or "pretending to claim."¹¹⁸

The general rule was applied when the covenant was in terms against disturbance by the lessor "or his assigns," and the lessor was regarded as not liable for a wrongful disturbance by an "assign,"¹¹⁹ and so, by the recent English cases, it appears that a covenant against the acts of the lessor or of those claiming under him applies to such acts only, by persons claiming under the lessor, as such persons have a right to do by reason of the instrument by which they claim, that is, that it does not apply to acts for which they have no authority derived from the lessor.¹²⁰

v. Bickerstaff, Vaughan, 118, 122, are that if the rule were otherwise: (1) A man's covenant, without necessary words to make it such, would be strained to be unreasonable, and therefore, improbable to be so intended, for it would be unreasonable a man should covenant against the wrongful acts of strangers impossible for him to prevent, or probably to attempt preventing; (2) the covenantor, who was innocent, would be charged when the lessee had his natural remedy against the wrongdoer, and the covenantor made to defend a man from that from which the law defended every man, that is, from wrong; (3) a man would have double remedy for the same injury and also against the wrongdoer; (4) a way would be opened to damage a third person (that is the covenantor) by undiscoverable practice between the lessee and a stranger, for there would

be no difficulty for the lessee secretly to procure a stranger to make a tortious entry that he might therefore charge the covenantor with an action.

¹¹⁵ *Hayes v. Bickerstaff, Vaughan*, 118; *Pabst Brew. Co. v. Thorley*, 127 Fed. 439; *Branger v. Manciet*, 30 Cal. 624; *Goodrich v. Sanderson*, 35 App. Div. 546, 55 N. Y. Supp. 881; *Surget v. Arighi*, 19 Miss. (11 Smedes & M.) 87, 49 Am. Dec. 46; *Rawle, Covenants for Title*, §§ 126, 127.

¹¹⁶ *Foster v. Mapes, Cro. Eliz.* 212; *Nash v. Palmer*, 5 Maule & S. 374; *Fowle v. Welsh*, 1 Barn. & C. 29.

¹¹⁷ *Hayes v. Bickerstaff, Vaughan*, 118.

¹¹⁸ *Chaplain v. Southgate*, 10 Mod. 383.

¹¹⁹ *Hayes v. Bickerstaff, Vaughan*, 118.

¹²⁰ *Sanderson v. Mayor of Berwick-upon-Tweed*, 13 Q. B. Div. 547; *Wil-*

The covenant for quiet enjoyment, implied either from the words of leasing or otherwise, like an express covenant, does not apply to the wrongful acts of strangers.¹²¹

(5) **Acts prior to lease.** The act complained of as a breach of the covenant must have been done after the making of the lease and not before,¹²² and a breach can evidently not take place, so as to give a right of action, till the term itself has begun.¹²³

(6) **Exclusion from possession.** Upon the question whether a covenant for quiet enjoyment may be broken by an interference with the lessee's original entry under the lease, that is with his original acquisition of possession, as well as by interference with his possession after it has been acquired, the cases are not in accord. They are considered in the next following chapter.

(7) **Miscellaneous classes of acts.** No breach results from the making of a subsequent lease or conveyance by the lessor, when this does not result in any interference with the tenant's possession.¹²⁴ And the mere failure of the lessor to erect fire escapes in compliance with an order of the city building inspector has been held not to involve a breach of the covenant.¹²⁵

The failure of the lessor to protect the building leased from injury by reason of an excavation on the land of an adjoining owner, the statute imposing on such lessor, as owner, the duty of protecting his building, which fell by reason of his failure so to do, has been regarded as a breach of the covenant.¹²⁶

The act of the lessor in procuring the institution of a suit by the tenant of adjoining premises to restrain the lessee from using the

Williams v. Gabriel [1906] 1 K. B. 155. See *Harrison, Ainsle & Co. v. Muncaster* [1891] 2 Q. B. 680. *Newell v. Magee*, 30 Ont. 550, is apparently to the same effect.

¹²¹ *Abrams v. Watson*, 59 Ala. 524; *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545; *Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279; *Schuykill & D. I. R. Co. v. Schmoele*, 57 Pa. 271; *Barns v. Wilson*, 116 Pa. 303, 9 Atl. 437; *Wallis v. Hands* [1893] 2 Ch. 83.

¹²² *Anderson v. Oppenheimer*, 5 Q. B. Div. 602.

¹²³ *Ireland v. Bircham*, 2 Bing. N. C. 90.

¹²⁴ *Ware v. Lithgow*, 71 Me. 62.

In *Maule v. Ashmead*, 20 Pa. 482, it was held that the lessor was liable for breach of the covenant because without expressly saving the lessee's rights he conveyed to one who ousted the lessor. It is most questionable, however, whether a lessor commits a wrong against the lessee by thus conveying the land. *Post*, § 146 a, at notes 6, 7.

¹²⁵ *Taylor v. Finnegan*, 189 Mass. 568, 76 N. E. 203.

¹²⁶ *Lindwall v. May*, 111 App. Div. 457, 97 N. Y. Supp. 821.

premises for the purpose for which they were leased has been regarded as constituting a cause of action for damages.¹²⁷

e. **Persons entitled to the benefit of the covenant.** The benefit of the covenant for quiet enjoyment passes with the leasehold to an assignee thereof.¹²⁸

f. **Persons bound by the covenant.** One to whom the reversion is transferred is bound by the covenant,¹²⁹ but not, it has been decided in England, so far as to be restrained in his use of adjoining property not obtained from the lessor.¹³⁰ One taking under paramount title, as by sale under a mortgage prior to the lease, is obviously not in privity with the lessor and is not bound by the covenant.¹³¹ Nor is a remainderman bound by a covenant in a lease made by the life tenant.¹³² A trustee, entering into a general covenant on a lease by him, is bound thereby, though he cannot bind his *cestui que trust*.¹³³

g. **Damages recoverable for breach.** The ordinary measure of damages for the breach of the covenant for quiet enjoyment, by which the lessee is deprived of the possession, is the excess of the rental value of the premises over the rent which he has agreed to pay therefor, from the time of the eviction till the end of the term,¹³⁴ or, in the case of a tenancy at will, till the lessor would

¹²⁷ Williams v. Getman, 114 App. Div. 282, 99 N. Y. Supp. 977.

¹²⁸ Spencer's Case, 5 Coke, 16 a; Noke v. Awder, Cro. Eliz. 426; Shelton v. Codman, 57 Mass. (3 Cush.) 318.

¹²⁹ Manchester, S. & L. R. Co. v. Anderson [1898] 2 Ch. 394; Buck v. Binniger, 3 Barb. (N. Y.) 391; Coulter v. Norton, 100 Mich. 389, 59 N. W. 163, 43 Am. St. Rep. 458.

¹³⁰ Davis v. Town Properties Inv. Corp. [1903] 1 Ch. 797.

¹³¹ Sprague Nat. Bank v. Erie R. Co., 22 App. Div. 526, 48 N. Y. Supp. 65.

¹³² Coakley v. Chamberlain, 8 Abb. Pr. (N. S.) 37, 31 N. Y. Super. Ct. (1 Sweeny) 676.

¹³³ Chestnut v. Tyson, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101; Rawle, Covenants for Title, §§ 34-36.

¹³⁴ Tyson v. Chestnut, 118 Ala. 387, 24 So. 73, 53 Am. St. Rep. 116;

Snodgrass v. Reynolds, 79 Ala. 452, 58 Am. Rep. 601; Prochaska v. Fox, 137 Mich. 519, 100 N. W. 746; Hughes v. Hood, 50 Mo. 350; Riley v. Hale, 158 Mass. 240, 33 N. E. 491; Duncklee v. Webber, 151 Mass. 408, 24 N. E. 1082 (semble); Sheets v. Joyner, 11 Ind. App. 205, 38 N. E. 830 (semble); Williams v. Burrell, 1 C. B. 402; Lock v. Furze, L. R. 1 C. P. 441. And see the cases to the effect that this is the measure of damages for the lessee's inability to obtain possession. Post, § 85.

Where the lessee had agreed to make permanent improvements which exceeded in value any possible benefit which he could derive from the lease, the court decided that there could be no recovery. O'Con-

have had the right to demand the possession.¹³⁵ In Pennsylvania and Ohio, apparently, a different rule has been adopted, and there, except in so far as rent may have been paid for a part of the term during which he was deprived of possession, the recovery by the tenant, in the case at least of an eviction by title paramount, is restricted to nominal damages;¹³⁶ and the same rule is perhaps to be regarded as applicable in New York when the landlord does not participate in the eviction.¹³⁷ In any case, the tenant is entitled to recover any rent which he may have paid for a part of the term, during which he has been kept out of possession.¹³⁸

Damages cannot be recovered ordinarily, for the tenant's loss of profits which he might have made on the premises had he not been evicted.¹³⁹

Expenditures on the tenant's part for costs and counsel fees

nor v. City of Memphis, 75 Tenn. (7 Lea) 219.

¹³⁵ *Ashley v. Warner*, 77 Mass. (11 Gray) 43.

¹³⁶ *McAlpin v. Woodruff*, 11 Ohio St. 120, 37 Am. Dec. 414; *Lanigan v. Kille*, 97 Pa. 120, 39 Am. Rep. 797. In the latter case it was held that the lessee could not recover the value of improvements placed by him on the premises by agreement with the lessor, which he was to have the right to remove, and this although the lessor had been allowed the value of the improvements in an action for mesne profits by the owner of the paramount title against him.

¹³⁷ See *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506. There the court referred to the rule of the previous decisions in that state that as between vendor and purchaser the recovery on the covenant should be limited to the consideration paid and interest, and, as stated by Mr. Rawle (Covenants for Title, § 169), "considered that the rule had not been very satisfactory to the courts in this country; that it had been relaxed or

modified more or less to meet the injustice done by it to lessees in particular cases, and had, in England, been repudiated, and it was held, without drawing a distinction between an eviction by the landlord himself and eviction under paramount title, but largely resting the decision on the landlord's complicity in the eviction, that the measure of damages was the value of the unexpired term at the time of eviction, over and above the rent reserved." In this case there was a mortgage prior to the lease which the lessor knew of and might have paid.

¹³⁸ *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491; *Blossom v. Knox*, 3 Chand. (Wis.) 295, 3 Pin. 262. See *Tyson v. Chestnut*, 118 Ala. 387, 24 So. 73, 53 Am. St. Rep. 116; *Lanigan v. Kille*, 97 Pa. 120, 39 Am. Rep. 797.

¹³⁹ *Denison v. Ford*, 10 Daly (N. Y.) 412; *Cleveland, C. C., & St. L. R. Co. v. Mitchell*, 84 Ill. App. 206. See authorities cited as to such recovery in case of exclusion of lessee from possession, post, § 85, notes 36-40.

incurred in defending the title against the paramount claimant can be recovered,¹⁴⁰ provided at least he notified the lessor to defend the suit and the latter failed so to do.¹⁴¹

In case there is a breach of a covenant for quiet enjoyment not amounting to an eviction, the tenant can obviously recover only the amount of injury which he has suffered thereby.¹⁴²

Quite frequently, in the case of an eviction by the landlord, the tenant, instead of proceeding upon the covenant for quiet enjoyment, sues in tort for the eviction.¹⁴³ Ordinarily, as will appear later, the same measure of damage is adopted in the two classes of action, but, apparently, in that of tort, circumstances of aggravation, as well as elements of pecuniary loss, may occasionally be considered which would be excluded in the action for breach of contract.¹⁴⁴

§ 80. Covenant of power to demise.

From the word "demise" in a lease, the law implies not only a covenant for quiet enjoyment, but also a covenant of title, or, which is the same thing, a covenant that the lessor has power to demise.¹⁴⁵ And it has apparently been decided in England that the word "let" has the same effect as the word "demise" for this purpose,¹⁴⁶ though in a previous decision in the same jurisdiction it was asserted that such a covenant would not be implied on a lease by parol.¹⁴⁷ In two states in this country it has been decided that such a covenant cannot be implied upon a written lease, without the use of the words "demise" or "grant."¹⁴⁸

¹⁴⁰ *McAlpin v. Woodruff*, 11 Ohio St. 120. *Ware v. Lithgow*, 71 Me. 62; *Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec.

¹⁴¹ *Chestnut v. Tyson*, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101. *Harms v. McCormick*, 132 Ill. 104; *Conrad v. Morehead*, 89 N. C. See *Rawle, Covenants for Title*, § 34. 200.

¹⁴² *Child v. Stenning*, 11 Ch. Div. 82. *Iron Co.*, 1 C. P. Div. 145.

¹⁴⁷ *Bandy v. Cartwright*, 8 Exch. 913.

¹⁴³ See post, § 185 i.

¹⁴⁴ See post, § 185 i.

¹⁴⁵ *Holder v. Taylor*, Hob. 12; *Fraser v. Skey*, 2 Chitty, 646 (semble); *Line v. Stephenson*, 5 Bing. N. C. 183 (dictum); *Burnett v. Lynch*, 5 Barn. & C. 589, 609 (dictum); *Stott v. Rutherford*, 92 U. S. 107; *Grannis v. Clark*, 8 Cow. (N. Y.) 36; *Baxter v. Ryers*, 13 Barb. (N. Y.) 284, where it is said that "it never was held that a mere sale or lease imported a warranty of title in the grantor or lessor of real estate, as in the case of personal property." A similar statement is made in *Gano v. Vanderveer*, 34 N.

On the other hand there are occasional suggestions to the effect that such a covenant will be implied without reference to the use of any particular words of leasing.¹⁴⁹

The effect of such a covenant is that the lessee may recover for injuries by failure of title to the whole or a part of the leased premises, even though there has been no actual interruption of his enjoyment of the premises by the holder of the paramount title, he not being obliged even to enter, and so subject himself to the possibility of eviction by the rightful owner.¹⁵⁰

The covenant for title thus implied from words of leasing is, like the covenant for quiet enjoyment, restrained by the language of an express covenant in the lease, even though this is in terms a covenant as to possession and not title. Thus, if there is an express covenant against any acts of interference with the lessee by the lessor or persons claiming under him, the lessor will not be held liable as for breach of covenant because of the existence of an outstanding paramount title.¹⁵¹

J. Law, 293, but in New Jersey, as before stated, a covenant of quiet enjoyment even is not implied in the absence of the words "demise" or "grant." See ante, note 7.

¹⁴⁹ See *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505; *Wade v. Halligan*, 16 Ill. 508; *Streeter v. Streeter*, 43 Ill. 155. In *Maas v. Kramer*, 52 Misc. 151, 101 N. Y. Supp. 800, the sublessee's lease extended beyond the term of the sublessor's leasehold, but the sublessor had a right to renew his lease unless the lessor could get a better rent elsewhere, and it was held that the sublessee, by his action in obtaining a lease from the head lessor, having prevented the sublessor from obtaining a renewal, could not recover damages. It does not appear on what specific character of default the action was based, whether a breach of the covenant for quiet enjoyment, of a covenant for title, or of some other obligation. If a covenant for title could have been implied, there might, it seems, have been a possibility of the recovery of nominal damages.

¹⁵⁰ *Holder v. Taylor*, Hob. 12; *Mostyn v. West Mostyn Coal & Iron Co.*, 1 C. P. Div. 145; *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505.

¹⁵¹ *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 5 Bing. N. C. 183; *Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 350. So in *Besley v. Besley*, 9 Ch. Div. 103, and *Clayton v. Leech*, 41 Ch. Div. 103, where it was held that an under-lessee who discovered that his lessor's term did not cover the whole term of the under-lease could not claim compensation from his lessor. There was in each case an express covenant against disturbance by the lessor or by any one claiming under him. This is not referred to in the former case, but in the latter *Bowen, L. J.*, says: "The implied covenant which would have arisen from the demise is excluded by the express qualified covenant for quiet enjoyment."

CHAPTER IX.

THE LESSOR'S OBLIGATION TO GIVE POSSESSION.

- § 81. Theory of the obligation to give possession.
- 82. Exclusion by one having paramount title.
- 83. Exclusion by stranger without right.
- 84. Exclusion by lessor.
- 85. Measure of damages.

§ 81. Theory of the obligation to give possession.

We consider elsewhere the question whether the lessee may allege, in defense to a claim for rent, that he was, by the action of the lessor or of some third person, prevented from obtaining possession of the leased premises.¹ We will here consider whether such exclusion from possession will justify an action for damages against the lessor. It seems convenient, however, first to consider the form or nature of such an action, assuming, in accordance with the great majority of decisions, that there is a right of action of some sort.

There are decisions to the effect that a failure to give possession to the lessee at the time named for the commencement of the term is a breach of the covenant for quiet enjoyment² which,

¹ See post, § 182 a.

King v. Reynolds, 67 Ala. 229, 42 Am.

² Ludwell v. Newman, 6 Term R. Rep. 107 (semble); Berrington v. Cas-
458 (semble); Smart v. Stuart, 5 ey, 78 Ill. 317 ("implied contract for
U. C. Q. B. (O. S.) 301; Riley v. Hale, possession and quiet enjoyment");
158 Mass. 240, 33 N. E. 491; Steel v. Edesheimer v. Quackenbush, 68 Hun,
Frick, 56 Pa. 172; Brennan v. Jacobs, 427, 23 N. Y. Supp. 75; Poposkey v.
22 Wkly. Notes Cas. (Pa.) 453, 15 Munkwitz, 68 Wis. 322, 32 N. W. 35,
Atl. 685 (semble); Garrison v. Hut- 60 Am. Rep. 858. And see Lock v.
ton, 118 App. Div. 455, 103 N. Y. Furze, L. R. 1 C. P. 441, where a
Supp. 265; Friedlander v. Myers, 47 lessee already in possession under
N. Y. St. Rep. 52, 19 N. Y. Supp. 741; a valid lease took a fresh lease in
Id., 139 N. Y. 432, 34 N. E. 1055; reversion which proved to be invalid

as we have seen, is ordinarily implied from the relation of landlord and tenant, if not expressed in the lease.^{2a} In opposition to this view, however, it has been stated that one who has a mere *interesse termini* cannot sue on a covenant for quiet enjoyment.³ A covenant for quiet enjoyment in a conveyance in fee is usually regarded as broken by the exclusion of the grantee from possession by one having a paramount title, since the law will not compel the grantee to obtain possession by committing a trespass before bringing suit on the covenant.⁴ And it would seem that, on the same theory, a lessee should be allowed to sue on such a covenant in the lease if excluded from possession by one having paramount title, or by the lessor himself. There is, however, some difficulty in accepting this view in any jurisdiction in which it is held that an eviction is necessary to effect a breach of the covenant,⁵ and where it is also the law that one who has not been in possession cannot be evicted.⁶ Nor can the covenant for quiet enjoyment be regarded as the basis of liability when the lessee is excluded by a stranger, in possession without right,⁷ it being recognized that the wrongful acts of strangers are not within the scope of such a covenant.⁸

In many of the cases in which the lessee has been allowed to recover damages on account of his exclusion from possession, the exact theory of the action does not clearly appear. In an English case denying the right of the lessee to sue on the covenant for quiet enjoyment in case of his exclusion from possession, his right

and recovered damages on the covenant for quiet enjoyment contained in the second lease.

In *Hawkes v. Orton*, 5 Adol. & E. 367, judgment was rendered for defendant because the only breach of the covenant of quiet enjoyment alleged was a dispossession of plaintiff, while the evidence showed that he was never admitted into possession. But, as stated in *Rawle, Covenants for Title* (5th Ed.) 180, note, "the court seem to have thought that a refusal to give possession might, if properly averred, be a breach of the covenant for quiet enjoyment."

^{2a} See ante, § 79.

³ *Wallis v. Hands* [1893] 2 Ch. 75.

⁴ See the discussion of the cases in *Rawle, Covenants for Title*, § 138 et seq. See, also, cases cited in 8 Am. & Eng. Enc. Law (2d Ed.) 105; 11 *Cyclopedia Law & Proc.* 1121.

⁵ See ante, § 79 d (1).

⁶ See *Etheridge v. Osborn*, 12 Wend. (N. Y.) 529; *Vanderpool v. Smith*, 4 Abb. Dec. (N. Y.) 461; *Stiger v. Monroe*, 109 Ga. 457, 34 S. E. 595; *Hawkes v. Orton*, 5 Adol. & E. 367. See post, § 185 f (1).

⁷ See post, § 83.

⁸ See ante, § 79 d (4).

of recovery in case of such exclusion is said to be "founded on implied covenant,"⁹ and so in several cases in this country it is said that there is a right of action on the implied agreement to give possession.¹⁰ Occasionally the expressions of the court are to the effect that the action is on an agreement to give possession, without terming the agreement "implied" although it is not expressed otherwise than in the language of demise.¹¹ Not infrequently the courts speak of the action for damages for exclusion from possession as being for "breach of the contract of lease,"¹² an expression which has been criticised in a previous part of this work.¹³ This can mean merely that the action is for breach of either an express or implied covenant to give possession. The most satisfactory mode, perhaps, of regarding the lessor's liability in damages on account of the lessee's inability to obtain possession, would be to view it as based on a covenant to give possession, implied from the making of the lease, as the covenant for quiet enjoyment is implied from the relation of landlord and tenant. Whether we term such a covenant a covenant for quiet enjoyment seems ordinarily immaterial, though in some jurisdictions, as before suggested,¹⁴ to do so would not harmon-

⁹ Wallis v. Hands [1893] 2 Ch. 75, action of tort for the violation of citing Coe v. Clay, 5 Bing. 440, the duty arising from the relation which decided that one who lets of landlord and tenant.

agrees to give possession, and is liable in an action for damages if a previous occupant retains possession. ¹¹ Cohn v. Norton, 57 Conn. 480, 18 Atl. 595; Clark v. Butt, 26 Ind. 236; Hughes v. Hood, 50 Mo. 351.

¹² Townsend v. Nickerson Wharf Co., 117 Mass. 501; Rogers v. McGuffey, 96 Tex. 565, 74 S. W. 753; McFarland v. Owens (Tex. Civ. App.) 64 S. W. 229; Shultz v. Brenner, 24 64 S. W. 229; 53 N. Y. Supp. 972; Goldman v. Reynolds, 67 Ala. 229, 42 Am. Rep. 107; Herpolsheimer v. Christopher, 76 Neb. 352, 111 N. W. 359; Hertzberg v. Beisenbach, 64 Tex. 262. See Berrington v. Casey, 78 Ill. 317 ("implied contract for possession and quiet enjoyment"). In Trull v. Granger, 8 N. Y. (4 Seld.) 115, it is said that the lessee has the alternative right to bring an ¹³ See ante, § 16, note 7. ¹⁴ See ante, at note 5.

ize with the views there asserted with reference to the latter character of covenant.

§ 82. Exclusion by one having paramount title.

As regards the existence of a right of action, in favor of the lessee against the lessor, for exclusion from the premises, we will consider separately the cases of exclusion, (1) by one having paramount title, (2) by a stranger having no title, and (3) by the lessor himself, acting personally or through another.

That the exclusion of the lessee by one having a paramount title gives him a right of action against the lessor is asserted in two or three cases,¹⁵ and so the lessor has been held liable when the lessee could not obtain possession from one rightfully in possession under a prior lease from the same lessor,¹⁶ such prior lessee's title being paramount as regards that of the subsequent lessee.¹⁷ The decisions, subsequently referred to,¹⁸ that such possession and title in another constitute a defense to a claim for rent, would also, perhaps, tend to support the view that the lessee may recover damages for his exclusion from possession by one having paramount title. The lessee thus kept out of possession by one having paramount title, even if not regarded as entitled to sue on the covenant for quiet enjoyment or an implied covenant to give possession, would clearly have the right to sue on the covenant of power to demise,¹⁹ when such covenant is expressed or can be implied from the use of particular words of demise.²⁰

§ 83. Exclusion by stranger without right.

A lessee who is kept out of possession by a third person who has no right to the possession, as when a previous lessee holds over

¹⁵ *Ludwell v. Newman*, 6 Term R. N. W. 35, 60 Am. Rep. 458. See 458; *Gardner v. Keteltas*, 3 Hill (N. Duncan v. Maloney, 115 Ill. App. Y.) 330. See 2 Platt, Leases, 288. 522; *Goerl v. Damrauer*, 27 Misc.

¹⁶ *Cohn v. Norton*, 57 Conn. 480, 18 555, 58 N. Y. Supp. 297.

Atl. 595, 5 L. R. A. 572; *Bernhard v.* ¹⁷ See post, § 186 a, at note 171.

Curtis, 75 Conn. 476, 54 *Atl.* 213; ¹⁸ See post, § 182 a (1).

Steel v. Frick, 56 Pa. 172; *Brennan* ¹⁹ *Holder v. Taylor*, Hob. 12 a;

v. Jacobs, 22 *Wkly. Notes Cas. (Pa.)* *Grannis v. Clark*, 8 Cow. (N. Y.) 36;

453, 15 *Atl.* 685; *Friedland v. Myers*, 1 *Wms. Saund.* 322, note a.

139 N. Y. 432, 34 N. E. 1055; *Pop-* ²⁰ See ante, § 80.

oskey v. Munkwitz, 68 *Wis.* 322, 32

after his term, has, by some decisions, a right to recover damages against his lessor,²¹ and it has been said, as justifying such view, that "he who lets agrees to give possession, and not merely to give a chance of a law suit."²² By other decisions he has no right of redress against the lessor in such case, it being for the lessee to obtain possession from the wrongdoer.²³ It has been said that, even though the lessee is otherwise entitled to damages as against the lessor for exclusion by a stranger, he cannot recover if he has already recovered judgment against the intruder for possession and rents and profits.²⁴

It has occasionally been stated that, though the lessor is liable in damages if a stranger is in possession at the time named for the commencement of his term, and the lessee is consequently

²¹ *Jenks v. Edwards*, 11 Exch. 775; *Hughes v. Hood*, 50 Mo. 351; *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107; *Carroll v. Peake*, 26 U. S. (1 Pet.) 18 (semble); *Hammond v. Jones*, 41 Ind. App. 32, 83 N. E. 257; *Rieger v. Wells*, 110 Mo. App. 166, 84 S. W. 1136; *Hertzberg v. Breisenbach*, 64 Tex. 262; *Herpolsheimer v. Christopher*, 76 Neb. 352, 111 N. W. 359; *Rose v. Wynn*, 42 Ark. 257 (semble).

²² *Coe v. Clay*, 5 Bing. 440.

The lessee can claim no damages for exclusion from possession by a third person when the lease is in terms "for the term of one year from the date of occupancy, which shall commence as soon as vacated by the present occupant," that is, by such third person. *Rhodes v. Purvis*, 74 Ark. 227, 85 S. W. 235.

In *Leininger v. Clark Nat. Bank*, 97 Minn. 364, 107 N. W. 396, a lessee having committed an act of forfeiture, the lessor made a lease to another, assuming that he could get possession, and his liability to the second lessee on his failure to obtain possession from the first lessee was regarded as dependent on

whether the lessor had done "all he might and should have done" to get the first lessee out and put the second lessee in.

²³ *Gardner v. Keteltas*, 3 Hill (N. Y.) 332, 38 Am. Dec. 637; *Cozens v. Stevenson*, 5 Serg. & R. (Pa.) 421; *Pendergast v. Young*, 21 N. H. 234 (dictum); *Gazzolo v. Chambers*, 73 Ill. 75; *Sigmund v. Howard Bank*, 29 Md. 324; *Playter v. Cunningham*, 21 Cal. 229; *Thomson-Houston Elec. Co. v. Durant Land Imp. Co.*, 4 Misc. 207, 23 N. Y. Supp. 900; *Dodd v. Hart*, 30 Misc. 459, 62 N. Y. Supp. 484; *Mirsky v. Horowitz*, 46 Misc. 257, 92 N. Y. Supp. 48; *Underwood v. Birchard*, 47 Vt. 305. In *Gazzolo v. Chambers*, 73 Ill. 75, it is said that the lessee alone, and not the lessor, had the right to bring an action against the occupant to recover possession, and this seems to have influenced the decision. In *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107, cited in note 21, ante, it is, on the other hand, said that such action cannot be brought by the lessee. See, as to this, post, §§ 215, 273 n, 356.

²⁴ *Hughes v. Hood*, 50 Mo. 351.

prevented from taking possession at that time, he is not liable when the lessee is prevented by a stranger from taking possession at a later time,²⁵ and this seems a reasonable limitation on the lessor's liability. He should not be required, if the lessee fails to enter at the time named in the lease, to keep the premises free from intruders until the lessee chooses to enter.

There is a decision apparently to the effect that one who purchases the property after the time for the delivery of possession under the lease is liable in damages if the lessee is, because of a wrongful holding over by a prior lessee, prevented from obtaining possession after the purchase.^{25a}

§ 84. Exclusion by lessor.

In case the lessor himself refuses to allow the lessee to take possession at the commencement of the term,²⁶ or in effect does so by leasing to another before such time has arrived,²⁷ the lessee may, the cases are agreed, recover damages from the lessor.

§ 85. Measure of damages.

The ordinary measure of damages for the lessee's exclusion from possession is the amount by which the rental value of the premises exceeds the rent agreed to be paid,²⁸ with the possible

²⁵ *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107; *Hertzberg v. Breisenbach*, 64 Tex. 262.

^{25a} *Hammond v. Jones*, 41 Ind. App. 32, 83 N. E. 257.

²⁶ *Adair v. Bogle*, 20 Iowa, 238; *Trull v. Granger*, 8 N. Y. (4 Seld.) 115; *Garrison v. Hutton*, 118 App. Div. 455, 103 N. Y. Supp. 265; *Hodges v. Fries*, 34 Fla. 63, 15 So. 682; *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107; *Berrington v. Casey*, 78 Ill. 317; *Loufer v. Stottlemeyer*, 16 Ind. App. 221, 44 N. E. 1008; *Steel v. Frick*, 56 Pa. 172 (semble).

There is no right of action for failure to give possession when there is merely an agreement to give a lease. In such case the action must be brought for the failure

to give the lease. *Drury v. Macnamara*, 5 El. & Bl. 612. See ante, § 62, note 2.

²⁷ *Trull v. Granger*, 8 N. Y. (4 Seld.) 115; *Edesheimer v. Quackenbush*, 68 Hun, 427, 23 N. Y. Supp. 75; *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491; *Berrington v. Casey*, 78 Ill. 317; *McFarland v. Owens* (Tex. Civ. App.) 64 S. W. 229; *Clark v. Butt*, 26 Ind. 236; *Grace v. Haas*, 20 La. Ann. 73; *Albey v. Weingart*, 71 N. J. Law, 92, 58 Atl. 87.

In *Clark v. Butt*, 26 Ind. 236, such action on the part of the lessor's administrator was regarded as a breach of a covenant that the lessee should "have full and peaceable possession for said term."

²⁸ *Snodgrass v. Reynolds*, 79 Ala.

result that, if there is no such excess, nominal damages only can be recovered.²⁹ Occasionally the value of the premises for the particular use intended by the lessee has apparently been regarded as the rental value for this purpose, when the lessor knew of the intended use.³⁰

Besides the "general" damages measured by the difference between the rent and rental value, the lessee may, according to the cases generally, recover "special" damages which can be regarded as directly resulting from the lessor's breach of his agreement, express or implied, to give possession, and which are capable of approximate ascertainment.³¹ So it is said that the lessee is entitled to recover all expenses caused him by the failure to give him possession,³² and the expenses of breaking up his former home and preparing to move to the premises in question have been allowed him,³³ though in one case his right to recover such expenses

- 452, 58 Am. Rep. 601; *Andrews v. Adair v. Bogle*, 20 Iowa, 238.
Minter, 75 Ark. 289, 88 S. W. 822; In *Goldman v. Gainey*, 67 App.
Green v. Williams, 45 Ill. 206; *Rose* Div. 330, 73 N. Y. Supp. 738, it is
v. Wynn, 42 Ark. 257; *Adair v.* decided that such difference in rent
Bogle, 20 Iowa, 238; *Bernhard v.* and rental value, "general dam-
Curtis, 75 Conn. 476, 54 Atl. 213; ages," cannot be recovered when
Newbrough v. Walker, 8 Grat. (Va.) there is only an allegation of special
16; *Hughes v. Hood*, 50 Mo. 351, 56 damages.
Am. Dec. 127; *Trull v. Granger*, 8 N. ³⁰ *Poposkey v. Munkwitz*, 68 Wis.
Y. (4 Seld.) 115; *Eastman v. New* 322, 32 N. W. 35, 60 Am. Rep. 858;
York, 152 N. Y. 468, 46 N. E. 841; *Townsend v. Nickerson Wharf Co.*,
Dodds v. Hakes, 114 N. Y. 260, 21 N. 117 Mass. 501; *Devers v. May*, 30 Ky.
E. 398; *Shultz v. Brenner*, 24 Misc. Law Rep. 528, 99 S. W. 255.
522, 53 N. Y. Supp. 972; *Goldman v.* ³¹ *Cohn v. Norton*, 57 Conn. 480,
Gainey, 67 App. Div. 330, 73 N. Y. 18 Atl. 595, 5 L. R. A. 572; *Adair v.*
Supp. 738; *Hodges v. Fries*, 34 Fla. *Bogle*, 20 Iowa, 238; *Hodges v. Fries*,
63, 15 So. 682; *Kenny v. Collier*, 79 34 Fla. 63, 15 So. 682; *Rose v. Wynn*,
Ga. 743, 8 S. E. 58; *Engstrom v. Mer-* 42 Ark. 257; *Williams v. Oliphant*,
riam, 25 Wash. 73, 64 Pac. 914; 3 Ind. 271; *Williamson v. Stevens*,
Taylor v. Cooper, 104 Mich. 72, 62 84 App. Div. 518, 82 N. Y. Supp.
N. W. 157; *Poposkey v. Munkwitz*, 1047; *Devers v. May*, 30 Ky. Law
68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 528, 99 S. W. 255; *Herp-*
Rep. 858; *Serfling v. Andrews*, 106 *sheimer v. Christopher*, 76 Neb. 352,
Wis. 78, 81 N. W. 991; *Robrecht v.* 111 N. W. 359.
Marling's Adm'r, 29 W. Va. 765, 16 ³² *Green v. Williams*, 45 Ill. 206.
Pac. 501; *Lock v. Furze*, L. R. 1 C. ³³ *Rose v. Wynn*, 42 Ark. 257;
P. 441. *Driggs v. Dwight*, 17 Wend. (N. Y.)

²⁹ *Rose v. Wynn*, 42 Ark. 257; 71, 31 Am. Dec. 283; *Adair v. Bogle*,

is denied.³⁴ And it is said that he is entitled to recover for loss of time involved in looking for other premises or seeking other employment, where such loss is the direct result of his exclusion, and he uses diligence to reduce the amount of loss.³⁵

Conjectural profits which the lessee might have made from his occupation of the premises, it has been decided, cannot be considered,³⁶ though in one case it is said that, if his business is unavoidably suspended in consequence of his exclusion from the premises, he should receive interest on the capital invested therein.³⁷ And in another case it was held that such loss of profits may be considered if the lessee is unable to procure another place of business, and his business has already become established in that vicinity, so that the amount of the profits lost can be estimated, the lessor having known of the purpose for which he took the lease, and that there was an outstanding paramount lease.³⁸ And evidence of the profits which the premises would have yielded has occasionally been admitted as bearing on their rental value.³⁹ Profits from a business venture which the lessee was compelled to relinquish by reason of the lessor's action in excluding him from the leased premises were regarded as not recoverable, in the absence of an averment as to the lessor's knowledge of such proposed venture at the time of making the lease.⁴⁰

In accordance with the general rule as to damages for avoidable

20 Iowa, 238; Kelly v. Davis, 9 Ky. 5 L. R. A. 572; Alexander v. Bishop, Law Rep. 647; Cilley v. Hawkins, 48 59 Iowa, 572, 13 N. W. 714; Smith v. Ill. 308; Yeager v. Weaver, 64 Pa. Phillips, 16 Ky. Law Rep. 615, 29 425; Griesheimer v. Botham, 105 Ill. S. W. 358; Robrecht v. Marling's App. 585. And see Herpolsheimer Adm'r, 29 W. Va. 765, 2 S. E. 827; v. Christopher, 76 Neb. 352, 111 N. Jarrait v. Peters, 145 Mich. 29, 13 W. 359. Det. Leg. N. 415, 108 N. W. 432;

³⁴ Hughes v. Hood, 50 Mo. 351.

Marrin v. Graver, 8 Ont. 39.

³⁵ Adair v. Bogle, 20 Iowa, 238; Herpolsheimer v. Christopher, 76 Neb. 352, 111 N. W. 359. But see Shultz v. Brenner, 24 Misc. 522, 53 N. Y. Supp. 972, contra.

³⁷ Green v. Williams, 45 Ill. 206.

³⁶ Hodges v. Fries, 34 Fla. 63, 21 So. 682; Green v. Williams, 45 Ill. 206; Cilley v. Hawkins, 48 Ill. 308; Williamson v. Stevens, 84 App. Div. 518, 82 N. Y. Supp. 1047; Cohn v. Norton, 57 Conn. 480, 18 Atl. 595,

³⁸ Puposkey v. Munkwitz, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858. And see Ward v. Smith, 11 Price, 19; Rice v. Whitmore, 74 Cal. 119, 16 Pac. 501, 5 Am. St. Rep. 479.

³⁹ Snodgrass v. Reynolds, 79 Ala. 452, 58 Am. Rep. 601; Townsend v. Nickerson Wharf Co., 117 Mass. 501. ⁴⁰ Serfling v. Andrews, 106 Wis. 78, 81 N. W. 991.

injuries, it has been decided that a mere delay in the delivery of possession does not entitle the tenant to recover damages as for an exclusion during the whole period of the lease, when possession was tendered him a short time after the time at which it should have been given him, and he refused to accept it, though its acceptance at that time would have involved no serious inconvenience or detriment to him.⁴¹

The lessee cannot, after he has reason to know that he will probably not be able to obtain possession, incur expenses by ordering goods or hiring clerks for the purposes of his occupation of the premises, and claim the amount thereof as damages for his exclusion from possession.⁴² And generally, it would seem, in accordance with the ordinary rule, the lessee cannot recover for injuries of a character which could not have been contemplated by the lessor, as for the loss of the use of the premises for a particular purpose, the intention to use them for which was not known to the latter.⁴³ On this theory it was held that the lessee could not recover for losses caused by his action in procuring other premises for his business, which proved to be unsuitable and which he had to vacate, thereby losing part of the sums paid for rent thereof, nor for expenditures in placing fixtures on other premises into which he subsequently moved.⁴⁴

It has been held in one case that the general rule, that the difference between the rent reserved and the rental value of the premises is a proper measure of recovery, applies in case the rent reserved is a certain share of the crops to be raised as well as when it is payable in money.⁴⁵ But in other cases the probable loss of profits has been regarded as the measure of recovery when the rent was reserved in a share of the crops.⁴⁶

⁴¹ *Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 57 S. E. 253.

⁴² *Cohn v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572; *Bernhard v. Curtis*, 75 Conn. 476, 54 Atl. 213.

⁴³ *Serfling v. Andrews*, 106 Wis. 78, 81 N. W. 991; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501. See *Rothman v. Kosower*, 107 N. Y. Supp. 2.

⁴⁴ *Bernhard v. Curtis*, 75 Conn. 476, 54 Atl. 213.

⁴⁵ *Adair v. Bogle*, 20 Iowa, 238.

⁴⁶ *Chew v. Lucas*, 15 Ind. App. 595, 43 N. E. 235; *Hoy v. Gronoble*, 34 Pa. 9, 75 Am. Dec. 628; *Wolf v. Studebaker*, 65 Pa. 459; *Brincefield v. Allen*, 25 Tex. Civ. App. 258, 60 S. W. 1010.

In *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479, an instruction that the lessee might recover the value of the crop that might have been raised less the cost of raising it, was approved.

Occasionally the measure of damages is regarded as greater, when the lessee's exclusion from the premises is owing to the direct action of the lessor in excluding him,⁴⁷ or to the action of the latter in making the lease with knowledge that another has paramount title,⁴⁸ than when he is entirely innocent of fault, this

This seems to ignore the fact that a certain portion of the crop was to go to the lessor.

In *Rogers v. McGuffey*, 96 Tex. 565, 74 S. W. 753, the court approved an instruction that the measure of damages was the reasonable market value of the "renter's" share of the crops he would be reasonably expected to have raised, less the amount he earned, or by reasonable diligence could have earned, after breach of the contract. This appears to ignore the fact that the raising of the crop would involve labor and expenditures. It does not seem that the lessee should recover the gross value of the crop, since he actually lost only the net value, that is, the value of the crop less the cost of raising it. See to this effect *Palmer v. Ingram*, 2 Ga. App. 200, 58 S. E. 362. Subsequently, in the intermediate appellate court (*Rogers v. McGuffey* [Tex. Civ. App.] 75 S. W. 817), it was decided that the lessee could not recover, *in addition* to the value of his share of the crops, the value of the labor bestowed by him in raising them, since this would involve the allowance of double damages.

In the case last cited, as well as in *Brincefield v. Allen*, 25 Tex. Civ. App. 258, 60 S. W. 1010, it was considered that the amount of recovery should be reduced by the amount which the lessee earned, or could have earned, elsewhere. *Wolf v. Studebaker*, 65 Pa. 459, is contra.

⁴⁷ *Smart v. Allegaert*, 14 Phila. (Pa.) 179; *Bartram v. Hering*, 18 Pa. Super. Ct. 395. In the latter case the court, in effect, says that the measure of damages for breach of a contract to lease is the same as for breach of a contract to sell, and cites authorities as to this distinction. But here there was an actual lease, apparently, not a mere contract to make a lease as in the case there cited of *McClowry v. Croghan's Adm'r*, 31 Pa. 22.

⁴⁸ *Cohn v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572, where it is said: "Nor are we prepared to sanction the claim that in this case the defendant is only liable for nominal damages. We can hardly say that a landlord who knows, or who has the means of knowing, that his property is incumbered with an outstanding lease, which may prevent his giving possession, acts in good faith in leasing unconditionally to another."

So in *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858, it was decided that the damages recoverable were greater when the lessor knew of the existence of a paramount lease than if he had not so known; referring to *Flureau v. Thornhill*, 2 Wm. Bl. 1078, which was a case of breach of a contract to sell property. The Wisconsin case referred to discusses the subject of damages in such case at considerable length, and it was decided that the lessee might recover, when

distinction, based upon the presence of bad faith on the part of the person guilty of the breach of contract, being one recognized by some courts in the case of one contracting to sell land who fails to make title.⁴⁹ In a New York case it is said that "if the property is leased for a special purpose, which is known to the lessor and possession is refused because of a prior lease to another party, or of other fault of the lessor, the lessee may recover as damages his actual and necessary expenses incurred in preparing for the occupation of the property in the manner contemplated by the parties,"⁵⁰ and in that case the lessee was allowed for expenditures for fixtures placed on the premises under the justifiable assumption that he would obtain possession, and in accordance with plans approved by the lessor, though not for loss through depreciation of the value of goods purchased by him for the purpose of stocking the premises, the purchase being one which might as well have been made after taking possession. But the lessee cannot, in spite of the lessor's bad faith, recover for expenditures which could not possibly have been anticipated, as, for instance, for money advanced to one whom the lessee proposed to employ on the premises.⁵¹ In one case at least, the theory that the damages could be increased by the existence of bad faith on the lessor's part is expressly repudiated.⁵²

kept out of possession by one hold- v. Heckert, 120 Wis. 374, 97 N. W. 952, ing under a prior lease made by the where it was held that the lessee same lessor which had not expired, could recover losses upon fixtures any sum paid as rent in advance and chattels purchased for the purpose and interest thereon, and also the of the business which he intended, as the lessor knew, to carry necessary expenses of moving his on upon the premises, that is, the goods to the premises with the difference between their cost and the lessor's consent and of bringing what he could have obtained on them back; also, if the lessor knew their resale. that the lease was taken for the purpose of carrying on a business 49 See 2 Sedgwick, Damages, § already established in that vicinity, 1001 et seq.; 2 Sutherland, Damages, § 578 et seq. any expense incurred in moving to another suitable store and any excess in the rent of such store over that agreed to be paid for the lessor's store; or, instead of demanding the value of his lease, he could, it was said, recover for damages to the lessor's business resulting from his breach of covenant. See, also, Gross 50 Friedland v. Myers, 139 N. Y. 432, 34 N. E. 1055, followed in Price v. Eisen, 31 Misc. 457, 64 N. Y. Supp. 405. 51 Gross v. Heckert, 120 Wis. 314, 97 N. W. 952. 52 Snodgrass v. Reynolds, 79 Ala. 452, 58 Am. Rep. 601.

CHAPTER X.

PHYSICAL CONDITIONS—REPAIRS AND IMPROVEMENTS.

I. LANDLORD'S OBLIGATIONS TOWARDS TENANT.

A. As to Premises Leased.

§ 86. Conditions existing at time of demise.

- a. Ordinarily no obligation.
- b. Contract as to existing conditions.
- c. Representations as to conditions.
- d. Concealed defects or dangers.
- e. Lease of furnished house or apartment.
- f. Contract by lessor to improve or put in repair.

87. Conditions arising after demise.

- a. Ordinarily no obligation.
- b. Conditions arising before commencement of term.
- c. Statutory provisions.
- d. Contract by landlord to repair or to pay for repairs.
 - (1) Evidence of the contract.
 - (2) Oral contract.
 - (3) Consideration to support the contract.
 - (4) Nature of the contract.
 - (5) Degree and mode of repair.
 - (6) Notice of the need of repairs and diligence in repairing.
 - (7) Making of repairs by tenant.
 - (8) Effect of breach on liability for rent.
 - (9) Damages for breach.
 - (10) Injuries to tenant's person or property on premises.
- e. Contract by landlord to improve or put in repair.
 - (1) General considerations.
 - (2) Inference from contract to keep in repair.
 - (3) Consideration to support the contract.
 - (4) Nature of the contract.
 - (5) Character of improvements or repairs.
 - (6) Time of making improvements or repairs.
 - (7) Waiver of performance.
 - (8) Making of repairs or improvements by tenant.
 - (9) Effect of breach on liability for rent.
 - (10) Damages for breach.

- f. Conditions arising from the making of repairs or improvements by landlord.
 - (1) Repairs or improvements properly made.
 - (2) Repairs or improvements without authority.
 - (3) Negligence of landlord in doing the work.
 - (4) Negligence of independent contractor.
 - g. Total or partial destruction of premises.
 - h. Repairs and improvements required by public authorities.
- B. As to Adjoining Parts, Places and Premises.
- § 88. Parts of building not open to tenant.
 - 89. Places open to use by tenant.
 - a. Common approaches.
 - b. Places other than approaches.
 - c. No liability apart from negligence.
 - d. Conditions existing at the time of demise.
 - e. Obligation to light approaches.
 - f. Ice and snow on approaches.
 - g. Negligence of independent contractor.
 - h. Contributory negligence of tenant.
 - i. Improper user by tenant.
 - j. Places not used in common.
 - 90. Adjoining buildings and grounds.
- C. As to Appliances.
- § 91. Appliances under landlord's control.
 - 92. Appliances not under landlord's control.
 - 93. Liabilities apart from negligence.
 - 94. Contributory negligence of tenant.
 - 95. Effect on liability for rent.

II. LANDLORD'S OBLIGATIONS TOWARDS THIRD PERSONS.

- A. To Persons on Premises Leased.
- § 96. Conditions existing at time of demise.
 - a. Ordinarily no obligation.
 - b. Concealed defects and dangers.
 - c. Premises of public or quasi public nature.
 - 97. Conditions arising after demise.
 - a. Ordinarily no obligation.
 - b. Negligent acts.
 - c. Contract by lessor to repair.
- B. To Persons in Places or Using Appliances Under the Landlord's Control.
- § 98. Persons in places under landlord's control.
 - 99. Persons using appliances under landlord's control.
 - 100. Statutory obligations.
- C. To Persons Owning or Using Neighboring Property or Highway.
- § 101. General rule of liability.
 - 102. Theory of liability.

§ 103. Applications of rule.

- a. Dangerous conditions in highway.
- b. Fall of building or part thereof.
- c. Fall of snow or ice.
- d. Escape of water or filth.
- e. Interference with water rights.
- f. Injuries to other tenants.

104. Liability of transferee of reversion.

105. Effect of renewal of lease.

106. Periodic tenancy.

107. Effect of contract as to condition or repairs.

108. Conditions in connection with property not leased.

III. TENANT'S OBLIGATIONS TOWARDS LANDLORD.

§ 109. To refrain from waste.

a. What acts constitute waste.

- (1) General considerations.
- (2) Alteration in character of land.
- (3) Diminution in value of land.
- (4) Removal of earth and minerals.
- (5) Destruction of trees and timber.
- (6) Estovers.
- (7) Alteration or removal of buildings or other fixtures.
- (8) Erection of building or other structure.
- (9) Improper user of building.
- (10) Equitable waste.
- (11) Effect of express stipulations.

b. Remedies for waste.

- (1) Action for damages.
- (2) Injunction against waste.
- (3) Persons entitled to sue.
- (4) Persons liable.
- (5) Time of suit.
- (6) Measure of damages.
- (7) Forfeiture.

c. Right to the proceeds of waste.

110. Injuries by third persons.

111. Injury or destruction by fire.

112. Accidental injuries.

113. Obligation to repair—Permissive waste.

114. Stipulations against alterations or erections.

115. Contract to put in repair or for specific repairs.

116. Contract to keep in repair.

- a. Degree and mode of repair.
- b. Particular causes of injury.
- c. Parts of premises to be repaired.
- d. Obligation to rebuild on destruction.
- e. Conditions precedent.
- f. Accrual and continuance of liability.

- g. Specific enforcement of contract.
- h. Damages for breach.
- i. Rights and liabilities on assignment.
- § 117. Contract to make alterations or improvements.
- 118. Contract as to condition at end of term.
 - a. Particular causes of injury.
 - b. Character of condition required.
 - c. Parts of premises within contract.
 - d. Accrual of liability.
 - e. Extinction of liability.
 - f. Effect of assignment.
 - g. Measure of damages.
- 119. Agricultural land.
 - a. Mode of cultivation.
 - (1) Implied obligation.
 - (2) Express obligation.
 - b. Removal of hay and straw.
 - c. Removal of manure.

IV. TENANT'S OBLIGATIONS TOWARDS THIRD PERSONS.

- § 120. To persons on the premises.
- 121. To persons not on the premises.

I. LANDLORD'S OBLIGATIONS TOWARDS TENANT.

A. AS TO PREMISES LEASED.

§ 86. Conditions existing at time of demise.

a. **Ordinarily no obligation.** It is agreed by the authorities at the present time that, as a general rule, there is no obligation on the part of the lessor to see that the premises are, at the time of the demise, in a condition of fitness for use for the purpose for which the lessee may propose to use them. A lessee, like the purchaser of a thing already in existence, is presumed to take only after examination. The maxim *caveat emptor* applies, and if he desires to protect himself in this regard he must exact of the lessor an express stipulation as to the condition of the premises.¹

¹ Hart v. Windsor, 12 Mees. & W. 48 Am. St. Rep. 671; Landt v. 68; McKenzie v. Cheetham, 83 Me. Schneider, 31 Mont. 15, 77 Pac. 307; 543, 22 Atl. 469; Roth v. Adams, 185 Lucas v. Coulter, 104 Ind. 81, 3 N. Mass. 341, 70 N. E. 445; Foster v. E. 622; Flaherty v. Nieman, 125 Peyser, 63 Mass. (9 Cush.) 242, 57 Iowa, 546, 101 N. W. 280; Clifton v. Am. Dec. 43; Cowen v. Sunderland, Montague, 40 W. Va. 207, 21 S. E. 145 Mass. 363, 14 N. E. 117, 1 Am. 858, 33 L. R. A. 449, 52 Am. St. Rep. St. Rep. 469; Hazlett v. Powell, 30 872; Purcell v. English, 86 Ind. 34, Pa. 293; Blake v. Dick, 15 Mont. 236, 44 Am. Rep. 255; Franklin v. Brown,

"There is no reason for holding the lessor, in the absence of any agreement or fraud, liable to the tenant for the present or future condition of the premises, that would not be equally applicable to a similar liability sought to be imposed by a grantee in fee upon his grantor."² As has been remarked, "there is, apart from fraud, no law against letting a tumble-down house,"³ and the same may be said of premises otherwise defective.

Since the tenant thus takes the premises as they are, with all their imperfections, he cannot assert a right to rescind the lease, or, which is in practical effect the same thing, defend against the claim for rent, on the ground that the premises are in unsatisfactory condition or are unsuitable for his purpose. So it has been held that it is no defense to an action for rent that the premises, though leased for the purpose of pasture, had scattered over them, unknown to the lessor, a poisonous substance which killed the lessee's cattle,⁴ that a house leased (unfurnished) was so in-

118 N. Y. 110, 23 N. E. 126, 6 L. See post, § 86 e. As a matter of R. A. 770, 16 Am. St. Rep. 744; Jaffe fact, the lessee usually has such v. Harteau, 56 N. Y. 398, 15 Am. Rep. an opportunity.
438; Davidson v. Fischer, 11 Colo. There are a few English decisions 583, 19 Pac. 652, 7 Am. St. Rep. 267; to the effect that there is an im- Gaither v. Hascall-Richards Steam plied stipulation in every lease that Generator Co., 121 N. C. 384, 28 S. E. 546; Wilkinson v. Clauson, 29 the property is and will remain rea- Minn. 91, 12 N. W. 147; Towne v. sonably fit for the purpose for which Thompson, 68 N. H. 317, 44 Atl. 492, it is let, as that a dwelling house is in such repair as to be fit for 46 L. R. A. 748; Davis v. George, habitation (Salisbury v. Marshal, 4 67 N. H. 393, 39 Atl. 977; Smith v. Car. & P. 65; Cowie v. Goodwin, 9 State, 92 Md. 518, 48 Atl. 92, 51 L. Car. & P. 378), that its walls are R. A. 772; Boyer v. Commercial safe (Edwards v. Etherington, Ryan Bldg. Inv. Co., 110 Iowa, 491, 81 N. & M. 268), or that there are suffi- W. 720; Lazarus v. Parmly, 113 Ill. cient sewer connections (Collins v. App. 624; Martin v. Surman, 116 Barrow, 1 Moody & R. 112). But these were overruled in Hart v. Ill. App. 282; Auer v. Vahl, 219 Wis. Windsor, 12 Mees. & W. 68, as re- 635, 109 N. W. 529. regards the lease of premises other than a furnished house or apart-

Occasionally the court remarks upon the fact that in the particular case the lessee had an opportunity to examine the premises before taking the lease. See e. g., Zerega v. Will, 34 App. Div. 488, 54 N. Y. Supp. 361. But no decision seems to have turned on the absence of such an opportunity, except perhaps in the case of a lease of a furnished house.

² Per Grover, J., in Jaffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 438.

³ Erle, C. J., in Robbins v. Jones, 15 C. B. (N. S.) 221.

⁴ Sutton v. Temple, 21 Mees. & W. 52.

fectured with bugs as to be uninhabitable,⁵ that the premises lacked a proper drain,⁶ that they were uninhabitable owing to a noxious stench,⁷ that the plumbing was defective,⁸ or that the building fell owing to the decayed condition of its supports.⁹ On the same principle it was held that the lessee of a dock could not refuse to pay rent because the state authorities refused to allow him to render it capable of use by dredging around it.¹⁰ In one state, however, a different rule has apparently been adopted, to the effect that if premises are leased for a particular purpose, the lessor is bound to see that they are fit for that purpose, and cannot recover rent if they are not so fit.¹¹

⁵ *Hart v. Windsor*, 12 Mees. & W. 68.

⁶ *Denison v. Nation*, 21 U. C. Q. B. 57; *Wilkinson v. Clauson*, 29 Minn. 91, 21 N. W. 147; *McGlashan v. Talmadge*, 37 Barb. (N. Y.) 313.

⁷ *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744.

⁸ *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236.

⁹ *Davis' Adm'r v. Smith*, 15 Mo. 467.

¹⁰ *Bennett v. Schoellkopf*, 12 App. Div. 98, 42 N. Y. Supp. 1027.

¹¹ In *Tyler v. Disbrow*, 40 Mich. 415, it was decided that it was a defense to an action for rent that the dwelling house was unfit for occupation at the time of the demise, but in that case there was, in the instrument of lease which was signed by both parties, a recital by the lessee that she had received the premises in good condition and that she would yield them up in like good condition and keep them clean and healthy. This, the court said, showed a "distinct understanding" that the premises were in good condition, which became "a part of the

consideration," and that "the consideration having failed" the lessee was justified in leaving and in refusing to pay rent. In *Young v. Collett*, 63 Mich. 331, 20 N. W. 850, it was decided that "when a landlord rents a building, and in the lease limits its use to a certain specified purpose, and the tenant agrees to do no more than keep the same in as good repair as when taken, it is evident that the landlord recommends the building as suitable in the condition it then is, if there are no modifying clauses to the contrary contained in the lease, and it should be so held; otherwise there would be no consideration for the tenant's agreement to pay rent." In support of this statement are cited *Tyler v. Disbrow*, 40 Mich. 415, supra; *Smith v. Marrable*, 11 Mees. & W. 5, which, as limited by *Hart v. Windsor*, 12 Mees. & W. 68, applies only to a lease of a furnished house; *West Side Sav. Bank v. Newton*, 76 N. Y. 616, which was a reversal without any opinion reported and applied apparently to defects arising after the demise; and *Salisbury v. Marshall*, 4 Car. & P. 65, which was overruled by *Hart v. Windsor*, 12 Mees. & W. 68.

Another application of the general rule appears in the decisions, not infrequently found, to the effect that the lessee cannot assert a claim for damages against the lessor on the ground that, owing to the condition of the premises at the time of the lease, he, or a member of his family, suffered physical injury, by reason of illness or otherwise,^{11a} or that, as a consequence of such condition, his property on the demised premises was injured.¹²

The landlord does not become liable for a defect or danger because he gratuitously attempts to remedy it and is unsuccessful in so doing.¹³

b. **Contract as to existing conditions.** There may, no doubt, be an express contract of warranty on the part of the lessor in this regard, and occasionally such a contract, though not clearly stated, may be inferred from the language of the lease.¹⁴

^{11a} *Chadwick v. Woodward*, 13 Cal. 586 (defective walls, resulting from flooding of cellar and injury to goods therein); *Wilcox v. Cate*, 65 Abb. N. C. 441 (illness from sewer gas); *Foster v. Peyser*, 63 Mass. (9 Cush.) 243, 57 Am. Dec. 43 (ditto); *Vt.* 478, 26 Atl. 1105 (explosion of boiler injuring tenant's property); *Gately v. Campbell*, 124 Cal. 520, 57 Pac. 567 (breaking of defective floor); *Lazarus v. Parmly*, 113 Ill. App. 624 (defective roof, injury to goods); *Buckley v. Cunningham*, 355 Lumber Co., 150 Cal. 111, 88 Pac. 355 (injury from suspended wire); 103 Ala. 449, 15 So. 826, 49 Am. St. Rep. 422 (no appliance for turning off water, injury to goods by freezing of pipes).
¹³ *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N. E. 326, 108 Am. St. Rep. 469; *Rhodes v. Seidel*, 139 Mich. 608, 102 N. W. 1025.
 That the landlord, in order to enable the tenant to walk over ice in the cellar caused by leakage in pipes for which the landlord was not responsible, placed a plank thereon, did not render him liable for injuries caused by ice subsequently forming on the plank. *Whitehead v. Comstock*, 25 R. I. 423, 56 Atl. 446.

¹² *Dutton v. Gerrish*, 63 Mass. (9 Cush.) 89, 55 Am. Dec. 45 (fall of building injuring lessee's goods); *Davidson v. Fisher*, 11 Colo. 583, 19 Pac. 652, 7 Am. St. Rep. 267 (ditto); *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389 (defective pipe causing injury to goods); *Loupe v. Wood*, 51

¹⁴ It was held that a lease of premises described as "the cold storage building now in course of construction" with a stipulation

It has been decided in a number of cases¹⁵ that if the lease is embodied in a written instrument, an oral warranty as to the condition of the premises cannot be shown. This appears to harmonize with numerous decisions excluding evidence of oral warranties,¹⁶ as well as with the tendency of the courts of this country to exclude evidence of any oral stipulations by the lessor or lessee,¹⁷ but it may be questioned whether, on theory, such a warranty might not ordinarily be regarded as admissible as being a "collateral agreement."¹⁸

A warranty that the premises are in repair is obviously not broken because they subsequently become out of repair.¹⁹

For a breach of a covenant or other contract by the lessor as to the condition of the premises, the ordinary measure of recovery is the difference between their actual rental value and their rental value as it would have been had their condition been as stated, and the lessee cannot recover for damage not within the contemplation of both parties at the time of the making of the covenant,

that the building should be used for storing fruit and produce only, and not hay, grain or feed, involved a warranty that the building which, not being completed, the lessee could not examine at the time of the lease, would be fitted for the storage and preservation of fruits at all times of the year. *Hunter v. Porter*, 10 Idaho, 72, 86, 77 Pac. 434. A clause in the description of the leased premises, "together with the fire-proof brick cotton warehouse built thereon," was, in view of the circumstances, regarded as a covenant that the warehouse was fireproof. *Vaughan v. Matlock*, 23 Ark. 9.

A provision that "the owner shall not be liable for any repairs during the term, the house now being in perfect order," was held to refer only to the condition of the house as an edifice in perfect repair, and not to involve a covenant that the house was reasonably fit for habi-

tation, or that the air therein was pure and would remain so. *Foster v. Peyser*, 63 Mass. (9 Cush.) 242, 57 Am. Dec. 43.

¹⁵ *Naumberg v. Young*, 44 N. J. Law, 331, 43 Am. Rep. 380; *Carey v. Kreizer*, 26 Misc. 755, 57 N. Y. Supp. 79; *Dutton v. Gerrish*, 63 Mass. (9 Cush.) 89, 55 Am. Dec. 45; *Wilcox v. Cate*, 65 Vt. 478, 26 Atl. 1105; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006; *Wilkinson v. Clauson*, 29 Minn. 91, 12 N. W. 147; *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

¹⁶ See 4 Wigmore, Evidence, § 2434.

¹⁷ See ante, § 61.

¹⁸ It is so regarded in *De Lassalle v. Guildford* [1901] 2 K. B. 215; *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 54 Am. St. Rep. 823.

¹⁹ *Lyon v. Buerman*, 70 N. J. Law, 620, 57 Atl. 1009.

nor for damage which he might have avoided after learning of the actual condition of the premises.²⁰

c. **Representations as to conditions.** It is generally assumed,²¹ and is, in one or two cases,²² clearly decided, that if the landlord makes fraudulent representations to the lessee as to the condition of the premises, in order to induce the latter to take the lease, the latter may refuse to pay rent, if, upon discovery of the fraud, he relinquishes possession of the premises. Furthermore, such fraudulent representation will afford ground for the recovery of damages by the lessee,²³ even though he retains possession of the premises after discovery of the fraud.²⁴ But he cannot, it would seem, by so retaining possession, increase the amount of damages recoverable.²⁵ So if the lessee, though he discovers that the lessor's representations as to the condition of the drains upon the premises are false, retains possession, and by so doing contracts an illness, he should not be allowed to include the losses caused by such illness in his claim for damages on account of the fraud.

Representations, though false, will not furnish ground for relief, if not fraudulent.²⁶ And a statement consisting merely of a

²⁰ *Kellogg v. Malick*, 125 Wis. 239, 103 N. W. 1116. See post, §-87 d (9).

²¹ *Smith v. State*, 92 Md. 518, 48 Atl. 92, 51 L. R. A. 772; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

²² *Milliken v. Thorndike*, 103 Mass. 382; *Wolfe v. Arrott*, 109 Pa. 473, 1 Atl. 333; *Meyers v. Rosenback*, 5 Misc. 337, 25 N. Y. Supp. 521; *Hinsdale v. McCune*, 135 Iowa, 682, 113 N. W. 478.

²³ *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 37 Law. Ed. 1215; *Whitney v. Allaire*, 1 N. Y. (1 Comst.) 305; *Arbuckle v. Biederman*, 94 Ind. 168; *Bauer v. Taylor*, 4 Neb. Unoff. 701, 96 N. W. 268; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006; *Harrington v. Douglas*, 181 Mass. 178, 63 N. E. 334; *Clogston v. Martin*, 182 Mass. 469, 65 N. E. 839.

²⁴ *Burroughs v. Clancy*, 53 Ill. 30; *Baker v. Fawcett*, 69 Ill. App. 300; *Morey v. Pierce*, 14 Ill. App. (14 Bradw.) 91; *Barr v. Kimball*, 43 Neb. 766, 62 N. W. 196; *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123.

²⁵ See *Lack v. Wyckoff*, 11 N. Y. St. Rep. 678.

²⁶ *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; *Saunders v. Pawley*, 2 Times Law R. 590; *Butler v. Goundry*, 4 Times Law R. 711; *York v. Steward*, 21 Mont. 515, 55 Pac. 29; *Wilkinson v. Clauson*, 29 Minn. 91, 12 N. W. 147. Unless constituting a condition or warranty. *Bunn v. Harrison*, 3 Times Law R. 146.

repetition of what a former owner had said, as the intending lessee was informed, has been regarded as not fraudulent for this purpose.²⁷

d. **Concealed defects or dangers.** The rule above stated, that the lessor is under no obligation to the lessee as regards the condition of the premises at the time of the demise, is subject to an exception to the effect that, if there is some hidden defect in the premises, or danger thereon, which is known to the lessor at the time of making the lease, but which is not apparent to the intending lessee, the lessor is bound to inform the latter thereof, and failing so to do, he is liable for injuries to the tenant arising therefrom.²⁸ Applying such a rule, the lessor has been held liable where he failed to notify the intending lessee that the premises were infected with disease,²⁹ that a well was polluted,³⁰ that offensive or noxious odors were emitted from a cesspool or drains on the premises,³¹ or that timbers in a floor were rotten,³² and the tenant was injured in health or in body by such conditions.

If the defects or dangers are such as would be apparent to the lessee on a reasonably careful inspection, there is no obligation upon the lessor to notify him of their existence,³³ unless, it seems,

²⁷ *Lewis v. Clark*, 86 Md. 327, 37 63 N. E. 1039; *Cutter v. Hamlen*, 147 Atl. 1035. Mass. 471, 18 N. E. 397, 1 L. R. A.

²⁸ See *Finney v. Steele*, 148 Ala. 429; *Kern v. Myll*, 80 Mich. 525, 45 197, 41 So. 976, 6 L. R. A. (N. S.) N. W. 587, 8 L. R. A. 682.

²⁹ *Holzhauser v. Sheeny*, 31 Ky. 977; *Law Rep.* 1238, 104 S. W. 1034; ³² *Moore v. Parker*, 63 Kan. 52, 64 Pac. 975, 53 L. R. A. 778; *Coke v. Rhoades v. Seidel*, 139 Mich. 608. *Gutkese*, 80 Ky. 598, 44 Am. Rep. 102 N. W. 1025; *Whitehead v. Comstock & Co.*, 25 R. I. 423, 56 Atl. 446; N. H. 316, 48 Atl. 281; *Borggatt v. Whiteley v. McLaughlin*, 183 Mo. Gale, 205 Ill. 511, 68 N. E. 1063.

³⁰ *Gallagher v. Button*, 73 Conn. 172, 46 Atl. 819; *Borggatt v. Gale*, 205 Ill. 511, 68 N. E. 1063; *Lazarus*

³¹ *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164; *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122. See *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469; *Davis v. Smith*, 26 R. I. 129, 58 Atl. 630, 66 L. R. A. 478; *Finney v. Steele*, 148 Ala. 197, 41 So. 976, 6 L. R. A. (N. S.) 977. *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Cate v. Blodgett*, 70 N. H. 316, 48 Atl. 281; *Davidson v.*

³² *Maywood v. Logan*, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. Rep. 431. *Fischer*, 11 Colo. 583, 19 Pac. 652, 7 Am. St. Rep. 269; *Willcox v. Hines*,

³³ *Sunasack v. Morey*, 196 Ill. 569, 100 Tenn. 538, 46 S. W. 297, 41 L.

the lessee makes an express inquiry of him as to the condition of the premises in this particular respect.³⁴

The theory on which liability is to be imposed upon the lessor for injuries to the lessee from concealed defects of which the lessor knows at the time of the lease has been stated as follows: "When there are concealed defects, attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such defects may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs." It is further said in the same case that "the principle, that one who delivers an article which he knows to be dangerous to another ignorant of its qualities, without notice of its nature or qualities, is liable for any injury reasonably likely to result, and which does result, has been applied to the letting of tenements."³⁵

R. A. 278, 66 Am. St. Rep. 770. See *Anderson v. Hayes*, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930.

In *Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 37 Law Ed. 223, it was held that where one demised a house on a mountain side, he was not negligent in failing to warn the lessee of the danger from snow slides, although he knew of the danger and the lessee, never having lived in such a region, did not know thereof, since the danger was not secret and was readily discoverable by the lessee. The court says: "The plaintiff's evidence failed wholly to show that there was any special and secret danger from snowslides, which was known only to the [lessor], and which could not have been ascertained by the plaintiff. It was, indeed, alleged that 'the house was in a place of danger from snowslides'; but this was plainly the danger that impended over any house placed, as this one necessarily was, on a mountain side in a coun-

try subject to heavy falls of snow. The danger referred to was that incident to the region and the climate, and, in the eye of the law, as well known to the plaintiff as to the defendant."

³⁴ In *Sunasack v. Morey*, 196 Ill. 569, 63 N. E. 1039, it does not clearly appear whether the lessor's liability is based upon his obligation to reveal concealed defects connected with the drainage, or upon his denial of the presence of such defects, thus causing the lessee to refrain from making an examination. If the defects were such as would not have appeared on a reasonably careful inspection by the lessee, and the lessor knew of them, the fact that he actually denied their presence would seem to be immaterial. See, also, *Meyers v. Russell*, 124 Mo. App. 317, 101 S. W. 606.

³⁵ *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469, per Devens, J.

That one who induces another to occupy land belonging to him owes to the latter a duty to inform him of facts which render such occupancy dangerous, and that, in failing to do so, he is guilty of negligence, would seem to admit of little question. This duty may well be assimilated, as in the language above quoted, to that of one who sells a dangerous article to one ignorant of its character, he being bound to warn the purchaser of the danger if he knows thereof;³⁶ and it evidently also bears a close resemblance to the obligation imposed upon the proprietor of land, as regards persons invited by him thereon, for purposes of mutual advantage, to take reasonable precautions to make the premises safe, or to warn such persons of dangerous conditions.³⁷ It would be singular if, while one inviting another, for purposes mutually beneficial, to come upon land for a brief period, owes a duty to protect him from dangers of which the former knows or should know, or to notify him of such dangers, he were to owe no such duty to one whom he invites to come upon the land for a protracted period, whether as lessee, lodger, servant or in any other capacity. No doubt the measure of the obligation varies as the purpose of the entrance or stay upon the land varies. A lessee of land may be expected to make a much closer investigation as to the safety of the premises than one going thereon as a mere customer or even a lodger, but that the same principle should govern seems hardly open to question.³⁸

³⁶ See the admirable presentation of the doctrine referred to in *Huset v. J. I. Case Threshing Mach. Co.*, 57 C. C. A. 237, 120 Fed. 865, 61 L. R. A. 303, per Sanborn, J. danger of which occurrence was known to defendant and not to plaintiff. The court referred to the general rule that the lessor owes no duty to the lessee as to the condition of the premises, and made no reference to the doctrine of the lessor's liability for injuries from hidden defects of which he knows.

³⁷ See Pollock, *Torts* (6th Ed.) 490; 2 Shearman & Redfield, *Neg.* § 704; Burdick, *Torts*, 456. Such is the theory of the lessor's liability asserted in *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122. The second count, however, which alleged that the plaintiff was upon the premises by the invitation of the defendant, not that the plaintiff was his tenant, was adjudged good, the court saying that it "presents a different question." It is submitted that both counts present the same question, and that the second count

³⁸ In *Land v. Fitzgerald*, 68 N. J. Law, 28, 52 Atl. 229, the court upheld a demurrer to a count alleging that plaintiff entered on the premises of defendant under a lease and was injured by the fall of a negligently constructed chimney, the

The view that the liability of the lessor for injuries from concealed defects is to be based on the theory of negligence is adopted, more or less clearly, in other cases besides that from which the above quotation is taken.³⁹ On the other hand, it is, in some cases, regarded as arising from the fraud of the lessor in failing to notify the lessee of the dangerous or defective condition.⁴⁰ In one recent case it is explicitly stated that "a lessor who, with knowledge, conceals sources of peril which are not discoverable by the lessee, is not guilty of negligence but of fraud,"⁴¹ and it is further said in the same case that "in cases of this character there is no place

would be supported by evidence lord's liability on negligence. that the plaintiff went on the premises under a lease.

³⁹ See *Gallagher v. Button*, 73 Conn. 172, 46 Atl. 819; *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122; *Edwards v. New York & H. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659; *Sunasack v. Morey*, 196 Ill. 569, 63 N. E. 1039; *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499; *Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 33 Law. Ed. 223; *Thum v. Rhodes*, 12 Colo. App. 245, 55 Pac. 264; *Howell v. Schneider*, 24 App. D. C. 532. The opinion in *Willcox v. Hines*, 100 Tenn. 538, 46 S. W. 297, 14 L. R. A. 278, 66 Am. St. Rep. 770, seems generally to proceed on the theory that the landlord is liable as for negligence, but in one place it states that he is liable because his conduct amounts to fraud.

⁴⁰ *Holzhauser v. Sheeny*, 31 Ky. Law Rep. 1238, 104 S. W. 1034; *Cate v. Blodgett*, 70 N. H. 316, 48 Atl. 281; *Steefel v. Rothschild*, 179 N. Y. 273, 72 N. E. 112. The latter case cites *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, in which the opinion assumes, for the purpose of argument, as contended by counsel, that the action by the lessee was an action for deceit. The Massachusetts cases ordinarily base the land-

In *Steefel v. Rothschild*, 179 N. Y. 273, 72 N. E. 112, *supra*, it was decided that though the lessor did not know of the dangerous condition at the time of the lease, he was liable if he learned of it before the commencement of the term, for the reason, it seems, that such condition was of a character to constitute a public nuisance, it being said that "it was, therefore, the direct consequence of the defendant's continuous violation of law in the maintenance of an illegal structure from July to the commencement of the demised term that allured the plaintiffs into entering upon the premises." The opinion seems to say that while ordinarily the lessor is liable for injuries caused by concealed defects or dangers only when he is guilty of fraud in concealing them, he is liable, even in the absence of fraud, if such defects or dangers constitute a public nuisance.

⁴¹ *Shinkle, Wilson & Kreis Co. v. Birney*, 68 Ohio St. 328, 67 N. E. 715. So in *Lovitt v. Creekmore*, 26 Ky. Law Rep. 234, 80 S. W. 1184, it was held that, in the absence of allegations of fraud the lessee's servant could not recover by reason of concealed defects in a boiler.

for the doctrines or phrases of the law of negligence.''' This latter statement is, it is respectfully submitted, incorrect. That the lessor thus failing to inform the intending lessee of latent defects of an injurious character is guilty of fraud appears to coincide with the view ordinarily adopted in this country as to the duty of a vendor to disclose such defects,⁴² a view which appears, to some extent, to ignore the difficulty of proving either the vendor's fraudulent intent in such case⁴³ or the purchaser's reliance upon his silence as upon a false representation. That the lessor's failure to mention the dangerous defect constitutes fraud does not, however, prevent it from also constituting negligence.^{43a} What is fraud as regards the lessee, when considered as a person with whom the lessor is entering into contractual relations, is negligence as regards the lessee, when considered as a person whom the lessor is inducing to dwell upon or otherwise utilize the dangerous premises.

Although the defect is not apparent to the lessee, and the lessor, knowing thereof, fails to inform him, nevertheless the lessee may be guilty of contributory negligence which will prevent recovery,⁴⁴ as when, though learning, after the demise, of the unhealthy condition of the premises, he remains thereon, and consequently contracts disease.⁴⁵ But the fact that the lessee was

⁴² See Mechem, Sales, § 869; 20 Cyclopedia Law & Proc. 63.

⁴³ That the lessor's intention is immaterial upon the question of negligence, see *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469. In *Willcox v. Hines*, 100 Tenn. 538, 46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770, the court says, in regard to the statement to this effect in the first of the above cited cases, that "this is evidently opposed to the great weight of authority which discriminates between the intentional and unintentional neglect to perform a duty, the former being a fraud or tort and the latter not." No authority is cited for this asser-

tion, and that liability in negligence is ordinarily, if not always, independent of intention, is unquestionable. See *Holmes*, The Common Law, Sect. 3; *Pollock*, Torts (6th Ed.) 421; *Burdick*, Torts, 421; 1 Beven, Neg. 17.

^{43a} See *Burdick*, Torts, 374.

⁴⁴ In *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122, it was held to be a question for the jury whether the lessee, who took smallpox from the infected condition of the premises, was negligent in failing to be vaccinated.

⁴⁵ See *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591; *Arnold v. Clark*, 45 N. Y. Super. Ct. (13 Jones & S.) 252; *Davis v. Smith*, 26 R. I. 129, 58 Atl. 630, 66 L. R. A. 478.

informed of the danger by a third person was held not to relieve the lessor from liability, if the latter assured the lessee of the non-existence of the danger, knowing this statement to be false.⁴⁶

The liability of the landlord by reason of the rule here referred to may, it has been decided, be excluded by express provisions in the instrument of lease that he shall not be liable for injury to the tenant caused by defects in the premises.⁴⁷

It has been asserted in a series of cases in one jurisdiction, quite frequently referred to in this connection,⁴⁸ that the lessor is liable, not only if he has actual knowledge of the dangerous conditions but also "if by the exercise of reasonable care and diligence he could have such knowledge." These cases have been criticised as imposing upon the lessor a duty of active diligence in discovering dangers and defects which properly rests upon the lessee,⁴⁹ but though the language above quoted is susceptible of this construction, it would appear, from a perusal of the opinion in the latest of these cases, that the court means, not that the lessor, though having no reason to suspect the existence of concealed defects or dangers, must nevertheless make an examination in the effort to discover them, but merely that if he has reason to suspect their existence he must exercise reasonable diligence to satisfy himself that they are nonexistent before leasing without mention of the matter to the lessee. That is, as is stated in the cases referred to, the lessor is liable not only if he knows, but also if he "ought to know," of these conditions. To impose any further obligation upon him would render him to a great extent an insurer against concealed defects and dangers, and such a view the court expressly repudiates. That the lessor owes no such duty to the lessee to discover defects which are not apparent to

⁴⁶ *Snyder v. Gorden*, 46 Hun, 538, A. 824, 54 Am. St. Rep. 823; *Stenberg v. Willcox*, 96 Tenn. 163, 33 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770; *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. 229. But see *Daley v. Quick*, 99 Cal. 179, 33 Pac. W. 917, 34 L. R. A. 615.

⁴⁷ See *Franklin v. Tracy*, 25 Ky. 859.

⁴⁸ *Bullock-McCall-McDonnell Elec. Co. v. Coleman*, 136 Ala. 610, 33 So. 884. Law Rep. 1409, 77 S. W. 113, 63 L. R. A. 649; *Shinkle, Wilson & Kreis Co. v. Birney*, 68 Ohio St. 328, 67 N. E. 715; *Whitmore v. Orono Pulp & Paper Co.*, 391 Me. 297, 39 Atl. 1032, 40 L. R. A. 377, 64 Am. St. Rep. 229.

⁴⁹ *Willcox v. Hines*, 100 Tenn. 538, 46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770; *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. 229.

ordinary observation, in order that he may warn the lessee, has been expressly decided in other jurisdictions.⁵⁰

The view that the lessor's liability as for negligence exists when he has reason to suspect the existence of the dangerous conditions as well as when he actually knows of them is asserted or indicated in other cases,⁵¹ and accords with the rule, ordinarily applied, in determining questions of negligence, when this is dependent on knowledge of physical conditions, that one has knowledge of that which he ought to know.⁵² It may be doubted, indeed, whether the statements occasionally made that the lessor is not liable unless he has actual knowledge of the dangerous conditions⁵³ are to be regarded as excluding his liability when he has reason to suspect their existence, though without actual knowledge thereof. Were the lessor to be regarded as liable only on proof of his actual knowledge of the defects or dangers, he might, by purposely refraining from inquiry into the presence of dangerous conditions, though having reason to believe that such exist, entirely escape liability. An owner of property, for instance,

⁵⁰ *Howell v. Schneider*, 24 App. D. C. 532; *Bennett v. Sullivan*, 100 Me. 118, 60 Atl. 886; and cases cited in next preceding note.

Even accepting the rule as stated in the Tennessee cases, there is obviously no liability if the defects could not have been discovered in the exercise of reasonable care. *Whiteley v. McLaughlin*, 183 Mo. 160, 81 S. W. 1094, 66 L. R. A. 484.

⁵¹ See *Thum v. Rhodes*, 12 Colo. App. 245, 55 Pac. 264; *Franz v. Mulligan*, 18 Misc. 411, 42 N. Y. Supp. 509; *Kennedy v. Fay*, 31 Misc. 776, 65 N. Y. Supp. 202; *Howell v. Schneider*, 24 App. D. C. 532; *Rhoades v. Seidel*, 139 Mich. 608, 102 N. W. 1025; *Borman v. Sandgren*, 37 Ill. App. 160; *Metzger v. Schultz*, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619, 59 Am. St. Rep. 323; *Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159.

⁵² See *Pollock*, Torts (6th Ed.)

421; 1 *Thompson*, Neg. § 8. E. g. an owner of an animal causing injury is liable if he had reason to know its vicious propensity (*Sherman & Redfield*, Neg. § 629); and a municipality is liable for a defect in a highway if in the exercise of due diligence it would have known of the defect (*Id.* § 368); and so in regard to the liability of a railroad for defects in cattle fences (*Id.* § 425); and an owner of land is bound, as regards persons coming thereon by invitation, to exercise reasonable care to discover defects (*Clerk & Lindsell*, Torts [3d Ed.] 454, note). And see the cases in which the landlord is charged with notice of defects in passageways. Post, note 363.

⁵³ *Smith v. Donnelly*, 45 Misc. 447, 92 N. Y. Supp. 43; *Davis v. Smith*, 26 R. I. 129, 58 Atl. 630, 66 L. R. A. 478. And see cases cited ante, note

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knowing that there have been numerous deaths in the house from a disease of a character likely to arise from defective drainage, is not justified, it would seem, in leasing to another without first making an effort to discover whether the drainage is actually defective, or mentioning to the lessee the existence of such suspicious circumstances, and if he does so he may well be held liable for injury to the lessee caused by such a dangerous condition. And so if the lessor has knowledge of a circumstance which may indicate structural weakness in the building on the demised premises, and fails to make any investigation, he should not be allowed to avoid liability to the lessee for injuries caused by the collapse of the building on the ground that he did not have actual knowledge of its weakness.⁵⁴ This seems in effect an application of the principle, which runs through the whole question of legal notice, that one knows what he ought to know. One who knew of defects in drains on his property three years ago is said to know of them now, because a reasonable man ought to know that those defects do not cure themselves. Whether a certain person has knowledge of a certain fact is ordinarily a matter of inference, and the inference of knowledge of present defects from knowledge of the past existence of such defects differs merely in degree from the inference of knowledge of such defects from the knowledge of other facts calculated to raise a probability of their existence.

Even actual knowledge on the part of the lessor of the condition which eventually causes the injury is not, it is said, sufficient to impose liability on him, unless he also knows, or "common experience" shows, that it is a source of danger.⁵⁵ And on the

⁵⁴ The lessor's knowledge of a dangerous condition existing at the time of the lease may be inferred, it has been decided, from his knowledge of such condition at a prior time and the character of the condition as likely to continue until the active application of measures for its removal. *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117. And see dictum in *Davis v. Smith*, 26 R. I. 129, 58 Atl. 630, 66 L. R. A. 478, as to knowledge of death from diphtheria as showing knowledge that the house was infected.

⁵⁵ *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591. In *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, a step in a stairway had been "sawed out" by a former tenant, as the lessor knew, but he tested it by standing upon it, and he testified that he

same principle it has been held, a lessor is not liable because the lessee's child contracts a disease owing to the fact that the house was infected with disease, when the lessor had, before offering to lease to him, employed skilled experts to disinfect the house.⁵⁶

It has been decided in one state that if the lessor, after the time of the demise, learns of dangerous conditions which, though they existed at the time of the demise, were then not visible and were unknown to both the lessor and lessee, he owes a duty to the lessee to inform him of the danger, and is liable for injuries resulting to the lessee from such conditions, which could have been avoided by the lessee had he received such information.⁵⁷ But in two states a contrary view has been taken.⁵⁸⁻⁶¹

e. Lease of furnished house or apartment. To the general rule that a tenant cannot refuse to pay rent on the ground that the premises are not in suitable condition for the purposes for which he took the lease, the English courts have established an exception in the case of a furnished house or apartment, provided, it seems, the lease is for a short term⁶² and for immediate occu-

thought that it would bear any person's weight. He was held not liable for injuries caused to the lessee's wife by the "giving way" of the step. "Common experience" would show, one would think, that a step "sawed out" was a source of danger, even though it would bear a particular individual for a short time.

⁵⁶ *Finney v. Steele*, 148 Ala. 197, 41 So. 976, 6 L. R. A. (N. S.) 977.

⁵⁷ *Maywood v. Logan*, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. Rep. 431, where the landlord was held liable for injury to the tenant and his family from drinking water from a well on the premises in which the landlord, after the demise, discovered a dead dog, which he failed to remove, and of the discovery of which he did not inform the tenant.

⁵⁸⁻⁶¹ *Holzhauser v. Sheeny*, 31 Ky. Law Rep. 1238, 104 S. W. 1034;

Bertie v. Flagg, 161 Mass. 504, 37 N. E. 572; *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96, 14 Am. St. Rep. 631.

⁶² In *Hart v. Windsor*, 12 Mees. & W. 68, Baron Parke distinguishes *Smith v. Marrable*, 11 Mees. & W. 5, on the ground that it was a demise of a ready furnished house "for a temporary residence at a watering place," and the other cases in which this asserted exception to the general rule has been applied (*Wilson v. Finch-Hatton*, 2 Exch. Div. 336; *Campbell v. Wenlock*, 4 Fost. & F. 716; *Ingalls v. Hobbs*, 156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460; *Bird v. Greville*, Cab. & E. 317) involved demises "for the season." In *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744, the court decided that, even were they prepared to adopt the doctrine of the English cases, that doctrine

pancy.⁶³ Accordingly, it has been held that where a furnished house or apartment was not, at the time of the demise,⁶⁴ reasonably fit for occupancy owing to the presence of insects,⁶⁵ or defects in the drains,⁶⁶ or danger of contagious illness,⁶⁷ the lessee could quit the premises and refuse to pay rent.

The grounds for making such a distinction between a furnished and an unfurnished house have been thus stated in an American case which adopted the English rule.⁶⁸ "In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it, for a term however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants; but there are good reasons why a different rule should apply to one who hires a furnished room or a furnished house for a few days or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if

would not apply to a lease for a year:

⁶³ See *Bunn v. Harrison*, 3 Times Law R. 146; *Ingalls v. Hobbs*, 156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460; *Smith v. Marrable*, 11 Mees. & W. 5.

⁶⁴ The rule applies only to defects existing at the time of the demise or at the commencement of the tenancy. *Maclean v. Currie*, Cab. & E. 361; *Sarson v. Roberts* [1895] 2 Q. B. 395.

⁶⁵ *Smith v. Marrable*, 11 Mees. & W. 5; *Campbell v. Wenlock*, 4 Post. & F. 716; *Ingalls v. Hobbs*, 156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460.

⁶⁶ *Wilson v. Finch-Hatton*, 2 Exch. Div. 336; *Harrison v. Malet*, 3 Times Law R. 58.

⁶⁷ *Bird v. Greville*, Cab. & E. 317.

⁶⁸ *Ingalls v. Hobbs*, 156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460, per Knowlton, J.

applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time." The reasons for the distinction as thus stated are, it seems, of a twofold nature; in the first place, that the lease is of a furnished house shows that it could not have been intended to take a lease which would involve the necessity of alterations or repairs of the house or of the furniture; in the second place, the difficulty or impossibility of any determination by the lessee of the fitness of the house or furniture.

It is to be observed, however, that the making of this exception to the rule of *caveat emptor* involves a departure from the principle established in the analogous case of personal chattels, since, on the sale of an ascertained and existing article, the purchaser cannot complain that it is unsatisfactory, although the seller knows that it is required by the purchaser for a particular use, and though an examination by the latter is inconvenient.⁶⁹ It is rarely, if ever, impossible for one to examine, either in person or by agent, a house of which he proposes to take a lease, and if in any case it is impossible, he should either not take the lease, or should protect himself by proper stipulations. The reasons stated for implying such an undertaking on the lease of a furnished house would frequently apply quite as well to the case of an unfurnished one, and it has even been questioned in an English case whether such an implication is not to be made when an unfurnished house is leased for immediate occupancy.⁷⁰ Certainly the fact that personal property of a particular character is included in a lease of land seems an inadequate reason for the establishment of a distinct rule as to the obligations of the lessor in reference to the land, or to a building thereon legally constituting a part thereof. If this peculiar doctrine were to be applied to every case of a short term lease in which immediate occupation is intended, the well established rule of the common law, that the lessee must make his objections to the condition of the premises before taking the lease, would be to a great extent nullified, and in every case of a short term lease a dissatisfied lessee would assert that he took

⁶⁹ Mechem, Sales, §§ 1312, 1314; ⁷⁰ Bunn v. Harrison, 3 Times Law Benjamin, Sales (7th Am. Ed.) 689; R. 146.
15 Am. & Eng. Enc. Law (2d Ed.)
1220, 1234.

the premises for immediate occupation. An examination of the English decisions, in which the doctrine referred to was first asserted, is calculated to suggest the idea that it was the result of an attempt to distinguish cases in their nature similar, rather than of a logical consideration of the principles involved.⁷¹

The English rule in this regard has been explicitly adopted in but one state in this country,⁷² while in others it has been repudiated, or at least unfavorably commented on.⁷³ In perhaps two cases a distinction has been suggested, based upon whether the defects are in the house itself or in the furniture, it being held that whatever might be the law in the latter case, in the former the tenant could not assert that the house was uninhabitable.⁷⁴ This distinction is opposed to an English case.⁷⁵ In another case in this country it was held that the exception in case of a furnished house

⁷¹ The history of the doctrine is as follows: In *Smith v. Marrable*, 11 Mees. & W. 5, which was a lease of a furnished dwelling for six weeks, Parke B., with the concurrence of Alderson and Gurney, B. B., held that one making a lease of a residence is regarded as undertaking that it shall be in a habitable state, basing this view on *Edwards v. Etherington*, Ryan & M. 268, and *Collins v. Barrow*, 1 Moody & R. 112, while Chief Baron Abinger concurred on the ground that "a man who lets a ready furnished house surely does so under the implied condition or obligation, call it which you will, that the house is in a fit state to be inhabited." In the subsequent case of *Hart v. Windsor*, 12 Mees. & W. 68, involving a lease of an unfurnished house, the opinion of the court being rendered by Baron Parke, the cases on which he had relied in his opinion in *Smith v. Marrable* were expressly overruled (ante, note 1), and he distinguished *Smith v. Marrable* on the ground that it was "the case of a demise of a ready furnished house

for a temporary residence at a waiting place." This exception to the rule in the case of a furnished house was approved and applied in *Wilson v. Finch-Hatton*, 2 Exch. Div. 336.

⁷² *Ingalls v. Hobbs*, 156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460.

⁷³ *Davis v. George*, 67 N. H. 393, 39 Atl. 979; *Murray v. Albertson*, 50 N. J. Law, 167, 13 Atl. 394, 7 Am. St. Rep. 787; *Fisher v. Lighthall*, 15 D. C. (4 Mackey) 82, 54 Am. Rep. 258; *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744; *Rotter v. Goerlitz*, 16 Daly, 484, 12 N. Y. Supp. 210. In *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1128, the court refused to consider the doctrine, there being an express covenant to put the house in condition which excluded any implied covenant.

⁷⁴ *Murray v. Albertson*, 50 N. J. Law, 167, 13 Atl. 394, 7 Am. St. Rep. 787; *Fisher v. Lighthall*, 15 D. C. (4 Mackey) 82, 54 Am. Rep. 258.

⁷⁵ *Wilson v. Finch-Hatton*, 2 Exch. Div. 336.

could not apply when the defect or danger came from outside the premises, as, for instance, a noxious odor arising from the neighboring property.⁷⁶

f. **Contract by lessor to improve or put in repair.** Not infrequently the lessor contracts, at the time of making the lease, to make specified improvements or repairs on the premises. It is immaterial as to the operation of such a contract whether it is made at the time of the lease or subsequently, and whether it is made for the purposes of obviating conditions existing at the time of the lease or subsequently arising, and we will defer the discussion of contracts of this character until we enter on the consideration of the landlord's obligation as to physical conditions arising after the lease.⁷⁷

§ 87. Conditions arising after demise.

a. **Ordinarily no obligation.** As the landlord is under no obligation to the lessee, as regards the condition of the premises, or its fitness for the lessee's purpose, at the time of the demise, so he is under no obligation to the lessee, or to the latter's assignee, to keep the premises during the tenancy in a condition satisfactory to the latter.^{77a} Accordingly, a landlord is not bound, as a general rule, in the absence of special stipulation, to make repairs or improvements on the premises in order to render them safe or fit them for the tenant's use.⁷⁸ And as a result of this principle,

⁷⁶ *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744. *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 722, 10 L. R. A. 147, 20 Am. St. Rep. 650; *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 119; *Kearines v. Cullen*, 183 Mass. 298, 67 N. E. 243; *Krueger v. Ferrant*, 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 233; *Murphy v. Illinois Trust & Sav. Bank*, 57 Neb. 519, 77 N. W. 1102; *Witty v. Mat-thews*, 52 N. Y. 512; *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492, 707, 30 Law. Ed. 776; *Gregor v. Cady*, 46 L. R. A. 748; *Moore v. Weber*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466; *Petz v. Voight Brewery Co.*, 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531; *Biddle v. Reed*, 33 Ind. 529; *Vai v. Weld*, 17 Mo. 232; *v. Crowe*, 88 Ill. App. 191; *Bona-*

⁷⁷ See post, § 87 d e.

^{77a} That the landlord has not the right to enter to make repairs in the absence of a grant of permission so to do, see ante, § 3 b (2).

⁷⁸ *Arden v. Pullen*, 10 Mees. & W. 321; *Gott v. Gandy*, 2 El. & Bl. 845; *Viterbo v. Friedlander*, 120 U. S. 707, 30 Law. Ed. 776; *Gregor v. Cady*, 46 L. R. A. 748; *Moore v. Weber*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466; *Petz v. Voight Brewery Co.*, 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531; *Biddle v. Reed*, 33 Ind. 529; *Vai v. Weld*, 17 Mo. 232; *v. Crowe*, 88 Ill. App. 191; *Bona-*

the tenant cannot assert any claim against the landlord on account of injury to himself or his property owing to defects in the premises arising since the demise.⁷⁹ Likewise, if the tenant makes repairs or improvements of his own volition, he cannot demand that the landlord repay him the cost thereof.⁸⁰ The landlord is not even liable, it has been decided, because he learns of dangerous conditions on the premises and fails to warn the tenant thereof,

parte v. Thayer, 95 Md. 548, 52 Atl. 496; Landt v. Schneider, 31 Mont. 15, 77 Pac. 307; Richmond v. Lee, 123 App. Div. 279, 107 N. Y. Supp. 1072; Lyon v. Buerman, 70 N. J. Law, 620, 57 Atl. 1009; Tucker v. Bennett, 15 Okl. 187, 81 Pac. 423; Mylander v. Beimschala, 102 Md. 689, 62 Atl. 1038, 5 L. R. A. (N. S.) 316. ⁷⁹ Lazarus v. Parmly, 113 Ill. App. 624; Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255; Roehrs v. Timmons, 28 Ind. App. 578, 63 N. E. 481; Libbey v. Tolford, 48 Me. 316, 17 Am. Dec. 229; Gregor v. Cady, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466; Weinstein v. Harrison, 66 Tex. 546, 1 S. W. 626; Perez v. Rabaud, 76 Tex. 191, 13 S. W. 177, 7 L. R. A. 620; Roberts v. Cottey, 100 Mo. App. 500, 74 S. W. 886; Jaffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 438; Galvin v. Beals, 187 Mass. 250, 72 N. E. 969; Cole v. McKey, 66 Wis. 500, 29 N. W. 279, 57 Am. Rep. 293; Glenn v. Hill, 210 Mo. 291, 109 S. W. 27, 16 L. R. A. (N. S.) 699; Dowling v. Nuebling, 97 Wis. 350, 72 N. W. 871; Rhoades v. Seidel, 139 Mich. 608, 102 N. W. 1025; Colebeck v. Girdlers Co., 1 Q. B. Div. 234; Tredway v. Machin, 91 Law T. (N. S.) 310. neighboring landowners. Stevens v. Wadleigh, 5 Ariz. 90, 46 Pac. 70. That the landlord made voluntary repairs after an injury resulting from defects in the premises does not involve an admission of liability. Kearines v. Cullen, 183 Mass. 298, 67 N. E. 243; Schiff v. Pottlitzer, 51 Misc. 611, 101 N. Y. Supp. 249. Nor does the fact that he repaired certain portions of the premises involve liability for injuries from defects in other portions. Galvin v. Beals, 187 Mass. 250, 72 N. E. 969. See 1 Wigmore, Evidence, § 283. ⁸⁰ Gocio v. Day, 51 Ark. 46, 9 S. W. 433; Jones v. Felker, 72 Ark. 405, 80 S. W. 1088; Savings & Loan Soc. v. Gerichten, 64 Cal. 520; Green v. Mann, 11 Ill. 613; Heintze v. Bentley, 34 N. J. Eq. (7 Stew.) 562; Estep v. Estep, 23 Ind. 114; Hopkins v. Ratliff, 115 Ind. 213, 17 N. E. 288; Powell v. Beckley, 38 Neb. 157, 56 N. W. 974; Thomas v. Conrad, 24 Ky. Law Rep. 1630, 71 S. W. 903; Mumford v. Brown, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; Cantrell v. Fowler, 32 S. C. 589, 10 S. E. 934; Hitner v. Ege, 23 Pa. 305; Campbell v. Luck, 2 Ohio Cir. Ct. R. (N. S.) 129; Castagnette v. Nichia, 76 App. Div. 371, 78 N. Y. Supp. 498; In re Brockway's Estate, 12 Misc. 240, 34 N. Y. Supp. 42; Riggs v. Gray, 31 Tex. Civ. App. 268, 72 S. W. 101; Brown v. Burlington, 36 Vt. 40.

The landlord is not liable for damage to the tenant caused by a failure of the water supply as a result of the destruction by a flood of an irrigating ditch erected and maintained by such landlord and other

though by giving such warning he would have enabled the latter to avoid the injuries which befell him by reason of such conditions.⁸¹

It has in one state been asserted that a custom that the landlord shall make repairs is valid,⁸² but elsewhere the contrary has been decided.⁸³

The tenant cannot avail himself of the fact that the lease purports to be made subject to the provisions of a will appointing the lessor trustee of the property, which by its terms requires him to keep the premises in repair.⁸⁴

Even though the premises are leased for a particular purpose, and any other use thereof is prohibited, the landlord is, it has been decided, under no obligation to keep them fit for such use.⁸⁵

Since the landlord is not responsible for the condition of the premises during the term, he is, as such, under no obligation to protect the premises leased, or the tenant's property thereon, from injuries by reason of building operations on adjoining premises,⁸⁶ and the fact that he himself is the owner of the adjoining

⁸¹ *Lyon v. Buerman*, 70 N. J. Law, 316; *Ward v. Fagin*, 101 Mo. 669, 14 620, 57 Atl. 1009. See *Bertie v. S. W.* 738, 10 L. R. A. 147, 20 Am. Flag, 161 Mass. 504, 37 N. E. 572. St. Rep. 650; *Brown v. Curran*, 53

⁸² *Shute v. Bills*, 191 Mass. 433, 78 How. Pr. (N. Y.) 303; *Howard v. N. E.* 96, 7 L. R. A. (N. S.) 965, 114 Doolittle, 10 N. Y. Super. Ct. (3 Am. St. Rep. 631. But in this same case it is held that a custom that the roof and gutters of the house leased shall remain in the lessor's control is bad. *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708; *McMullen v. Moffitt*, 68 Ill. App. 160.

⁸³ *Weinsteine v. Harrison*, 66 Tex. 546, 1 S. W. 626; *Biddle v. Reed*, 33 Ind. 529. See *Sawtelle v. Drew*, 122 Mass. 228. The landlord is not obliged, for the protection of his tenant from injuries by excavations on adjoining premises, to give a license to the adjoining owner, as provided by law, to enter on the leased premises to protect them from injury. *Sherwood v. Seaman*, 15 N. Y. Super. Ct. (2 Bosw.) 130;

⁸⁴ *Wheeler v. Crawford*, 86 Pa. 327. ⁸⁵ *Brewster v. De Fremery*, 33 Cal. 341; *Howard v. Doolittle*, 10 N. Y. Super. Ct. (3 Duer) 464; *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973. he does not by giving such license become liable for the acts of the adjoining owner. *McKenzie v. Hatton*, 70 Hun, 142, 24 N. Y. Supp. 88.

⁸⁶ *Brewster v. De Fremery*, 33 Cal. 341; *Serio v. Murphy*, 99 Md. 545, 58 Atl. 435, 105 Am. St. Rep.

premises has been held to be immaterial, provided he used due care in conducting the operations.⁸⁷

While it is thus held, expressly, that there is, in the absence of express contract, no obligation on the landlord to make repairs, the doctrine which has been adopted in some states and is discussed elsewhere,⁸⁸ that if the premises become "untenantable" the tenant may vacate them and refuse to pay further rent, has the effect of frequently imposing on the landlord the obligation of making repairs in order to avoid losing all benefits from the lease and from the lessee's covenant to pay rent, and the same may be said of the doctrine of "constructive eviction" as developed in some jurisdictions.⁸⁹

b. **Conditions arising before commencement of term.** While the lessor is not responsible for the condition of the premises either at the time of the demise or during the tenancy, he is, it has been held, bound to see that their condition does not change for the worse between the time of the demise and the time named for the beginning of the tenancy, and the lessee has been regarded as relieved from liability on his covenants in the instrument of the lease when the building on the premises was destroyed during this interval.⁹⁰ And so he has been held to be relieved from liability when he refused to accept possession of the premises because of injuries thereto caused by an outgoing tenant prior to the time for the commencement of the term.⁹¹ On the other hand it has been decided that he is not so relieved from liability by the fact that the premises, consisting of residence property, have, before the commencement of the tenancy, become so infected with disease as to make it dangerous for the lessee to bring his family thereon.⁹²

⁸⁷ *Rotter v. Goerlitz*, 16 Daly, 484, 12 N. Y. Supp. 210. But the lessor is obviously liable if by his operations on the adjoining property he interferes with an easement existing in favor of the demised premises, such as an easement of support. *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059, or if he authorizes the adjoining owner to interfere therewith. *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553.

⁸⁸ See post, § 182 e (1), § 185 f (4).

⁸⁹ *Meeks v. Ring*, 51 Hun, 329, 21 N. Y. St. Rep. 855, 4 N. Y. Supp. 117; *Lightfoot v. West*, 98 Ga. 546, 25 S. E. 587. In *Wood v. Hubbell*, 10 N. Y. (6 Seld.) 479, the court refused to consider the question.

⁹¹ *Rosenstein v. Cohen*, 93 Minn. 336, 104 N. W. 965.

⁹² *Edwards v. McLean*, 122 N. Y. 302, 25 N. E. 483.

⁸⁸ See post, § 182 n, p.

If the lessor, after making the lease, and before the time for the entry of the lessee, himself injures the premises so as to render them practically untenable, the lessee, it has been held, may refuse to take possession and pay rent.⁹³

c. **Statutory provisions.** There are, in some states, statutory provisions changing the common-law rules as to the obligation to repair.

In California it is provided that the lessor of a building constructed for the occupation of human beings must put it in a condition for such occupation, and repair all dilapidations not occasioned by the lessee's negligence, and that if he fails to do so on notice, the lessee may either vacate the premises or expend one month's rent on repairs.⁹⁴ And such provision has been substantially adopted in a few other jurisdictions.⁹⁵ Buildings intended for use for business purposes are not regarded as "intended for the occupation of human beings" within the meaning of the statute.⁹⁶ The statute imposes upon the lessor no duty of putting in new improvements, such as a sewer to prevent the occasional flooding of the cellar, this not rendering the house unfit for occupation.⁹⁷ The statute gives the tenant the right to repair to the extent named, provided he first gives notice to the landlord,⁹⁸ and it gives him the alternate right to vacate the premises after notice to the landlord to repair, and the latter's failure to comply with the notice.⁹⁹ If the tenant remains in possession, however, the landlord's failure to repair is no defense to an action for rent,¹⁰⁰ except to the amount named in the statute, expended by the tenant

⁹³ *Cleves v. Willoughby*, 7 Hill (N. Y.) 83. See *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304.

⁹⁴ Civ. Code, §§ 1941, 1942.

⁹⁵ *Montana* Rev. Codes, 1907, §§ 5226, 5227; *North Dakota* Rev. Codes 1905, §§ 5527, 5528; *South Dakota* Rev. Civ. Codes, §§ 4080, 4081. In the two latter states the right of the lessee to make repairs is not restricted to the equivalent of one month's rent.

⁹⁶ *Edmison v. Aslesen*, 4 Dak. 145, 27 N. W. 82; *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307; *Tucker v. Bennett*, 15 Okl. 187, 81 Pac. 423.

Oral evidence is admissible to show the purpose for which the premises are intended to be used, this not appearing from the instrument of lease. *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307.

⁹⁷ *Torreson v. Walla*, 11 N. D. 481, 92 N. W. 834.

⁹⁸ *Tatum v. Thompson*, 86 Cal. 203, 24 Pac. 1009.

⁹⁹ *Green v. Redding*, 92 Cal. 548, 28 Pac. 599.

¹⁰⁰ *Moroney v. Hellings*, 110 Cal. 219, 42 Pac. 560.

on repairs. Nor is the landlord's failure to repair ground for the recovery of damages by the tenant for depreciation in the rental value of the premises, or for injuries to his property thereon,¹⁰¹ or to his person,¹⁰² caused by the defects which the landlord has thus failed to repair.

In Georgia the statute provides that "the landlord must keep the premises in repair."¹⁰³ The effect of the statute is to make the landlord liable for injuries to the tenant's property,¹⁰⁴ or to his person,¹⁰⁵ or to a member of his family,¹⁰⁶ caused by defects of which the landlord had notice, or, by reasonable diligence, might have had notice,¹⁰⁷ and might, in the exercise of such diligence, have repaired,¹⁰⁸ unless there is contributory negligence on the part of the person injured.¹⁰⁹ The statute does not, however, render the landlord liable for extraordinary and unforeseen occurrences.¹¹⁰ Neither is the landlord under any obligation to rebuild in case the building is totally destroyed.¹¹¹ And if the defects are patent and known to both parties at the time of the lease, the lessee takes the premises as they are and cannot demand that the landlord remove the defects.¹¹² The statutory obligation on the landlord may be changed by express stipulation.¹¹³

¹⁰¹ *Van Every v. Ogg*, 59 Cal. 563; *Hamilton*, 112 Ga. 901, 38 S. E. 204. *Tatum v. Thompson*, 86 Cal. 203, 24 Pac. 1009.

¹⁰² *Gately v. Campbell*, 124 Cal. 520, 57 Pac. 567; *Callahan v. Loughran*, 102 Cal. 476, 36 Pac. 835; *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. 260.

¹⁰³ Ga. Code 1895, § 3123.

¹⁰⁴ *Whittle v. Webster*, 55 Ga. 180; *Guthman v. Castleberry*, 48 Ga. 172; *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764, 25 S. E. 764.

¹⁰⁵ *Johnson v. Collins*, 98 Ga. 271, 26 S. E. 744; *Stack v. Harris*, 111 Ga. 149, 36 S. E. 615.

¹⁰⁶ *Veal v. Hanlon*, 123 Ga. 642, 51 S. E. 579.

¹⁰⁷ *Stack v. Harris*, 111 Ga. 149, 36 S. E. 615; *Powers v. Cope*, 93 Ga. 248, 18 S. E. 815. But the landlord is not under any obligation to look for defects unless requested by the tenant to do so. *Ocean S. S. Co. v.*

¹⁰⁸ *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764, 25 S. E. 764; *Gavan v. Norcross*, 117 Ga. 356, 43 S. E. 771.

¹⁰⁹ *Miller v. Smythe*, 95 Ga. 288, 22 S. E. 532; *Johnson v. Collins*, 98 Ga. 271, 26 S. E. 744; *Veal v. Hanlon*, 123 Ga. 642, 51 S. E. 579; *Aikin v. Perry*, 119 Ga. 263, 46 S. E. 93.

¹¹⁰ *Guthman v. Castleberry*, 49 Ga. 272; *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764, 25 S. E. 764.

¹¹¹ *Mayer v. Morehead*, 106 Ga. 434, 32 S. E. 349; *Gavan v. Norcross*, 117 Ga. 356, 43 S. E. 771.

¹¹² *Driver v. Maxwell*, 56 Ga. 11; *Bosworth v. Thomas*, 67 Ga. 640; *Aikin v. Perry*, 119 Ga. 263, 46 S. E. 93. Compare *Henley v. Brockman*, 124 Ga. 1059, 53 S. E. 672.

¹¹³ *Powers v. Cope*, 93 Ga. 248, 18 S. E. 815.

In Louisiana the statute provides that the lessor shall maintain the thing leased in a condition such as to serve the use for which it is hired, that he shall deliver it in good condition, and that he shall make all repairs which may accidentally become necessary, except such as the tenant is bound to make. It further provides that if the lessor does not make such necessary repairs, the lessee may himself have them made and deduct the price from the rent due. And a final provision is to the effect that the lessor guarantees the lessee against all the vices and defects of the thing which may prevent its being used, even in case it should appear that he knew nothing of the existence of such vices and defects at the time the lease was made, and even if they have arisen since, provided they do not arise from the lessee's fault, and that the lessor is bound to indemnify the lessee in case of loss from the vices and defects.^{113a} Under these provisions the tenant must notify the landlord to repair before he can himself make the repairs and charge their cost to the landlord.¹¹⁴ If there are vices and defects in the original construction of the premises, rendering them unfit for the tenant's use, or, perhaps, merely a serious need of repairs, the tenant may have a rescission of the lease.¹¹⁵ But if the defects are such as can be repaired out of the accruing rent, it is his duty to make the repairs rather than abandon the premises.¹¹⁶ If he remains in possession he cannot refuse to pay rent on account of the need of repairs.¹¹⁷ The guaranty by the lessor against all vices and defects does not apply to the results of the defective and unlawful construction of adjacent buildings, whereby liquids percolate through the walls, in view of another statute providing that the lessor does not guarantee against disturbances by one not claiming any right in the premises.¹¹⁸ The provision

^{113a} La. Civ. Code 1900, arts. 2692-2695.

¹¹⁴ *Caldwell v. Snow*, 8 La. Ann. 392; *Favrot v. Mettler*, 21 La. Ann. 220.

¹¹⁵ *Caffin v. Redon*, 6 La. Ann. 487.

¹¹⁶ *Welham v. Lingham*, 28 La. Ann. 903.

¹¹⁷ *Mulhaupt v. Enders*, 38 La. Ann. 744.

¹¹⁸ *Pargoud v. Tourne*, 13 La. Ann. 292.

A stipulation that the lessee will not be responsible for damage caused by leaks in the roof or by any vice or defect in the leased property, has been held not to relieve the lessor from liability for injuries from defects so radical as to call for the condemnation of the premises as dangerous to the public safety. *Pierce v. Hedden*, 105 La. 294, 29 So.

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for indemnity to the lessee for loss from vices and defects makes the lessor liable only for damage resulting immediately and not that resulting consequentially.¹¹⁹ And the lessor's failure to make repairs will not, it is held, sustain a claim for damages on the part of the lessee if the rent was sufficient to enable the lessee to make them himself.¹²⁰ It seems that there is a liability upon the lessor for injuries to persons other than the lessee, members of his family or his employes, for instance.¹²¹

It has been decided that an ordinance, imposing a penalty for allowing filth to escape from the premises upon adjoining land, is to be construed as making the tenant and not the landlord liable therefor, the latter being under no obligation to repair.¹²²

d. Contract by landlord to repair or to pay for repairs—

(1) **Evidence of the contract.** Quite frequently there is an express contract by the lessor to make repairs during the tenancy, or to pay for repairs made by the tenant.^{122a}

The fact that the lessee contracts to make certain classes of repairs does not indicate an agreement by the lessor to make all other repairs,¹²³ nor does the lessee's covenant to make all repairs with certain exceptions impose on the landlord the burden of the excepted repairs.¹²⁴ A covenant by the lessor to pay for

¹¹⁹ *Redon v. Caffin*, 11 La. Ann. Wendel, 33 Misc. 100, 67 N. Y. Supp. 695, where it was decided that the lessee could recover the cost of

fixtures which he had placed on the premises and which were a total loss to him, but not the diminution of profits resulting from his enforced removal to a new location.

¹²⁰ *Lewis v. Pepin*, 33 La. Ann. 1417; *Bianchi v. Del Valle*, 117 La. 587, 42 So. 148; *Brodman v. Finerty*, 116 La. 1103, 41 So. 329.

¹²¹ *Leithman v. Vaught*, 115 La. 249, 38 So. 982; *Schoppel v. Daly*, 112 La. 201, 36 So. 322.

¹²² *City of New York v. Corlies*, 4 N. Y. Super. Ct. (2 Sandf.) 301. As to a construction of the New York law requiring garbage receptacles to be furnished in tenement houses, see *Department of Health v.*

^{122a} As to the effect of a covenant to make repairs as entitling the landlord to enter to make them, see ante, § 3 b (3).

¹²³ *Jones v. Millsaps*, 71 Miss. 10, 14 So. 440, 23 L. R. A. 155; *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 119; *Witty v. Matthews*, 52 N. Y. 512; *Schiavone v. Callahan*, 52 Misc. 654, 102 N. Y. Supp. 538.

¹²⁴ *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11, 5 L. R. A. 400; *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858, 33 L. R. A. 449, 52 Am. St. Rep. 872. See *Weigall v. Waters*, 6 Term R. 488; *Turner v. Townsend*, 42 Neb. 376, 60 N. W. 587.

buildings and improvements made by the lessee is not a covenant to pay for repairs made by him,¹²⁵ and, conversely, a covenant to pay for repairs does not require him to pay for improvements made by the tenant.¹²⁶ A provision that the lessee shall return the premises in as good order as when received, "ordinary wear and tear and natural decay excepted," imposes no obligation on the lessor to repair defects arising from the excepted causes.¹²⁷ A warranty as to the safe condition of the premises at the time of the lease does not involve any obligation to keep them in that condition.¹²⁸

That the lessor makes repairs, voluntarily or at the lessee's request, does not tend to show any agreement by him to make repairs.¹²⁹ Even the fact that the lease shows an intention on the part of the lessor to make repairs does not impose on him an obligation to make them,¹³⁰ and so the fact that he is expressly given a right to enter to make them is immaterial in this regard.¹³¹

That land was demised with water privileges from a mill pond for turning a certain factory wheel was held not to bind the lessor to keep the mill dam in repair so that it would turn the wheel.¹³²

A provision of the lease that the premises shall be used by the lessee for a particular purpose only does not involve a covenant by the lessor to make or keep them fit for such use.¹³³

¹²⁵ *Lametti v. Anderson*, 6 Cow. (N. App. 191; *Moore v. Weber*, 71 Pa. Y.) 302. 429, 10 Am. Rep. 708; *McKeon v.*

A covenant by the lessor to furnish the materials necessary for repairs does not involve a covenant on his part to make repairs. *Brett v. Berger*, 4 Cal. App. 12, 87 Pac. 222. *Cutter*, 156 Mass. 296, 31 N. E. 389; *Galvin v. Beals*, 187 Mass. 250, 72 N. E. 969; *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N. E. 326; *Schanda v. Sulzberger*, 7 App. Div. 221, 40 N. Y. Supp. 116; *Watson v. Almirall*, 61

¹²⁶ *Cornell v. Vanartsdalen*, 4 Pa. App. Div. 429, 70 N. Y. Supp. 662. 364. ¹³⁰ *Moyer v. Mitchell*, 53 Md. 171.

¹²⁷ *Thomas v. Conrad*, 24 Ky. Law Rep. 1630, 71 S. W. 903; *Turner v. Townsend*, 42 Neb. 376, 60 N. W. 587; *Olmstead v. Tennessee Fixture & Showcase Co.*, 1 Tenn. Ch. App. 653. ¹³¹ *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852. See *Boston v. Gray*, 144 Mass. 53, 10 N. E. 509. And compare *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 4 L. R. A. 528, 12 Am. St. Rep. 778.

¹²⁸ *Ousley v. Hampe*, 128 Iowa, 675, 105 N. W. 122. ¹³² *Morse v. Maddox*, 17 Mo. 569.

¹²⁹ *Gridley v. City of Bloomington*, 68 Ill. 47; *Quinn v. Crowe*, 88 Ill. son v. Oppenheim, 34 N. Y. Super. Y. Super. Ct. (3 Duer) 464; *John-*

(2) **Oral contract.** An oral contract to repair, at the time of or previous to a written demise, has, in a number of cases, been held to be inadmissible by force of the "parol evidence" rule.¹³⁴ Occasionally, however, such an agreement has been regarded as "collateral" to the matters comprised in the written instrument and so valid and effective.¹³⁵

(3) **Consideration to support the contract.** A contract by the lessor to make repairs must, at least when not under seal, be supported by a valid consideration. Consequently, a parol promise to repair, made after the lease, if not based on a new consideration, cannot be enforced,¹³⁶ and this is the case when it is made merely in consideration of the lessee's agreement to do what he is already bound to do, as to keep on paying rent or not to abandon the premises.¹³⁷ But it has been held that when the landlord had notified the tenant to quit for nonpayment of rent, the ten-

Ct. (2 Jones & S.) 416; Lyons v. Galvin, 43 Misc. 659, 88 N. Y. Supp. 252; Brewster v. De Fremery, 33 Cal. 341; Taylor v. Finnigan, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973.

¹³⁴ Gulliver v. Fowler, 64 Conn. 556, 30 Atl. 852; Smith v. Smull, 69 App. Div. 452, 74 N. Y. Supp. 1061; Hall v. Boston, 26 App. Div. 105, 49 N. Y. Supp. 811; Kabus v. Frost, 50 N. Y. Super. Ct. (18 Jones & S.) 72; Howard v. Thomas, 12 Ohio St. 201; York v. Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; Roehrs v. Timmons, 28 Ind. App. 578, 63 N. E. 481; Peticolas v. Thomas, 9 Tex. Civ. App. 442, 29 S. W. 166.

¹³⁵ Vandegrift v. Abbott, 75 Ala. 487; Clenighan v. McFarland, 16 Daly, 402, 11 N. Y. Supp. 719 (contract to put in repair); Johnson v. Blair, 126 Pa. 426, 17 Atl. 663; De Lassalle

v. Guildford [1901] 2 K. B. 215 (warranty as to state of repair); Mann v. Nunn, 43 Law J. C. P. 241 (contract to make improvement).

See ante, § 61.

¹³⁶ Fowler Cycle Works v. Fraser, 110 Ill. App. 126; Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255; Altsheler v. Conrad, 26 Ky. Law Rep. 538, 82 S. W. 257; Libbey v. Tolforde, 48 Me. 316, 17 Am. Dec. 229; Rhoades v. Seidel, 139 Mich. 608, 102 N. W. 1025; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Bronner v. Walter, 15 App. Div. 295, 44 N. Y. Supp. 583; Gottsberger v. Radway, 2 Hilt (N. Y.) 342; Schiff v. Pottlitzer, 51 Misc. 611, 101 N. Y. Supp. 249; Whitehead v. Comstock & Co., 25 R. I. 423, 56 Atl. 446; Dowling v. Nuebling, 97 Wis. 350, 72 N. W. 871; Perez v. Rabaud, 76 Tex. 191, 13 S. W. 177, 7 L. R. A. 620; Clyne v. Helmes, 61 N. J. Law, 358, 39 Atl. 767; Taylor v. Lehman, 4 Ind. App. 585, 46 N. E. 84, 47 N. E. 230.

¹³⁷ Proctor v. Keith, 51 Ky. (12 B. Mon.) 252; Eblin v. Miller, 78 Ky. 371; Hall v. Boston, 26 App. Div. 105, 49 N. Y. Supp. 811, *affd.* 165 N. Y. 632, 59 N. E. 1123.

ancy was to be regarded as terminated, so that a subsequent promise by him to make repairs if the tenant would remain at the same rent was supported by a sufficient consideration.¹³⁸ And it has been decided that if the condition of the premises was such that the tenant had a right to leave them, his promise to stay was a sufficient consideration to support an agreement to repair.¹³⁹

A contract by the lessor to pay for repairs if the tenant will make them is based on a sufficient consideration, so far as the repairs are not such as the tenant is bound to make,¹⁴⁰ but it is plainly otherwise if the tenant is already under the legal obligation of making them.

(4) **Nature of the contract.** A contract by the landlord to repair is in its nature continuing, and is not discharged by a single breach, though this is followed by a judgment for damages, and the tenant may recover for each of several successive breaches.¹⁴¹

A covenant by the lessor to repair runs with the land and accordingly may be enforced by the assignee of the leasehold interest, or against the transferee of the reversion, in case of breach during the existence of such transferee's interest.¹⁴²

(5) **Degree and mode of repair.** A covenant to repair is not, it is said, to be extended by construction.¹⁴³ On the other hand, it

¹³⁸ Conkling v. Tuttle, 52 Mich. (2 Comst.) 96, 49 Am. Dec. 369; 630, 18 N. W. 391. Kingdon v. Nottle, 1 Maule & S. 365.

¹³⁹ Rauth v. Davenport, 60 Hun, 142 Allen v. Culver, 3 Denio (N. 70, 14 N. Y. Supp. 69; Ehinger v. Y.) 284; Day v. Swackhamer, 2 Hilt. Bahl, 208 Pa. 250, 57 Atl. 572; and (N. Y.) 4; Gerzebek v. Lord, 33 N. J. cases cited post, note 212. Law, 240.

¹⁴⁰ Hughes v. Van Stone, 24 Mo. 143 Clark v. Babcock, 23 Mich. App. 637; Benson v. Bolles, 8 Wend. 164; Witty v. Matthews, 52 N. Y. 512. (N. Y.) 175; Oettinger v. Levy, 4 A covenant by the lessor of a E. D. Smith (N. Y.) 288; Caulk v. gristmill to keep it in repair has Everly, 6 Whart. (Pa.) 303. See been held not to embrace duties Peticolas v. Thomas, 9 Tex. Civ. ordinarily performed by the miller, App. 442, 29 S. W. 166. So where such as dressing the stones, regu- the landlord agreed to pay part of lating the machinery and clearing the cost if the tenant would pay the the race of ordinary deposits. Mid- remainder. Woodworth v. Thomp- dlekauff v. Smith, 1 Md. 329.

¹⁴¹ Block v. Ebner, 54 Ind. 544; A covenant to repair if at any Coffin v. Talman, 8 N. Y. (4 Seld.) time "during" the term a part of 465. See Beach v. Crain, 2 N. Y. the premises was condemned for public use was held not to apply

has been said that such a covenant is to be construed in favor of the covenantee.¹⁴⁴

A covenant to "keep in repair" obliges the landlord to keep the premises in at least as good condition as at the date of the covenant,¹⁴⁵ and a covenant to keep them "in good repair" requires him to put them in good repair if out of repair at the time, the degree of repair required to be determined with reference to the nature, age and location of the premises.¹⁴⁶ Neither a covenant to keep in repair nor one to keep in good repair obliges the lessor, it has been considered, actually to renew portions of the structure which have become worn out.¹⁴⁷

A covenant to make all inside and outside repairs has been said to bind the lessor for ordinary, and not for extraordinary, repairs.¹⁴⁸ A covenant to repair the "external parts of the demised premises" includes all parts forming the enclosure, even though adjoining another building, a party wall, for instance.¹⁴⁹

In perhaps two states, a covenant to repair, where the lease was for a particular purpose, has been held to require the lessor to put the building in such repair as the purpose requires,¹⁵⁰ and in another a covenant to "do all necessary repairs" was held to re-

when the condemnation was before the beginning of the term though after the making of the lease. ¹⁴⁴ *Saner v. Bilton*, 7 Ch. Div. 815; *Prager v. Bancroft*, 112 Mass. 76. ¹⁴⁵ *Miller v. McCardell*, 19 R. I. 304, 33

It was held to be no defense to a suit for breach of a covenant to repair a sawmill that there was a ¹⁴⁶ *Atl. 445, 30 L. R. A. 682; Payne v. Haine*, 16 Mees. & W. 541.

breach by the lessee of a covenant not to run the mill faster than a rate named, the excessive speed not having caused the defects calling ¹⁴⁷ *Torrens v. Walker* [1906] 2 Ch. 166, applying the decisions in this regard as to a covenant by the lessee. Post, § 116 a.

for repairs. The covenants were regarded as independent. *Hinckley v. Beckwith*, 23 Wis. 328. A covenant to "keep in good necessary repair," in the lease of a hotel, was held to require the landlord to put the flues in such condition that there could be fires in the rooms, this being otherwise impossible owing to the escape of smoke.

¹⁴⁴ *Miller v. McCardell*, 19 R. I. 304, 33 *Atl. 445, 30 L. R. A. 682*. See ante, § 58 a, at note 112. ¹⁴⁵ *Stultz v. Locke*, 47 Md. 562. ¹⁴⁶ *Meyers v. Burns*, 35 N. Y. 269.

In *Lovejoy v. Townsend*, 25 Tex. Civ. App. 385, 61 S. W. 331, a covenant to repair the roof and keep it in repair was held to require the landlord to put it in repair if in a ¹⁴⁷ *May v. Gillis*, 169 N. Y. 330, 62 N. E. 385.

¹⁴⁸ *Green v. Eales*, 2 Q. B. 235. ¹⁴⁹ *Piper v. Fletcher*, 115 Iowa, 263, 88 N. W. 380; *Riley v. Pettis*

quire the floors to be put in as good condition at least as they were in when originally constructed.¹⁵¹

(6) **Notice of the need of repairs and diligence in repairing.** A covenant by the landlord to repair is ordinarily regarded as one to repair on notice of the need of repairs, and consequently no liability can be asserted thereon against him till after such notice,¹⁵² and also the lapse of a reasonable time within which to make the repairs.¹⁵³ And for this purpose the fact that the landlord has the means of knowing of the need of repairs is not, it has been held, equivalent to actual notice thereof.¹⁵⁴ If the lease provides that notice in writing shall be given, there can be no recovery for nonrepair in the absence of such notice.¹⁵⁵ But the requirement of a notice of the need of repairs has been regarded as not applying when the repairs were rendered necessary by the

County, 96 Mo. 318, 9 S. W. 906. 580; *Young v. Burhans*, 80 Wis. 438, In the latter case the covenant was 50 N. W. 343. See *Whittle v. Webster*, 55 Ga. 180; *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764, 25 S. E. 764, where it was so decided as

regards the statutory requirement of that state that the landlord make repairs. See, also, cases cited post, note 157.

¹⁵¹ *Ward v. Kelsey*, 38 N. Y. 80, 97 Am. Dec. 773. ¹⁵² *Makin v. Watkinson*, L. R. 6 Exch. 25; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507; *Hugall v. McLean*, 53 Law T. (N. S.) 94; *Torrens v. Walker* [1906] 2 Ch. 166; *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. 260; *Cummings v. Ayer*, 188 Mass. 292, 74 N. E. 336; *Galvin v. Beals*, 187 Mass. 250, 72 N. E. 969; *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. 127; *Marley v. Wheelwright*, 172 Mass. 530, 52 N. E. 1066; *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618; *Thomas v. Kingsland*, 108 N. Y. 616, 14 N. E. 807; *Gerzebeck v. Lord*, 33 N. J. Law, 240; *Frank v. Conradi*, 50 N. J. Law, 23, 11 Atl. 480.

¹⁵³ *Green v. Eales*, 2 Q. B. 225; *Forrest v. Buchanan*, 203 Pa. 454, 53 Atl. 267; *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580; *Young v. Burhans*, 80 Wis. 438, 50 N. W. 343. See *Whittle v. Webster*, 55 Ga. 180; *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764, 25 S. E. 764, where it was so decided as regards the statutory requirement of that state that the landlord make repairs. See, also, cases cited post, note 157. ¹⁵⁴ *Hugall v. McLean*, 53 Law T. (N. S.) 94. But in *Hayden v. Bradley*, 72 Mass. (6 Gray) 425, 66 Am. Dec. 421, it was held that the tenant need not give notice of the need of repairs in order to put the landlord in default, the latter having the opportunity to himself learn the need of repairs by reason of a clause of the lease giving him the right to enter "to view and make improvements." The instruction approved in *Flynn v. Trask*, 93 Mass. (11 Allen) 550, seems also to be adverse to the rule stated in the later Massachusetts cases (*supra*, note 152) as to the necessity of actual notice. ¹⁵⁵ *Sternberg v. Burke*, 84 N. Y. Supp. 862.

negligent acts of the lessor himself and he knew of the need of repairs.¹⁵⁶

(7) **Making of repairs by tenant.** Upon the failure of the landlord to make repairs as agreed, after notice from the tenant to do so, the tenant may himself make them, and recover, in an action on the agreement, the amount of the expenditures, so far as reasonable.¹⁵⁷ But the tenant is not bound to make the repairs himself, at least if the repairs required are of considerable extent,¹⁵⁸ and he may, it has been held, remain in possession without repairs and recover damages for the breach of agreement upon the principles hereafter stated.¹⁵⁹ Occasionally the statement is made that the tenant should himself make the repairs, merely, it seems, for the purpose of excluding a particular class of liability,

¹⁵⁶ Pratt, Hurst & Co. v. Tailer, Middlekauff v. Smith, 1 Md. 329; 186 N. Y. 417, 79 N. E. 328, afg. 114 Thompson v. Clemens, 96 Md. 196, App. Div. 574, 100 N. Y. Supp. 16. 53 Atl. 919, 60 L. R. A. 580.

¹⁵⁷ Green v. Eales, 2 Q. B. 225; Thompson v. Clemens, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580; Myers v. Burns, 35 Ky. 269; Parr v. Village of Greenbush, 112 N. Y. 246, 19 N. E. 684; Markham v. David Stevenson Brew. Co., 111 App. Div. 178, 97 N. Y. Supp. 604; Ross v. Stockwell, 19 Ind. App. 86, 49 N. E. 50; Wright v. Lattin, 38 Ill. 293; Lewis & Co. v. Chisholm, 68 Ga. 40. See Cantrell v. Fowler, 32 S. C. 589, 10 S. E. 934. Even though it would otherwise be the duty of the tenant to make the repairs himself and then claim reimbursement from the landlord, so that, failing to do so, he could not recover damages resulting from failure to repair, this is not the case if the landlord, on being notified of the need of specific repairs, promises to make them and thus keeps the lessee from making them. Keyes v. Western Vermont Slate Co., 34 Vt. 81; Parker v. Meadows, 86 Tenn. 181, 6 S. W. 49.

¹⁵⁸ Bien & Co. v. Hess (C. C. A.) 102 Fed. 436; Cook v. Soule, 56 N. Y. 423; Woodward v. Jones, 15 Misc. 1, 72 N. Y. St. Rep. 4, 36 N. Y. Supp. 775; Thomson-Houston Elec. Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7; Biggs v. McCurley, 76 Md. 409, 25 Atl. 466; Bostwick v. Losey, 67 Mich. 554, 35 N. W. 246; McCoy v. Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208. ¹⁵⁹ Thomson-Houston Elec. Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7; Myers v. Burns, 35 N. Y. 269; Spencer v. Hamilton, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611; Lewis & Co. v. Chisholm, 68 Ga. 40; Buck v. Rodgers, 39 Ind. 222; Culver v. Hill, 68 Ala. 66, 44 Am. Rep. 134; Vandergrift v. Abbott, 75 Ala. 487; Bostwick v. Losey, 67 Mich. 554, 35 N. W. 246; Hexter v. Knox, 63 N. Y. 561.

It has been said that if the repairs needed are trifling in character, the tenant should make them.

that for injuries to the tenant's person or property resulting from defective conditions.¹⁶⁰

(8) **Effect of breach on liability for rent.** It has been decided in numerous cases that the covenant by the lease to pay rent and that by the lessor to repair are independent. Consequently, the failure to repair as agreed is, in most jurisdictions, no defense to an action for rent.^{161, 162} And, conversely, the failure to pay rent is no defense to an action for breach of a covenant to repair.¹⁶³ There are, however, in a number of jurisdictions, decisions to the effect that breach of the lessor's covenant to make repairs may, under particular circumstances, justify the tenant in relinquishing possession and refusing to pay rent. These decisions will be more specifically referred to in another place.¹⁶⁴

In the case of an agreement by the landlord to pay for repairs by the tenant, though it is provided that the rent shall be applied on the cost of such repairs, the tenant may recover the amount thereof without asserting it in reduction of the rent.¹⁶⁵ And he may assert it in reduction of the rent, as agreed, without securing the landlord's approval of the repairs, or effecting any settlement with him as to their value¹⁶⁶⁻¹⁷⁰

¹⁶⁰ See *Hendry v. Squier*, 126 Ind. N. W. 343. And see cases cited 19, 25 N. E. 830, 9 L. R. A. 798; *Hedekin v. Gillespie*, 33 Ind. App. 650, 72 N. E. 143; *Schick v. Fleischhauer*, 26 App. Div. 210, 49 N. Y. Supp. 962; *Spero v. Levy*, 43 Misc. 24, 86 N. Y. Supp. 869; *Cantrell v. Fowler*, 32 S. C. 589, 10 S. E. 934. See post, § 87 d (10).

^{161, 162} *Central Appalachian Co. v. Buchanan* (C. C. A.) 73 Fed. 1006; *Lewis & Co. v. Chisholm*, 68 Ga. 40; *Lunn v. Gage*, 37 Ill. 19, 87 Am. Rep. 233; *Bryan v. Fisher*, 3 Blackf. (Ind.) 316; *Long v. Gieriet*, 57 Minn. 278, 59 N. W. 194; *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330; *Smith v. Wiley*, 60 Tenn. (1 Baxt.) 418; *Kelsey v. Ward*, 38 N. Y. 83; *Prescott v. Otterstatter*, 85 Pa. 534; *Young v. Burhans*, 80 Wis. 438, 50

post, note 236.

¹⁶³ *Drago v. Mead*, 30 App. Div. 258, 51 N. Y. Supp. 360; *Leick v. Tritz*, 94 Iowa, 322, 62 N. W. 855.

¹⁶⁴ See post, § 182 r (2).

¹⁶⁵ *McKenna v. Rowlett*, 68 Ala. 186. Where it was provided that the cost of repairs should be deducted from the rent to accrue under a new lease, such cost could be recovered, it was held, if the new lease was never made. *Smith v. Farnworth*, 6 Hun (N. Y.) 598.

As to the right of the tenant to recover for labor and materials furnished under such an agreement, when the landlord re-entered before the repairs were finished or paid for, see *Smith v. Newcastle*, 48 N. Y. 70.

¹⁶⁶⁻¹⁷⁰ *Dallman v. King*, 4 Bing. N. C. 105; *Fillebrown v. Hoar*, 124 Mass. 580.

(9) **Damages for breach.** The measure of damages for breach of the landlord's covenant to repair is ordinarily stated to be the difference between the rental value of the premises with the repairs and without the repairs.¹⁷¹ In one or two cases it is said that the measure is the difference between the rental value as fixed in the lease and the rental value without the repairs,¹⁷² but this is open to the objection that it assumes the rent fixed in the lease to be the actual rental value of the property with the repairs, and deprives the one party or the other of any profit that he may have by reason of the lease.^{172a} The rule as first above stated seems preferable, the rent fixed being, however, regarded as *prima facie* the actual rental value.¹⁷³

In some jurisdictions a still different measure of damages from those above mentioned has been adopted, and a lessor failing to repair has been held liable for the actual loss involved in the expenditures of various kinds which the lessee was compelled

¹⁷¹ *Winne v. Kelley*, 34 Iowa, 339; *Leick v. Tritz*, 94 Iowa, 322, 62 N. W. 855; *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. 246; *Cook v. Soule*, 56 N. Y. 420; *Taylor v. Lehman*, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230. In *Thomson-Houston Elec. Co. v. Durant Land Imp. Co.*, 144 N. Y. 34, 379 N. E. 7, it is said: "We are inclined to the opinion that when a building erected for business purposes is rented as a whole and without any specific reference to a use by way of subletting, or where that is not the primary purpose contemplated by the parties, the damages for the breach of a covenant to repair is the difference in the rental value of the premises as they are and as they were to be, regarding the premises as a whole, and that they are not to be measured by supposed loss by reason of the tenant being unable to parcel out separate portions and let them to undertenants."

¹⁷² *Parker v. Meadows*, 86 Tenn. 181, 6 S. W. 49; *Biggs v. McCurley*, 76 Md. 409, 25 Atl. 466.

^{172a} For instance, suppose the rental value of the premises is \$1,000 per year with the repairs, and \$750 without the repairs, but the lessee obtained the lease at a low rent, say \$750, in spite of the covenant to repair. In such case the lessee could, according to the rule last stated, recover merely nominal damages for breach of the covenant, though the rental value is reduced \$250 by the lack of repairs. Or suppose the lessee had agreed to pay an unduly high rent, say \$1,250, while the rental value with the repairs is only \$1,000, and \$750 without them. In such case the rule last referred to would give the lessee \$500 damages, though the rental value is reduced \$250 only by the breach of covenant.

¹⁷³ See *Kohne v. White*, 12 Wash. 199, 40 Pac. 794; *Bien & Co. v. Hess*, 42 C. C. A. 421, 102 Fed. 436.

to make owing to the absence of repairs,¹⁷⁴ or for the conjectured loss of returns from the property caused thereby.¹⁷⁵ In one case at least the tenant has been allowed for the probable profits of the business which he was prevented from continuing on the premises owing to the lack of repair,¹⁷⁶ but the great weight of authority is adverse to such an allowance.¹⁷⁷ In the case,

¹⁷⁴ See *Green v. Eales*, 2 Q. B. 225. *Fort v. Orndoff*, 54 Tenn. (7 Heisk.) 167. So where the tenant agreed to repair the inside, and the landlord the outside, increased expenditures by the tenant on the inside due to the landlord's failure to repair the outside were held to be recoverable. *Miller v. McCardell*, 19 R. I. 304, 33 Atl. 445. And for the lessor's failure to repair a sawmill, the expense of having the tenant's timber sawed at another mill was allowed. *Hinckley v. Beckwith*, 17 Wis. 413. And where the landlord failed to repair fences as agreed, the tenant was allowed to recover the expenditures and losses involved in keeping live stock away from his crops. *Buck v. Rodgers*, 39 Ind. 222.

Where the lack of repair affected the productiveness of the premises leased, which consisted of a manufacturing plant, it was held that the expenditures involved in operating the plant "over time" in order to obtain the normal product should be deducted from the agreed rent in order to determine the actual rental value with the repairs not made. *Bien & Co. v. Hess*, 42 C. C. A. 421, 102 Fed. 436.

It was held that where the lessor agreed to keep the premises in repair, but it was also provided that the lessee should have the right, in case of the latter's default, to make the repairs himself, the lessee could recover only the cost of the repairs.

¹⁷⁵ *Hinckley v. Beckwith*, 13 Wis. 31. In *Spencer v. Hamilton*, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611, where the lessor had covenanted to make certain repairs on the farm leased in clearing out ditches, and failed to do so, it was held that he was liable for the net amount by which the lessee's crop was decreased by such failure. But see cases cited post, note 245.

In *Watson v. Hooton*, 4 Ill. App. (4 Bradw.) 294, it was held that the fact that the lessee had subleased to another who paid him the same rent as he himself had agreed to pay did not affect the damages recoverable by him for lack of repairs.

¹⁷⁶ *Raynor v. Valentine Blatz Brew. Co.*, 100 Wis. 414, 76 N. W. 343. This case involved the lease of a theatre. The court says that loss of profits must clearly have been in the contemplation of the parties.

¹⁷⁷ *Bien & Co. v. Hess*, 42 C. C. A. 421, 102 Fed. 436; *Lightfoot v. West*, 98 Ga. 546, 25 S. E. 587; *Middlekauff v. Smith*, 1 Md. 329; *Mason v. Howes*, 122 Mich. 329, 81 N. W. 111; *Drago v. Mead*, 30 App. Div. 258, 51 N. Y. Supp. 360; *Dorwin v. Potter*, 5 Denio (N. Y.) 306. See *Kellogg v. Malick*, 125 Wis. 239, 103 N. W. 1116.

however, of premises leased for the express purpose of use as a hotel or lodging house, with a covenant by the landlord to repair, the tenant has usually been allowed the amount which he has lost by reason of his inability to obtain occupants owing to the lack of repair of part of the premises.¹⁷⁸

It has been held that the lessee cannot, if he sues on the contract during the term, recover damages which may accrue from failure to repair during the balance of the term, since it cannot be known that the breach will continue.¹⁷⁹ But though the action is brought during the term, if the trial takes place after the term, the jury may, it seems, give damages for the loss during the balance of the term after the breach.¹⁸⁰

If the tenant himself makes the repairs upon the landlord's failure to make them, he can, as before stated, recover the amount of his reasonable expenditures in that behalf,¹⁸¹ and presumably, in addition, the amount of the loss caused by the temporary lack of repair.¹⁸²

There are *dicta* to the effect that, if a third person recovers against the tenant for injuries caused by dangerous conditions on the premises which would not have existed had the lessor complied with his covenant to repair, the tenant can recover from the lessor, as for breach of his covenant, the amount which he has thus been compelled to pay.¹⁸³ It would seem on principle,

¹⁷⁸ *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852; *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561; *Stewart v. Lanier House Co.*, 75 Ga. 582. Compare *Thomson-Houston Elec. Co. v. Durant Land Imp. Co.*, 144 N. Y. 34, 39 N. E. 7, quoted ante, note 171.

In *Kohne v. White*, 12 Wash. 199, 40 Pac. 794, it is decided that the net rental value of the rooms after deducting the expenses involved in running the lodging house, and not their gross rental value, was to be allowed.

¹⁷⁹ *Block v. Ebner*, 54 Ind. 544.

¹⁸⁰ *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

¹⁸¹ See ante, at note 157.

¹⁸² In *Benkard v. Babcock*, 25 N. Y. Super. Ct. (2 Rob.) 175, 17 Abb. Pr. 421, 27 How. Pr. 391, it was held that for breach of covenant by the lessor that the cellar should be free from percolation of water through its walls or floor, the lessee could recover for actual loss arising from the expense of repairing past and preventing future evils, and deprivation of the temporary use of the building, or its permanent deterioration, though not for injuries which he could have prevented.

¹⁸³ See cases cited post, § 107, in which the right of a third person to recover against the lessor on account of injuries which would not have occurred if the lessor had com-

however, decidedly questionable whether such an item of loss to the tenant could be regarded as having been within the contemplation of the parties at the time of the making of the covenant, within the general rule determining the amount of recovery for breach of contract.¹⁸⁴

Since the tenant would not be entitled to recover for disturbance of his possession by reason of the making by the landlord of repairs in accordance with his covenant,¹⁸⁵ the tenant making them himself, on the landlord's default in performance of the covenant, should not, it seems, be allowed to recover for the resulting disturbance of possession.¹⁸⁶

(10) **Injuries to tenant's person or property on premises.** A question of difficulty has arisen in connection with a landlord's covenant to repair, as to whether the tenant can recover, as against the landlord, for an injury to his person, or to his property on the premises, which would not have occurred had the landlord complied with his covenant. Such injuries resulting not directly from a breach of the contract, but from physical conditions existing apart from the contract, which the contract merely undertook to eliminate, cannot well be regarded as a proximate result of the breach of the contract, within the contemplation of the parties at the time of the making thereof. To allow a recovery for such injuries is to allow a recovery as for tort on account of a breach of contract. As has been remarked, there is no more reason for allowing such a recovery against a landlord than against any other person, a carpenter or contractor, for instance, who fails to carry out his contract to repair the premises.¹⁸⁷

plied with his covenant to repair is based in theory on a supposed right of recovery by the lessee from the lessor of any sum which might have been recovered against the lessee by the person injured. the lessor could be held liable to the tenant, conceding that he could be held liable for any part of the amount for which the tenant had been made liable, a question which the court refused to consider.

¹⁸⁴ In *Consolidated Hand-Method Lasting-Mach. Co. v. Bradley*, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 417, it was decided that a judgment recovered against the tenant under the employer's liability act was not conclusive upon the question of the amount for which

¹⁸⁵ See post, § 87 f (1).
¹⁸⁶ See *Green v. Eales*, 2 Q. B. 225; *Ward v. Kelsey*, 42 Barb. (N. Y.) 582. But *Middlekauff v. Smith*, 1 Md. 329, seems to be *contra*.
¹⁸⁷ *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465.

There are no doubt numerous cases in which one who has contracted to do a thing, and has entered upon the performance of the contract, has been held liable for negligence in the course of performance, as in the familiar case of injuries to one traveling under a contract of carriage,¹⁸⁸ but there is, it is conceived, no principle upon which one can be held liable as for a tort merely because he has failed to perform a contract entered into by him, there being no obligation upon him, apart from the contract, to do that which he has contracted to do,¹⁸⁹ unless perhaps an element of fraud has intervened.¹⁹⁰

The view that a tenant or a member of his family cannot recover for personal injuries which would not have occurred had the landlord performed his covenant to repair finds support in a number of decisions.¹⁹¹ In others the right of recovery for such in-

¹⁸⁸ See Pollock, Torts, c. 13; 1 Jaggard, Torts, 895, 897.

¹⁸⁹ See Pollock, Torts (6th Ed.) 512; Dustin v. Curtis, 74 N. H. 266, 67 Atl. 220.

In *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708, 124 Am. St. Rep. 575, it is said, per Loring, J., that "to charge a landlord in tort for personal injuries caused by a negligent omission to make needed repairs, not only must the tenant prove that the landlord agreed to keep the premises in repair, but he must go one step further and prove that the landlord agreed to maintain the premises in a safe condition for his (the tenant's) use. * * * In short, that so far as their safety is concerned, the landlord's relation to the premises to be kept in repair is the same as that of a landlord in case of common passageways in a tenement house."

¹⁹⁰ In *Rich v. New York Cent. & H. R. R. Co.*, 87 N. Y. 382, it is decided that a breach of contract may be so intended and planned, and so interwoven into a scheme of oppression and fraud, as to become, in

its association with the attendant circumstances, a tortious act or omission.

¹⁹¹ *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465; *Glenn v. Hill*, 210 Mo. 291, 109 S. W. 27, 16 L. R. A. (N. S.) 699 (semble); *Spellman v. Bannigan*, 36 Hun (N. Y.) 174; *Kabus v. Frost*, 50 N. Y. Super. Ct. (18 Jones & S.) 72; *Sanders v. Smith*, 5 Misc. 1, 25 N. Y. Supp. 125; *Miller v. Rinaldo*, 21 Misc. 470, 47 N. Y. Supp. 636; *Cuilhe v. Ackerman*, 58 Misc. 538, 109 N. Y. Supp. 714; *Schick v. Fleischauser*, 26 App. Div. 210, 49 N. Y. Supp. 962; *Golob v. Pasinsky*, 72 App. Div. 176, 76 N. Y. Supp. 388; *Flynn v. Hatton*, 43 How. Pr. (N. Y.) 333; *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855; *Van Tassel v. Read*, 36 App. Div. 529, 55 N. Y. Supp. 502; *Eschbach v. Hughes*, 7 Misc. 172, 27 N. Y. Supp. 320; *O'Gorman v. Teets*, 20 Misc. 359, 45 N. Y. Supp. 929 (sickness); *Arnold v. Clark*, 45 N. Y. Super. Ct. (13 Jones & S.) 252; *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am.

injuries is denied upon the ground that the person injured contributed to the injury by remaining on or using the premises after knowledge of the defect.¹⁹² Occasionally the landlord has been held liable for such injuries by reason of his noncompliance with his covenant to repair.¹⁹³

In one case the lessor was held liable upon the theory that his failure to make repairs in accordance with his contract constituted negligence on his part, it being said that where the landlord agrees to repair, "his duties and liabilities are in some respects

St. Rep. 485; *Collins v. Karatopsky*, App. 340, 108 S. W. 616; *Moore v. 36 Ark. 316*; *Davis v. Smith*, 26 R. Steljes, 69 Fed. 518. And see cases I. 129, 58 Atl. 630, 66 L. R. A. 478, cited post, notes 196-201, as to the 106 Am. St. Rep. 691. landlord's liability for injuries to

¹⁹² *Hanson v. Cruse*, 155 Ind. 176, the tenant's goods on the premises. 57 N. E. 904; *Hedekin v. Gillespie*, There are also *dicta* in favor of 32 Ind. App. 650, 72 N. E. 143; imposing such liability in *Edwards Martin v. Surman*, 116 Ill. App. 282; v. New York & H. R. Co., 98 N. Y. Walker v. Swayzee, 3 Abb. Pr. (N. 248, 50 Am. Rep. 659; *Perez v. Rab-* aud, 76 Tex. 191, 13 S. W. 177. Y.) 138; *Arnold v. Clark*, 45 N. Y. There is sometimes an implication Super. Ct. (13 Jones & S.) 252; *Mc-* to this effect, the court saying that *Ginn v. French*, 107 Wis. 54, 82 N. in the absence of a covenant to re- W. 724; *Reams v. Taylor*, 31 Utah, pair the landlord is not liable for 288, 87 Pac. 1089, 120 Am. St. Rep. such injuries. See e. g., *Harpel v.* 30. And see *Alexander v. Rhodes*, Fall, 63 Minn. 520, 65 N. W. 913; 104 Ga. 807, 30 S. E. 968; *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919, *Laird v. McGeorge*, 16 Misc. 70, 37 60 L. R. A. 580; *Brown v. Toronto* N. Y. Supp. 631; *Tredway v. Machin*, General Hospital, 23 Ont. 599. On 91 Law T. (N. S.) 310.

the other hand, in *Stillwell's Adm'r v. South Louisville Land Co.*, 22 Ky. Law Rep. 785, 58 S. W. 696, 52 L. R. A. 325, it was held that, when the landlord had promised to repair a dangerous cistern on the premises, the lessee was not negligent in moving on the premises with his small child, the tenant exercising care to prevent the child falling into the cistern, which it nevertheless did.

¹⁹³ *Sontag v. O'Hare*, 73 Ill. App. 432; *Stillwell's Adm'r v. South Louisville Land Co.*, 22 Ky. Law Rep. 785, 58 S. W. 696, 52 L. R. A. 325; *Collins v. Fillingham*, 129 Mo. In *Cavalier v. Pope* [1906] App. Cas. 428, afg. [1905] 2 K. B. 757, a husband and wife sued for injuries from defects which the landlord had agreed to repair, and there was a judgment for the husband, as for breach of contract, for the expense caused him by his wife's injuries. There was no appeal from the judgment for the husband, and consequently the appellate courts do not discuss whether the expense thus caused the husband was properly recoverable by him as damages for breach of contract. A judgment for the wife was reversed.

similar to those of an owner and occupant.''¹⁹⁴ And in another case it is stated that his liability under such circumstances is to be based on his negligence in failing to make repairs in accordance with his covenant, after he has notice of the need of repairs, and the lapse of a reasonable time within which to make them.¹⁹⁵ But, as before suggested, it is difficult to see how the mere breach of the contract can in any case constitute negligence, there being no legal duty upon the lessor as to the condition of the premises, apart from the contract.

If the landlord, after contracting to repair, commences the making of repairs, and in the course of the work renders the premises dangerous to persons thereon by reason of what he him-

¹⁹⁴ *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289. There the person injured was a sublessee holding under a lease from defendant's tenant. (Post, § 97 c). The case does not discuss the theory of liability, and cites two cases only, one involving the liability of a landlord for defects in an elevator of which he retained the entire control as not being included in the leased premises, and the other involving the question of the lessor's liability for concealed defects existing at the time of the lease of which he had reason to know.

¹⁹⁵ *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580, where it is said. "It may be conceded that in this state, when a landlord has agreed to make repairs, there is a duty resting on him to do so, and upon his failure the tenant may either sue on his contract or bring an action on the case founded in tort for neglect of that duty. * * * It seems to us that the correct rule in a case such as the one under consideration is that the mere failure of the landlord to make repairs which he had agreed to make cannot make him responsible to the tenant, or a member of his family, for damages for personal injuries sustained by reason of the defective condition of the premises, whether such suit be in assumpsit or in case, but in order to recover such damages there must be shown some clear act of negligence or misfeasance on the part of the landlord beyond the mere breach of contract." It was held in this case that the landlord was not negligent, since he did not know of the need of repairs, and consequently was not liable for the personal injuries. The same result, under the facts, might have been attained on the theory that the contract to repair was to be construed as requiring the landlord to repair only when he had notice of the need of repair, as before stated. See ante, § 78 d (6). The statements made in the case last cited are approved in *Graff v. Lemp Brew. Co.*, 130 Mo. App. 618, 109 S. W. 1044, where it is also said that if a duty from one person to another becomes an incident of the relation between them, though it is created by contract, a negligent omission to discharge it gives a right of action *ex delicto*.

self does, he is then, it is evident, liable as for negligence on account of injuries to the tenant or other person rightfully on the premises, not himself guilty of contributory negligence.

There are a number of decisions to the effect that the landlord is liable for injuries to the tenant's property on the leased premises which would not have occurred had the landlord complied with his covenant to repair.¹⁹⁶ No distinction can, it is conceived, be taken between the case of injury to the person of the tenant or one of his family, and injury to his chattels on the premises, and these cases may be considered as equivalent to decisions that he would be liable for such personal injuries as a result of his failure to perform his contract.¹⁹⁷ Occasionally, on the other hand, it has been decided that he is not so liable for injuries to the tenant's chattels¹⁹⁸ for the reason, as sometimes stated, that the tenant has no right to leave his property where it is exposed

¹⁹⁶ *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764, 25 S. E. 764; *Mason v. Howes*, 122 Mich. 329, 81 N. W. 111 (semble); *Rauth v. Davenport*, 60 Hun. 70, 14 N. Y. Supp. 69; *Coleman v. Central Trust Co.*, 25 Misc. 295, 54 N. Y. Supp. 561; *Phillips v. Ehrmann*, 8 Misc. 39, 28 N. Y. Supp. 519; *Ehinger v. Bahl*, 208 Pa. 250, 57 Atl. 572; *Kohne v. White*, 12 Wash. 199, 40 Pac. 794; *Murphy v. Farley*, 124 Ala. 279, 27 So. 442. See *Green v. Eales*, 2 Q. B. 225; *Pratt, Hurst & Co. v. Tailer*, 186 N. Y. 417, 79 N. E. 328.

¹⁹⁷ See ante, at note 193.

¹⁹⁸ In *Dorwin v. Potter*, 5 Denio (N. Y.) 306, the landlord was held not to be liable for injury to the tenant's dairy stock and decrease in the supply of milk resulting from defects in a barn which he had agreed to keep in repair. In *Cook v. Soule*, 56 N. Y. 420, it was held that while only the difference between the actual rental value of the premises and that which they would have had in case the coven-

ant had been performed could be recovered, the fact that property on the premises was injured owing to the defects could be proven for the purpose only of showing that the premises could not be used as originally intended.

In *Varner v. Rice*, 39 Ark. 344, and *Wisdom v. Newberry*, 30 Mo. App. 241, it is decided that in case of breach of contract to repair a fence, there is no right of recovery for consequent injuries to crops. Compare cases cited post, note 202.

In *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 119, it was decided that a covenant to make repairs on the outside of the building did not render the landlord liable for injuries to the tenant's articles in the building caused by a fall of the building, since the covenant was in effect not that the outside would not give way, but that if it did he would repair it. But in *Green v. Eales*, 2 Q. B. 225, a substantially similar covenant was construed differently, it seems.

to injury owing to the nonrepair of the premises,¹⁹⁹ while sometimes it is stated that the landlord is not liable for the reason that the tenant could have avoided any such injury by making the repairs himself, it being the duty of one injured to reduce the damage so far as possible.²⁰⁰ In one or two cases, the fact that the tenant thus failed to make repairs is regarded as a ground for exempting the landlord from liability only if the making of repairs would have involved but a small outlay by the tenant.²⁰¹

¹⁹⁹ *Hendry v. Squier*, 126 Ind. 19, justified in remaining, see *Miller v. 25 N. E. 830*, 9 L. R. A. 798; *Cook v. Sullivan*, 77 Kan. 252, 94 Pac. 266. *Soule*, 56 N. Y. 420; *Reiner v. Jones*, In *Mason v. Howes*, 122 Mich. 329, 38 App. Div. 441, 56 N. Y. Supp. 423; 81 N. W. 111, a tenant was decided *Weinberg v. Ely*, 114 App. Div. 857, not to be negligent in remaining on 100 N. Y. Supp. 283; *Cantrell v. the premises*, though the plastering *Fowler*, 32 S. C. 589, 10 S. E. 934. which fell on him was defective, he

In *Flynn v. Trask*, 93 Mass. (11 Allen) 550, involving an action of contract on the agreement to repair, it was held that evidence of the lessee's failure to exercise due care to prevent injury by the landlord's failure to perform his contract could be given only in reduction of damages. This is, of course, a rule applicable to any action on a contract. In this case it seems that damages were given by the jury for injuries to property on the premises, but, the opinion says, "No instructions were asked or objected to upon the rule of damages." In *Gavan v. Norcross*, 117 Ga. 356, 43 S. E. 771, it is decided that a statement by the landlord, after the destruction of the roof by fire, made to the tenant, that it was not necessary to remove from the building on account of the fire, did not justify the tenant in leaving his property there exposed to the rain. Even if regarded as a guaranty against injury to the goods, it would be invalid as not based on any consideration.

Where a tenant, aware of the defective condition of the premises, remained thereon, relying on the landlord's promise to repair and to pay him for any damage to his furniture from lack of repair, it was held to be a question for the jury whether the tenant was justified in remaining and so entitled to recover for such damage. *Bold v. O'Brien*, 12 Daly (N. Y.) 160. And see *Neglia v. Lielouka*, 32 Misc. 707, 65 N. Y. Supp. 500. That the tenant was, under particular circumstances,

²⁰⁰ *Hendry v. Squier*, 126 Ind. 19, 25 N. E. 830, 9 L. R. A. 797; *Cantrell v. Fowler*, 32 S. C. 589, 10 S. E. 934. See *Brett v. Berger*, 4 Cal. App. 12, 87 Pac. 222, where the lessor's contract was to furnish material for repairs.

²⁰¹ *Parker v. Meadows*, 86 Tenn. 181, 6 S. W. 49. See *Biggs v. McCurley*, 76 Md. 409, 25 Atl. 466.

The tenant cannot, it has been held, be deprived of a right to recover damages for injury to his property by the fact that he failed to make the repairs himself, if the landlord purported to make them

Occasionally the covenant to repair expressly states that the purpose is to avoid a particular source of injury, and such injury may then be regarded as within the contemplation of the parties and as consequently a proper element of damages for breach of the covenant.^{201a} So in the case of a covenant to repair fences so as to prevent injury to crops from live stock, the tenant has been held to be liable for such injuries to the crops resulting from the landlord's failure to repair the fences.²⁰²

e. **Contract by landlord to improve or put in repair—(1) General considerations.** The contract to repair, above considered, is one to keep in repair, that is, to make repairs as occasion for them arises during the tenancy, such a contract, of itself, ordinarily assuming that the premises are already in repair. Occasionally the lessee, knowing that the premises are not in repair, or are in an unfinished condition, or are otherwise in a condition not suited to his purposes, requires the lessor to agree generally to put the premises in repair, to make certain repairs, or to complete certain designated improvements. The principles applicable to such an agreement are ordinarily the same as those applicable to an agreement to keep in repair. Some matters, however, in connection with contracts for specific repairs or improvements,

(repairs of leaks in the roof) and told the tenant that he had done so. *Dempsey v. Hertzfield*, 30 Ga. 866. To the same effect, see *Miller v. Sullivan*, 77 Kan. 252, 94 Pac. 266. And it has been suggested that he might be excused from making them by the fact that the landlord promised to make them after being informed that they were necessary (*Flynn v. Hatton*, 43 How. Pr. [N. Y.] 333), a view which is disapproved in *Sanders v. Smith*, 5 Misc. 1, 25 N. Y. Supp. 125.

^{201a} See the remarks in *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708, 124 Am. St. Rep. 575, as to an agreement by the lessor to maintain premises in safe condition. Ante, note 189.

²⁰² *Bloodworth v. Stevens*, 51 Miss. 475; *Rowe v. Baber*, 93 Ala. 422, 8

So. 865; *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Buck v. Rodgers*, 39 Ind. 222. See *Hay v. Short*, 49 Mo. 139. In such cases the contract may, it would seem, be construed as a guaranty against injury from the cause named provided the landlord knows of the lack of repairs. Somewhat similar, at least in theory, is a case in which the landlord reserved the right to care for certain trees on the premises and agreed that in caring for them he would not injure the tenant's plants, and he was held liable for injuries to the plants caused by a mixture which he sprinkled on the trees without reference to whether he was negligent. *Roussinet v. Rebout*, 76 Cal. 454. And see *Beakes v. Holzman*, 47 Misc. 384, 94 N. Y. Supp. 33.

may conveniently be considered apart from the other class of contracts referred to.

There is a decision in one state that a lease of a store in a building in course of erection involves a covenant by the lessor that the store shall be finished and fit for use at the commencement of the term named,²⁰³ but this seems questionable, and in another state it has been decided that a lease of a building in course of construction does not imply a covenant to complete it.²⁰⁴

(2) **Inference from contract to keep in repair.** Even without an explicit contract by the landlord to put the premises in repair, a contract by him to keep the premises "in good repair," requires him to put them in good repair, if out of repair at the time, the degree of repair to be determined with reference to the nature, age, and location of the premises.²⁰⁵

In two states a covenant, in the lease of a building for a particular purpose, to make repairs, is said to require the building to be put in such repair as the purpose requires.²⁰⁶ And in another a covenant to "do all necessary repairs" was held to require the floors to be put in as good condition at least as they were in when originally constructed.²⁰⁷

²⁰³ *La Farge v. Mansfield*, 31 Barb. (N. Y.) 345 (one out of three judges dissenting). There is a dictum to that effect in *Paul B. Pough & Co. v. Cerimedo*, 44 Misc. 246, 88 N. Y. Supp. 1054.

²⁰⁴ *Ratkowski v. Masolowski*, 57 Ill. App. 525.

²⁰⁵ *Saner v. Bilton*, 7 Ch. Div. 815; *Payne v. Haine*, 16 Mees. & W. 541; *Miller v. McCardell*, 19 R. I. 304, 33 Atl. 445, 30 L. R. A. 682. In *Keroes v. Richards*, 28 App D. C. 310, such is said to be the result of a covenant merely "to repair." The authorities cited do not sustain the statement.

A covenant to keep in good necessary repair, in the lease of a hotel, was held to require the landlord to put the flues in such condition that

there could be fires in the rooms. *Meyers v. Burns*, 35 N. Y. 269.

²⁰⁶ *Piper v. Fletcher*, 115 Iowa, 263, 88 N. W. 380; *Riley v. Pettis County*, 96 Mo. 318, 9 S. W. 906. In the latter case the covenant actually was "to keep in good repair," which brings the case more into accord with those cited in the previous note. Both decisions cite *Meyers v. Burns*, 35 N. Y. 269, *supra*. See, also, *Olson v. Schultz*, 67 Minn. 494, 70 N. W. 779, 36 L. R. A. 790, 64 Am. St. Rep. 437.

²⁰⁷ *Ward v. Kelsey*, 38 N. Y. 80, 97 Am. Dec. 773.

A covenant to make specific repairs can, obviously, not be construed as requiring the making of all repairs necessary to make the premises perfectly safe. *Howell v. Schneider*, 24 App. D. C. 524.

(3) **Consideration to support the contract.** An agreement to put in repair, or for specific repairs and improvements, must, like one to keep in repair, be supported by a consideration, and if made after the demise without any new consideration, it is invalid.²⁰⁸ A promise to pay an increased rent is sufficient consideration,²⁰⁹ as is the waiver of the lessee's right to rescind the lease for false representations made by the lessor.²¹⁰ A contract by the lessor, made after the destruction by fire of the buildings on the land, to rebuild, if the lessee will replace the machinery, is supported by a sufficient consideration.²¹¹ And there is, no doubt, a sufficient consideration if the tenant has a right to relinquish possession owing to the condition of the premises, and the lessor agrees to make the repairs in consideration of the tenant's consent to remain.²¹²

(4) **Nature of the contract.** A covenant to put in repair or improve differs from one to keep in repair in that it is not a continuing covenant admitting of successive breaches, but, when broken, it is broken once for all.²¹³

A covenant to put in repair or improve no doubt runs, before breach, in favor of an assignee of the leasehold and against a transferee of the reversion,²¹⁴ but since, as just stated, it is not continuous, if it is broken before a transfer of the leasehold or of the reversion, there can be no further breach and the covenant does not run.²¹⁵

²⁰⁸ *Hardison v. Hooker*, 25 Tex 91; *Handrahan v. O'Regan*, 45 Iowa, 298.

²¹⁰ *Sisson v. Kaper*, 105 Iowa, 599, 75 N. W. 490.

In *Vass v. Wales*, 129 Mass. 38, it was held that where an agreement by the lessor to make certain repairs was in a separate paper, but was contemporaneous with, and a part of the same transaction as, the lease, the acceptance of the lease which contained a covenant to deliver up the premises at the end of the term in as good order and repair "as the same now are or may be put into by the lessor" was a sufficient consideration.

²⁰⁹ See *Donellan v. Read*, 3 Barn. & Adol. 899.

²¹¹ *Frey v. Vignier*, 145 Cal. 251, 78 Pac. 733.

²¹² See *Beakes v. Holzman*, 47 Misc. 384, 94 N. Y. Supp. 33; *Bennett v. Sullivan*, 100 Me. 118, 60 Atl. 886 and cases cited ante, note 139.

²¹³ *Coward v. Gregory*, L. R. 2 C. P. 153; *Chadwick v. Woodward*, 13 Abb. N. C. (N. Y.) 441.

²¹⁴ *Spencer's Case*, 5 Coke, 16 a; *Gerzebek v. Lord*, 33 N. J. Law, 240.

²¹⁵ *Coward v. Gregory*, L. R. 2 C. P. 153; *Grescot v. Green*, 1 Salk. 199; *Morris v. Kennedy* [1896] 2 Ir. 247.

(5) **Character of improvements or repairs.** The decisions construing various covenants of this nature with regard to the character of the improvements or repairs required thereby are not susceptible of reduction to any general principles. Several of them are stated in the notes below.²¹⁶ Sometimes the contract is to complete a building in course of construction,²¹⁷ and sometimes merely to put in repair or to improve a building already erected.²¹⁸ A covenant of the former class, that is, to complete

In *Gerzebek v. Lord*, 33 N. J. Law, 240, the lessor agreed "to give said house one coat of paint inside and out, to repair and cleanse the walls inside, and also, during the term of lease, to repair the water pipes and water, closets, walls, and do all other necessary repairs to make the property in a good and tenantable condition," and it was held that the covenants to give a coat of paint and to repair and cleanse the walls were capable of but a single breach, and consequently, if not performed within a reasonable time, were broken, and the burden did not pass to a transferee of the reversion; but *aliter* as to the other covenants to do certain things "during the term of lease."

²¹⁶ A covenant by the lessor to put in a skylight in case the owner of the land adjoining should build and thereby cut off the light was held not to require him to put in the skylight merely because the adjoining owner erected a temporary structure, a "spite fence," as a result of a quarrel between him and the lessee. *Huber v. Ryan*, 57 App. Div. 34, 67 N. Y. Supp. 972.

A provision in a lease at a certain rent that until the landlord put in another heating apparatus the rent should be a less sum was held not to require the landlord to put in such apparatus. *Gatch v. Garretson*, 100 Iowa, 252, 69 N. W. 550.

²¹⁷ In the case of a lease of a part of an unfinished building, a covenant to finish the premises leased in the manner of another building named was held to require the part leased to be made as tenantable and fit for use as the corresponding part of the building named, it not being sufficient to finish that part and to leave the building without a roof. *Tuller v. Davis*, 11 N. Y. Super. Ct. (4 Duer) 187. But where, during the construction of a three story building, the owner of the land leased the two upper stories for five years, it was held that, in spite of a provision that the "building" should be completed by a date named, it was sufficient that the two upper stories were completed by that date. *Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112.

²¹⁸ Where there was an agreement that the tenant should put the premises in complete repair and that he should be allowed for the expense on the rent for the second year, and the cost of making repairs exceeded the rent for that year, it was held that the tenant was entitled to be paid out of the rent for the third year. *Mattocks v. Cullum*, 6 Pa. 454.

Where a lease provided that the premises should be kept in good repair by the lessees, "it being understood that said premises shall be in good repair before entry"

the building, does not require that the building should be constructed in such a manner that, when completed, it will be suitable for the use to which the lessee intends to devote it,²¹⁹ though no doubt the lessor is bound actually to complete it and not leave part of the work undone.²²⁰ So far as it may be the rule in any state²²¹ that, when the lease is for a particular purpose, a covenant to keep in repair requires the lessor to put the premises in such repair as the purpose requires, a covenant to put in repair would no doubt have the same effect. But it has been held in England that an agreement by the lessor to put the premises in good tenantable repair does not involve an undertaking to put them in repair so as to be suitable for any particular purpose for which, to the lessor's knowledge, the lessee may intend to use them.²²² Such a covenant, there, necessitates merely that they shall be put in good repair, having reference to their age, class and location.²²³

under the lease, it was held that there was in effect an express covenant by the lessor to put the premises in good repair before entry. *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641.

²¹⁹ *Bentley v. Taylor* (Iowa) 39 N. W. 267; *Rutland Foundry & Mach. Shop Co. v. King*, 51 Vt. 462.

²²⁰ See *Swift v. East Waterloo Hotel Co.*, 40 Iowa, 322.

²²¹ See ante, note 150.

²²² *McClure v. Little*, 19 Law T. (N. S.) 287. This was a case of a dwelling house which had been converted into a warehouse, and the walls of which were insufficient to sustain the weight placed in it by the lessee. The theory of the decision presumably is, having regard to the cases cited in the next note, that the repairs were sufficient for a warehouse of that class, that is, one created out of an old dwelling, and that the covenantee could not require the lessor to make the building equal to a new warehouse even

though the lessor knew that it was to be used for storing heavy goods. The judges also emphasize the fact that the lessee made no complaint as to the walls till after the repairs were made and the lessee had taken possession.

²²³ *Saner v. Bilton*, 7 Ch. Div. 815. In *Payne v. Haine*, 16 Mees. & W. 541, Parke said: "The cases all show that the age and class of the premises let, with their general condition as to repair, may be estimated in order to measure the extent of the repairs to be done. Thus, a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor square"; and it was said by Baron Alderson that "It is no doubt, in practice, difficult to say what is a putting premises, so old as to be ready to perish, into good repair, or keeping them in it; but a contract to 'put' premises in good repair cannot mean to furnish new ones where those demised were

(6) **Time of making improvements or repairs.** If the lease provides that the lessor shall make improvements or specific repairs, without naming any time for making them, they are, it has been held, to be made in a reasonable time, and if not so made there is a breach of the covenant.²²⁴

(7) **Waiver of performance.** While it is stated in a number of cases that the right to require the lessor's compliance with his covenant to make preliminary repairs or improvements as a condition precedent to the payment of rent is waived by the lessee's entry into possession,²²⁵ it does not seem that such entry involves a waiver of compliance with the covenant for other purposes,²²⁶ except perhaps as regards the sufficiency of the repairs actually made.²²⁷

That the tenant pays the rent as stipulated would seem not to involve any waiver of the right to assert a claim for damages on account of the breach of the lessor's covenant.²²⁸ There is ordinarily no obligation on one to assert his claim by way of set-off, and the payment of the rent without any assertion of the claim for damages in no way prejudices the landlord. There is, however, perhaps, a Wisconsin case to the contrary,²²⁹ and in Penn-

old, but to put and keep them in good tenantable repair with reference to the purpose for which they are to be used."

²²⁴Coward v. Gregory, L. R. 2 C. P. 153; Gerzebek v. Lord, 33 N. J. Law, 240; Lunn v. Gage, 37 Ill. 19, 87 Am. Dec. 233; Young v. Burhans, 80 Wis. 438, 50 N. W. 343.

²²⁵ See post, § 182 r (2).

²²⁶ See Swift v. East Waterloo Hotel Co., 40 Iowa, 322; Piper v. Fletcher, 115 Iowa, 263, 88 N. W. 380; Thompson-Houston Elec. Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7; Kiernan v. Germain, 61 Miss. 498.

That the lessee entered into possession of part of the building on the premises in course of construction was held not to waive his claim on account of the condition of the

balance of the building, which was not ready for occupancy, in breach of the lessor's contract to have the whole building so ready at a certain time. San Reno Hotel Co. v. Brennan, 64 Hun, 607, 19 N. Y. Supp. 276.

²²⁷ In Williamson v. Miller, 55 Iowa, 86, 7 N. W. 416, it was held that if the landlord, having covenanted to put the fences in repair, did repair them, the lessee, having taken possession, was concluded from objecting to the sufficiency of the repairs. And see McClure v. Little, 19 Law T. (N. S.) 287, stated ante, note 222.

²²⁸ See Oliver v. Bredl, 25 Pa. Super. Ct. 653; Pewaukee Mill. Co. v. Howitt, 86 Wis. 270, 56 N. W. 784.

²²⁹ Deuster v. Mittag, 105 Wis. 458, 81 N. W. 643. The opinion is decidedly obscure.

sylvania it has been said that the failure to complete the building on the premises at a certain time, as agreed, could not be asserted after the lessee had paid twenty-five months' rent, taking for each month's rent a written receipt in full without demand for abatement.²³⁰

It has been held that the lessor was justified in not making the stipulated repairs if the lessee notified him that he did not intend to abide by the terms of the lease.²³¹ The tenant may no doubt release the lessor from such a covenant as from any other.²³²

(8) **Making of repairs or improvements by tenant.** In the case of a contract of this character, as of a contract to keep in repair, the tenant may himself make the stipulated repairs or improvements and recover the cost thereof from the landlord.²³³ Applying the same rule as prevails with regard to a contract to keep in repair,²³⁴ the tenant's failure himself to make the repairs or improvements would not prevent his recovery of damages, unless perhaps when the expenditure is slight.²³⁵

(9) **Effect of breach on liability for rent.** A contract of this character, to put in repair, or to make specific repairs or improvements, is, like one to keep in repair, ordinarily independent of that to pay rent.²³⁶ The contract may, however, in the particular

²³⁰ *Murphy v. Marshall*, 179 Pa. 516, 36 Atl. 294.

In *New Era Mfg. Co. v. O'Reilly*, 197 Mo. 466, 95 S. W. 322, the right to object that certain machinery put in by the lessor did not comply with the stipulations of the lease was held to be lost by the use thereof by the lessee for a year without complaint.

²³¹ *Floyd v. Maddux*, 68 Ind. 124.

²³² See ante, § 59.

²³³ *Barnhart v. Boyce*, 102 Ill. App. 172; *Hopkins v. Ratliff*, 115 Ind. 213, 77 N. E. 288; *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973; *Cox v. Volkert*, 86 Mo. 505; *Beardsley v. Morrison*, 18 Utah, 478, 56 Pac. 303, 72 Am. St. Rep. 795.

²³⁴ See ante, at note 158.

²³⁵ *Green v. Mann*, 11 Ill. 613; *Mc-*

Coy v. Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208; *Pewaukee Mill. Co. v. Howitt*, 86 Wis. 270, 56 N. W. 784. See *Ladner v. Balsley*, 103 Iowa, 674, 72 N. W. 787; *Reams v. Taylor*, 31 Utah, 288, 87 Pac. 1089, 120 Am. St. Rep. 930. But in *Edward v. Gale*, 52 Me. 360, the opinion strongly intimates that, when it is expressly stipulated that if the lessor does not make a certain improvement as agreed the lessee "may" make it, the fact that on the lessor's failure to make it the lessee fails to do so may be asserted in reduction of the damages recoverable for the lessor's breach. This though the clause referred to is recognized as having been inserted for the benefit of the lessee.

²³⁶ *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1127; *Bryan v. Fisher*, 3

case, be capable of another construction.²³⁷ Conceding the contract (covenant) to make repairs or improvements and that to pay rent to be independent in the particular case, it does not seem that the fact that the repairs or improvements are, by the language of the contract, to be made before the commencement of the term, should enable the lessee to exclude liability for rent by refusing to take possession until the contract is performed. His refusal to take possession should have no greater effect in this regard than his relinquishment of possession after taking it. Any decisions or *dicta* to the effect that, in such case, the lessee may repudiate the lease²³⁸ would seem to involve the view that the contracts or covenants are dependent.

The doctrine asserted in a considerable number of states, that a failure to comply with a contract to repair, rendering the premises untenable,²³⁹ is ground for abandonment of the premises by the tenant and a refusal to pay rent, is applicable, it seems, to breach of a contract to put in repair or to make specific repairs, as well as of a contract to keep in repair.²⁴⁰

(10) **Damages for breach.** The measure of damages for breach of a contract to put in repair, or to make specific repairs and improvements, is, it would seem, the same as in the case of a

Blackf. (Ind.) 316; Long v. Gieriet, 57 Minn. 278, 59 N. W. 194; Thompson-Houston Elec. Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7; Prescott v. Otterstatter, 85 Pa. 534; Obermyer v. Nichols, 6 Bin. (Pa.) 159, 6 Am. Dec. 439; Malick v. Kellogg, 118 Wis. 405, 95 N. W. 372. See ante, at note 161.

²³⁷ See post, § 182 r (2).

²³⁸ Hickman v. Rayl, 55 Ind. 551; Reno v. Mendenhall, 58 Ill. App. 87; Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127; Thompson-Houston Elec. Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7.

²³⁹ See post, § 182 r (2).

²⁴⁰ See Pierce v. Joldersma, 91 Mich. 463, 51 N. W. 1116; Fisher v. Nergararian, 112 Mich. 327, 70 N. W. 1009; Kiernan v. Germain, 61 Miss. 498.

In Prescott v. Otterstatter, 85 Pa. 534, it is stated that the failure to make certain repairs and additions does not entirely defeat the claim for rent unless the result is that the tenement is worthless for the tenant's purposes, and that any damage resulting from breach of the covenant may be deducted from the rent, or the tenant may have a verdict for any excess of damage over the rent. Here the breach of covenant is evidently regarded not as an absolute bar, but as a ground of recoupment or set-off.

In Goodfellow v. Noble, 25 Mo. 60, it was held that the lessor's failure to make certain repairs as agreed did not justify the lessee in abandoning the premises and refusing to pay rent.

contract to keep in repair, which is ordinarily the difference between the rental value of the premises with and without the repairs or improvements.²⁴¹ In one state, however, such difference in rental value has not been regarded as the measure of damages.²⁴²

Incidental expenditures by the tenant, consequent upon the lessor's failure to perform his covenant to make improvements, have been regarded as not a proper item of damages.²⁴³

In one state the estimated decrease in the net yield of the land leased, resulting from a failure to make improvements as agreed, to prevent the flooding of the land, has been allowed.²⁴⁴ Elsewhere, the recovery of conjectural profits, whether based on failure to raise a crop²⁴⁵ or on other grounds,²⁴⁶ has been refused, an exception being made in one state, apparently, in the case of a building leased for the purpose of use as a hotel or lodging house.²⁴⁷

²⁴¹ *McEwen v. Dillon*, 12 Ont. 411; *recover the expense to which he was McCoy v. Oldham*, 1 Ind. App. 372, put in procuring water elsewhere. 27 N. E. 647, 50 Am. St. Rep. 208; *But here the court seems to be of Long v. Gieriet*, 57 Minn. 278, 59 N. W. 194; *Pewaukee Mill. Co. v. Howitt*, 86 Wis. 270, 56 N. W. 784; *Hunter v. Hathaway*, 108 Wis. 620, 84 N. W. 996; *Prescott v. Otterstatter*, 79 Pa. 462; *Oliver v. Bredl*, 25 Pa. Super. Ct. 653. See *Green v. Mann*, 11 Ill. 613; *Beakes v. Holzman*, 47 Misc. 384, 94 N. Y. Supp. 33.

²⁴² In *Fisher v. Goebel*, 40 Mo. 475, a charge fixing such difference of rental value as the measure of damages was disapproved, and it was said that the proper measure was "what it would cost to rebuild the wall, together with any loss that may have been sustained as the direct and immediate consequence of the insufficiency of the wall and the breach of the covenant."

²⁴³ In *Ladner v. Balsley*, 103 Iowa, 674, 72 N. W. 787, it was held that the lessee could not, for breach of the lessor's contract to put in a well, recover the expense to which he was put in procuring water elsewhere. But here the court seems to be of the opinion that he was bound to save this expense by sinking a well himself. Compare ante, at note 235.

²⁴⁴ In *Turner v. Strange*, 56 Tex. 141, it seems to be decided that the lessee cannot recover, in case of the lessor's breach of a contract to build a cistern, for sickness and inconvenience resulting to his family.

²⁴⁵ *Spencer v. Hamilton*, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611. See ante, note 175.

²⁴⁶ *Cundiff v. Cundiff*, 18 Ky. Law Rep. 1059, 39 S. W. 433. And see *Turner v. Strange*, 56 Tex. 141.

²⁴⁷ *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217; *Godfrey v. India Wharf Brew. Co.*, 87 App. Div. 123, 84 N. Y. Supp. 90. And see cases cited ante, note 177.

²⁴⁸ *Hexter v. Knox*, 63 N. Y. 561; *Daly v. Piza*, 45 Misc. 608, 90 N. Y. Supp. 1071.

We have previously discussed the question of the right of the tenant, in case of a breach of the landlord's contract to repair, to recover for injuries to his person or to property on the premises.²⁴⁸ The same considerations are applicable as regards injuries from breach of a contract to put in repair or to make specific repairs or improvements.²⁴⁹

f. Conditions arising from the making of repairs or improvements by landlord—(1) **Repairs or improvements properly made.** If the landlord has a right, under the terms of the lease or by the tenant's consent, to enter on the premises and to make repairs or alterations thereon, he is not liable to the tenant for any interruption to the latter's enjoyment of the premises or for any other resulting injury, in the absence of negligence on his, the landlord's part, either in making or completing the work.²⁵⁰ Likewise, he is free from liability, otherwise than for negligence, if, in making repairs or alterations, he is merely obeying a statute or municipal requirement.²⁵¹

²⁴⁸ See ante, § 87 d (10).

²⁴⁹ That the same rule applies in both cases is explicitly decided in *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708, 124 Am. St. Rep. 575. In this case the right of the tenant's wife to recover for personal injuries which would not have occurred had the lessor performed his contract was denied. To the same effect, that a breach of a contract to make specific repairs does not authorize a recovery for personal injuries, see *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465; *Collins v. Karatovsky*, 36 Ark. 316; *Stelz v. Van Dusen*, 93 App. Div. 358, 87 N. Y. Supp. 716. Contra, *Sontag v. O'Hare*, 73 Ill. App. 432; *Stillwell's Adm'r v. South Louisville Land Co.*, 22 Ky. Law Rep. 785, 58 S. W. 696, 52 L. R. A. 325.

In *Reams v. Taylor*, 31 Utah, 288, 87 Pac. 1089, 120 Am. St. Rep. 930, the lessor's inability to recover for personal injuries was based on the

fact that by failing to make the improvement himself and remaining in possession he was guilty of contributory negligence and assumed the risk arising from the failure to make the improvement.

²⁵⁰ *Saner v. Bilton*, 7 Ch. Div. 815; *Ward v. Kelsey*, 42 Barb. (N. Y.) 582; *Kellenberger v. Foresman*, 13 Ind. 475; *Clark v. Lindsay*, 7 Pa. Super. Ct. 43; *Reineman v. Blair*, 96 Pa. 155. See *Blake v. Dick*, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671, and ante, § 3 b (3).

The fact that a portion of the building falls during the making of repairs by the landlord which are such as to interfere with the support of the building has been decided to raise a presumption of negligence. *Butler v. Cushing*, 46 Hun (N. Y.) 521; *Judd v. Cushing*, 50 Hun, 181, 2 N. Y. Supp. 836.

²⁵¹ *Campbell v. Porter*, 46 App. Div. 628, 61 N. Y. Supp. 712.

(2) **Repairs or improvements without authority.** If the landlord or his servant enters on the premises to make repairs or improvements, without authority by statute or under the lease, and without the tenant's consent, he is liable as a trespasser for all injuries resulting from the work, without reference to whether there was negligence in its execution.²⁵² The fact that the tenant makes no open objection to his entry has been held not to relieve him from liability.²⁵³

(3) **Negligence of landlord in doing the work.** Although the landlord is not under any obligation to make repairs, if he does undertake to make them he is liable for any injuries which may result to the latter from the negligent manner in which he does the work. That is, if he undertakes to make repairs he must exercise reasonable diligence not to create a condition which may result in injury to the tenant, since the creation of such condition involves an active misfeasance.²⁵⁴ On this principle, a landlord undertaking to renew the roof has been held liable to a tenant for injuries to the latter's property on the premises caused by rain falling through openings negligently left by the landlord while doing the work.²⁵⁵ And so a landlord undertaking to repair a well on the premises has been held liable for injuries to one falling into

²⁵² Wolff v. Hvass, 11 Misc. 561, 32 N. Y. Supp. 798; Butler v. Cushing, 109; Slafter v. Siddall, 97 Minn. 291, 15 N. Y. St. Rep. 903, 2 N. Y. Supp. 106 N. W. 308; O'Dwyer v. O'Brien, 39; Frepons v. Grostein, 12 Idaho, 13 App. Div. 570, 43 N. Y. Supp. 815; 671, 87 Pac. 1004; Herbst v. Hafner, Randolph v. Feist, 23 Misc. 650, 52 7 Pa. Super. Ct. 363. N. Y. Supp. 109; Blumenthal v.

²⁵³ Northern Trust Co. v. Palmer, Prescott, 70 App. Div. 560, 75 N. Y. 171 Ill. 383, 49 N. E. 553. Supp. 710; Lynch v. Ortlieb (Tex. Civ. App.) 28 S. W. 1017; Leslie v.

A consent by the tenant to the making of a certain alteration by the landlord, with a proviso that a temporary structure be erected to protect the tenant's goods during the alteration, will not relieve the landlord from liability for resulting injuries to the goods if he fails to erect such structure. Willard v. Bunting, 34 N. Y. 153. Pounds, 4 Taunt. 649.

²⁵⁴ Sulzbacher v. Dickie, 51 How. Pr. (N. Y.) 500, 6 Daly, 469; Bancroft v. Godwin, 41 Wash. 253, 83 Pac. 189; Wertheimer v. Saunders, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146; Rice v. Whitney, 115 Iowa, 748, 87 N. W. 694; Mitchell v. Plaut, 31 Ill. App. 148; Nahm v. Register Newspaper Co., 27 Ky. Law Rep. 887, 87 S. W. 296.

²⁵⁵ Barman v. Spencer (Ind.) 49 N. E. 9; Jefferson v. Jameson & Morse Co., 165 Ill. 138, 46 N. E. 272;

the well owing to the former's negligence in leaving it uncovered and unguarded while making the repairs.²⁵⁶ And he is liable not only for conditions negligently created by him while making the repairs, but also if the completion of the repairs is effected so negligently as to cause injury to the tenant's person or property. So the landlord was held liable when a part of the structure which had been repaired by him fell, owing to the negligent manner in which the repairing was done, thereby injuring the tenant.²⁵⁷

The fact that the action of the landlord in thus undertaking to make repairs was entirely gratuitous, that is, not called for by any valid contract on his part, is entirely immaterial upon the question of his liability,²⁵⁸ it being a general rule of law that "if a party makes a gratuitous engagement, and actually enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for the misfeasance."²⁵⁹ Nor does the fact that the tenant himself was under an obligation to make these repairs which the landlord undertook, affect the latter's liability.²⁶⁰

If the repairs made by the landlord are merely insufficient, that is, if the pre-existing defects and dangers still exist, in spite of the landlord's action in setting about their repair, he should not, it seems, be liable by reason of such action.²⁶¹ If no liability

A clause exempting the landlord from liability for damage "caused by leakage of water or for any cause or event" was held to apply only to leakage caused by ordinary wear and tear, or by the carelessness of other tenants, or by the sudden action of the elements, and not to injury caused by water coming through the roof during repairs. *Randolph v. Feist*, 23 Misc. 650, 52 N. Y. Supp. 109.

²⁵⁶ *Barman v. Spencer* (Ind.) 49 N. E. 9.

²⁵⁷ *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466.

²⁵⁸ *Callahan v. Loughran*, 102 Cal. 476, 36 Pac. 835; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep.

466; *McHenry v. Marr*, 39 Md. 510; *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Glenn v. Hill*, 210 Mo. 291, 109 S. W. 27; *Little v. Mac Adaras*, 38 Mo. App. 187; *Lynch v. Ortlieb* (Tex. Civ. App.) 28 S. W. 1017; *Mann v. Fuller*, 63 Kan. 664, 66 Pac. 627; *Wertheimer v. Saunders*, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146; *Leslie v. Pounds*, 4 Taunt. 649.

²⁵⁹ 2 Kent's Comm. 570. See, also, notes to *Coggs v. Bernard*, 1 Smith's Leading Cases (8th Am. Ed.) 369; *Elsee v. Gatward*, 5 Term R. 143.

²⁶⁰ *McHenry v. Marr*, 39 Md. 510; *Lynch v. Ortlieb* (Tex. Civ. App.) 28 S. W. 1017.

²⁶¹ It is so decided in *Wynne v. Haight*, 27 App. Div. 7, 50 N. Y.

is to be imposed upon him by reason of his entire failure to do the work, he cannot well be liable because he "half" does it. There are, however, occasional decisions which ignore any distinction between ineffectual repairs, leaving conditions as they were before, and repairs creating a new source of danger.²⁶² Even in the case of merely insufficient repairs, if they are such as to appear sufficient, and they lead the tenant, or person claiming under the tenant, to venture into parts of the premises into which he would not have ventured had he not supposed the repairs to be sufficient, the landlord would be liable as for negligence.²⁶³ Where repairs to the floor were under the tenant's immediate supervision, though paid for by the landlord, and the tenant agreed that no further repairs should be required, he could not, it was held, recover because the floor gave way under a heavy load.²⁶⁴

That the tenant knew that the premises were open to the weather when work ceased on a Saturday evening, and that he left his goods exposed, was held not to show contributory negligence precluding recovery for injury to the goods, he having a right to expect that upon the approach of rain the landlord would take measures to protect the interior of the premises.²⁶⁵

(4) **Negligence of independent contractor.** The making of repairs on the leased premises is frequently committed by the landlord to an "independent contractor," and in such case the question may arise whether the landlord is liable for injury to the tenant's person or property caused by the negligence of the contractor. The general rule is that for the acts of such a contractor, not under the control of his employer,²⁶⁶ the latter is not liable, but this rule is subject to a number of exceptions, the ex-

Supp. 187. And see *Rice v. Whiteley*, 115 Iowa, 748, 87 N. W. 694.

²⁶² *Mann v. Fuller*, 63 Kan. 664, 66 Pac. 627; *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96, 7 L. R. A. (N. S.) 965, 114 Am. St. Rep. 631.

²⁶³ See *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466; *Upham v. Head*, 74 Kan. 17, 85 Pac. 1017.

²⁶⁴ *Bosworth v. Thomas*, 67 Ga. 640. The opinion is obscure.

²⁶⁵ *Blumenthal v. Prescott*, 70 App. Div. 560, 75 N. Y. Supp. 710.

And see cases cited post, note 276.

²⁶⁶ If the contractor is not "independent," that is, if he is a mere servant, the landlord is liable for all his acts as such. *Mumby v. Bowden*, 25 Fla. 454, 6 So. 453; *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; *Bernauer v. Hartman Steel Co.*, 33 Ill. App. 491. See 16 Am. & Eng. Enc. Law (2 Ed.) 187.

tent and application of which raise questions of difficulty, and the uncertainty and confusion which exist in other connections in this respect are fully present in the decisions rendered as between landlord and tenant.²⁶⁷

One absolute prerequisite to the immunity of the landlord from liability to the tenant for the acts of his contractor in the course of the making of repairs or improvements is that the entry on the premises by the contractor was authorized, either by statute or by license from the tenant, expressed or inferred from his acts. If the entry by the contractor was not thus authorized, the landlord, as having procured the commission of a trespass, is liable as a joint wrongdoer for all the consequences thereof.²⁶⁸

Another exception to the ordinary rule exempting an employer from liability for the acts of an independent contractor occurs in the case of a duty absolutely assumed by the employer, it being held that he cannot relieve himself from the obligation to perform such duty by delegating it to an independent contractor.²⁶⁹ Consequently, if the landlord should agree with the tenant to keep the premises safe or free from defects, he could not relieve himself from liability for failure to comply with his contract by asserting that this was the result of the acts of an independent contractor employed by him.²⁷⁰ And so, it would seem, the landlord's liability for breach of a contract to repair would not be affected by the fact that he employed, to make repairs, an independent contractor who failed to make them, or failed to make them properly. And, consequently, in any jurisdiction in which the tenant is entitled to recover for injuries to his person or property, by reason of the breach of a contract to keep in repair,²⁷¹

²⁶⁷ The cases upon the subject of Independent Contractors are collected in an article by the present writer in 16 Am. & Eng. Enc. Law (2d Ed.) 186.

²⁶⁸ See *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553; *Nahm v. Register Newspaper Co.*, 27 Ky. Law Rep. 887, 87 S. W. 296. And *Eberson v. Continental Inv. Co.*, 118 Mo. App. 67, 93 S. W. 297, is to the same effect. These decisions apparently make the contract to re-

pair equivalent to a contract to keep the roof weather-tight. The landlord, might, it seems, have been held liable in these cases without reference to his contract to repair, *Post*, at notes 273-276.

²⁶⁹ See 16 Am. & Eng. Enc. Law (2d Ed.) 202.

²⁷⁰ See *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116.

²⁷¹ See ante, § 87 d (10).

such liability would not be affected by the fact that the landlord delegated the making of repairs to a contractor, who failed to make them. But it does not seem that the fact that the landlord has contracted to make repairs should render him liable for injuries caused by the negligence of the contractor in the course of the performance of the work, these not arising from any breach of such contract.²⁷²

One exception to the rule of immunity from liability for the acts of an independent contractor, which is recognized in most jurisdictions, exists in the case of work which is, in its nature, unless special precautions are taken, calculated to injure another person, it being held that one cannot relieve himself from liability for injury caused by such work by employing an independent contractor to do it, and leaving to him the taking of precautions to prevent injury to others.²⁷³ This exception would seem to apply to the case of such a work, undertaken by the landlord, as the renewal of the roof, this evidently involving a decided element of danger to the tenant's goods, and it has been applied in such case in one jurisdiction at least.²⁷⁴ In New York this exception to the ordinary rule of immunity from liability for the acts of a contractor is apparently not recognized,²⁷⁵ and it is not clear

²⁷² But in *Blumenthal v. Prescott*, 70 App. Div. 560, 75 N. Y. Supp. 710, it is decided that the lessor was liable for injury to the tenant's goods, caused by the negligence of a contractor employed to repair the roof in leaving it temporarily uncovered while doing the work, on the ground, apparently, that the landlord had contracted with the tenant to repair the roof.

²⁷³ See 16 Am. & Eng. Enc. Law (2d Ed.) 201.

²⁷⁴ *Wertheimer v. Saunders*, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146. In *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238, the liability of the landlord, in such a case of the removal of a part of the roof, seems to be based on the theory that the person employed to re-

pair the roof was not an independent contractor but a servant, since there was no "surrender of control of the premises." And see *Rice v. Whitley*, 115 Iowa, 784, 87 N. W. 694, which may perhaps be based on the same theory.

²⁷⁵ In *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692, the owner of property was held not to be liable for injuries to a person on the adjoining premises caused by the fall of a wall which he had employed a contractor to remove, the fall resulting from the removal by the contractor of the roof which had held it in place when the wall, weakened by age and decay, evidently required support. The rule was in this case laid down that "if the act to be done may be

upon what theory several decisions in that state, holding a landlord liable for the negligence of a contractor in leaving the roof "open," are to be regarded as based.²⁷⁶

Another exception to the rule that one is not liable for the negligence of an independent contractor, recognized by some cases,^{276a} is that if one accepts the work done by the contractor employed by him, he is liable to one subsequently injured by the defects therein which could have been discovered upon a reasonably careful examination. It is perhaps on this theory that a landlord voluntarily undertaking to put on a new roof was held

safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care." There was in the contract no specific requirement that the contractor should exercise due care, but the court says that "it was implied in his contract that he should take down the wall in a careful and proper manner." And see *Berg v. Parsons*, 156 N. Y. 109, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. Rep. 542, to the effect, apparently, that this exception, arising from the character of the work to be done, to the general rule of exemption from liability, is not recognized in that state.

²⁷⁶ In *Sulzbacher v. Dickie*, 51 How. Pr. (N. Y.) 500, 6 Daly, 469, the concurring opinion of Robinson, J., supports the view stated in the text. He said: "The process in itself was of such a character that it naturally exposed the property of the occupants of the building to damage from the fall of rain. The undertaking, from its very nature, exacted every reasonable effort to avoid any injury likely to result from the character of the work so

undertaken." In the opinion by Daly, C. J., the view seems to be asserted that the landlord was liable in such a case because it was his duty, and not that of the contractor, to cover the building with tarpaulin or otherwise to keep out the rain during the making of repairs, and intimates that if the contract had required the contractor to do his, the landlord would not be liable. But the idea that the landlord could relieve himself of the duty of taking precautions by providing in the contract that the contractor should take the precautions is opposed to the authorities. *Dalton v. Angus*, 6 App. Cas. 740, per Lord Blackburn; *Bower v. Peate*, 1 Q. B. Div. 321; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32. For other decisions and dicta in the intermediate courts of New York to the effect that a landlord is liable for injuries thus occurring during the renewal of the roof, see *Malony v. Brady*, 38 N. Y. St. Rep. 803, 14 N. Y. Supp. 794; *O'Rourke v. Ferst*, 42 App. Div. 136, 59 N. Y. Supp. 157; *Blumenthal v. Prescott*, 70 App. Div. 560, 75 N. Y. Supp. 710; *Prescott v. Le Conte*, 83 App. Div. 482, 82 N. Y. Supp. 411.

^{276a} See 16 Am. & Eng. Enc. Law (2d Ed.) 206.

liable for injuries to the tenant's property caused by the defective character of the new roof, though the work was done by an independent contractor.^{276b}

An employer is liable for the acts of an independent contractor if he undertakes to control or direct the work,²⁷⁷ the contractor becoming to that extent the employer's servant. So the landlord has been held liable for injury to the tenant caused by the action of his contractor in leaving unmended, by his, the landlord's, express direction, a board in the floor accidentally broken by the contractor.²⁷⁸ Likewise the landlord is liable, in accordance with a recognized exception to the general rule of immunity from liability for a contractor's acts,²⁷⁹ if the injury to the tenant is the result not of the mode of doing the work, but of the plan and nature of the work which he was employed to do.²⁸⁰

There are several cases which seem to recognize some absolute duty upon the part of the landlord to the tenant as to the condition of the premises which renders him liable for all the acts of an independent contractor employed by him, and which undertake to impose such liability on him, without bringing the case within any recognized exception to the general rule of immunity from liability for a contractor's acts.²⁸¹ Thus, he has been held liable

^{276b} *Dalkowitz v. Schreiner* (Tex. Civ. App.) 110 S. W. 564.

²⁷⁷ 16 Am. & Eng. Enc. Law (2d Ed.) 206.

²⁷⁸ *Aldag v. Ott*, 28 Ind. App. 542, 63 N. E. 480.

²⁷⁹ 16 Am. & Eng. Enc. Law (2d Ed.) 196.

²⁸⁰ *Evans v. Murphy*, 87 Md. 498, 40 Atl. 109. *McHenry v. Marr*, 39 Md. 510, is perhaps based on the same theory.

²⁸¹ In *Rosenberg v. Zeitchik*, 52 Misc. 153, 101 N. Y. Supp. 591, it is said that the rule as to independent contractors does not apply as between landlord and tenant. Why this should be so is not stated, and the case cited (*Sulzbacher v. Dickie*, 6 Daly [N. Y.] 469, ante, note 276) does not support the statement.

An analogous view is apparently adopted in *Blickley v. Luce's Estate*, 148 Mich. 233, 14 Det. Leg. N. 121, 111 N. W. 752, where the landlord was held liable for the act of one of his tenants in making alterations authorized by him which resulted in the fall of the building to the injury of another tenant in the building. The decision might have been placed, it seems, on the ground that such work was in its nature, unless special precautions were taken, calculated to cause injury to other tenants. Ante, at notes 273, 274.

In *Myhre v. Schleuder*, 98 Minn. 234, 108 N. W. 276, it was held that a landlord was liable for the fall of a platform constructed by a tenant of part of the building under authority from him, but at the ten-

for injuries to his tenant's goods caused by the defects in an "automatic sprinkler system" erected by an independent contractor,²⁸² and also, without reference to the character of the work as involving risk of injury to the tenant, for the failure of the contractor to protect the tenant from the rain while replacing the roof.²⁸³ These cases fail, it would seem, to give proper attention to the effect of the tenant's consent to the doing of the work as relieving the landlord from any absolute duty not to interfere with the tenant's possession.

If the landlord is subjected to liability to the tenant by reason of the negligence of the contractor in doing the work, he may, it seems, recover over against the latter,²⁸⁴ and such would seem to

ant's expense, such fall injuring an employee of another tenant. The case cites *Wertheimer v. Saunders*, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146, ante, note 274, where, however, the work was such as necessarily to involve danger during its performance unless precautions were taken; but in the principal case the platform fell after its construction.

²⁸² *Peerless Mfg. Co. v. Bagley*, 126 Mich. 225, 85 N. W. 568, 53 L. R. A. 285, 86 Am. St. Rep. 537. In this case the defect in the sprinkler system, consisting of its adjustment so as to flood the building when subjected to the heat of the sun merely, was not discoverable by the landlord, so that his liability could not well be regarded as based upon the acceptance by the landlord from the contractor of the completed work. See ante, note 276 a.

²⁸³ In *Bancroft v. Godwin*, 41 Wash. 253, 83 Pac. 189, the landlord was held liable, by reason of the negligence of the contractor in leaving the roof in such condition that water came through, on the ground that "by virtue of said lease, actually, or by implication (the lessor)

guaranteed that he would neither do, nor permit to be done, anything which would render said premises unfitted for such purpose, or disturb the substantial enjoyment by his tenant thereof, as contemplated by the lease." The opinion cites *Wusthoff v. Schwartz*, 32 Wash. 337, 73 Pac. 407, but that case involved an eviction by reason of acts of a contractor, done by order of the lessor, causing the tenant to vacate the premises.

Nahm v. Register Newspaper Co., 27 Ky. Law Rep. 887, 87 S. W. 296, in which the landlord was held liable for rain thus entering the building when the roof was removed by a contractor in the course of the erection of a second story, contains expressions to the effect that the landlord is under an absolute duty of this sort, but it also refers to the finding that the work was undertaken without the tenant's consent.

See, also, *Blumenthal v. Prescott*, 70 App. Div. 560, 75 N. Y. Supp. 710, and other New York cases, ante, note 276.

²⁸⁴ See 1 Clark & Skyles, Agency, § 401; Huffcut, Agency (2d Ed.) § 288.

be the ground of liability in a case in which, a subtenant having recovered against the original tenant on account of injuries from the negligence of the landlord in chief, who had undertaken, in pursuance of his contract with the tenant contained in the original lease, to make the repairs, the tenant in chief was allowed to recover over against the landlord in chief the amount of the judgment in favor of the subtenant.²⁸⁵

The decisions exempting a landlord from liability for injuries to the tenant as a result of the acts of an independent contractor are fewer in number than those imposing such a liability, and they are, on the facts, difficult to reconcile with the latter, though presumably, in theory, they are all cases in which the work contracted for was in itself not such as to involve any risk to the tenant's person or goods, if properly carried out.

The landlord has been held not to be liable for injuries to property of the tenant caused by the escape of water from a drain pipe negligently broken by an independent contractor while making improvements with the tenant's consent,²⁸⁶ nor for such injuries caused by the escape of water from a cistern owing to the negligence of the plumber employed to repair it,²⁸⁷ nor for personal injury caused by falling into a privy vault left unenclosed by the contractor,²⁸⁸ nor for injury to an invalid resulting from the negligence of a contractor repairing a chimney on the premises, which caused soot and other matter to fall down and frighten and suffocate him,²⁸⁹ nor for injury caused by the failure of a contractor, employed to "underlay" a wall with stone, properly to support the wall while so doing.²⁹⁰

In one case it is decided that if the landlord, with the consent of the tenant, employs a contractor to make repairs for their com-

²⁸⁵ *Prescott v. Le Conte*, 83 App. Idle District Council [1896] 1 Q. B. Div. 482, 82 N. Y. Supp. 411, *affd.* 335.

without opinion 178 N. Y. 585, 70 N. E. 1108. It cannot be said, however, that the view indicated in the text is explicitly stated in the opinion. ²⁸⁸ *Wiese v. Remme*, 140 Mo. 289, 41 S. W. 797. The court says that the work was "not of a dangerous character."

²⁸⁶ *Jefferson v. Jameson & Morse* 356, 33 N. Y. Supp. 562. Co. 165 Ill. 138, 46 N. E. 272. ²⁸⁹ *O'Connor v. Schnepel*, 12 Misc.

²⁸⁷ *Blake v. Woolf* [1898] 2 Q. B. 587. This, however, was merely a decision by a single judge as arbitrator. ²⁹⁰ *Lawrence v. Shipman*, 39 Conn. 426. This case seems somewhat difficult to reconcile with *Hardaker v.*

mon benefit, the landlord being otherwise under no obligation to make them, the tenant can look only to the contractor for compensation for damage caused by the latter's negligence.²⁹¹

g. Total or partial destruction of premises. The landlord is, in the absence of any covenant bearing on the subject, under no obligation to rebuild a structure on the land leased which has been totally or partially destroyed by fire or other cause, this being merely one application of the principle that the landlord is not responsible for the condition of the premises.²⁹² The fact that there is in the instrument of lease an express covenant for quiet enjoyment is immaterial in this regard,²⁹³ as is the fact that the landlord has received the proceeds of insurance on the structure destroyed.²⁹⁴

A tenant has been regarded as entitled to contribution from the lessor for expenses incurred by him in removing a wall left in a dangerous condition after the destruction of a building by fire.²⁹⁵

Occasionally the instrument of lease contains an express covenant by the lessor to rebuild in case of the destruction of the premises by fire.²⁹⁶ It has been decided that such a covenant, in the

²⁹¹ *Lasker Real-Estate Ass'n v. 416, 19 Law. Ed. 166; Sedalia Plan-*
Hatcher (Tex. Civ. App.) 28 S. W.
404. *ing Mill & Lumber Co. v. Swift &*
Co., 129 Mo. App. 471, 107 S. W.

To the same effect is *Eblin v. Mil-*
ler's Ex'r, 78 Ky. 371, where it is
decided that if the landlord gratui-
tously agrees with the tenant to have
repairs made by the person regu-
larly employed by him for such pur-
pose, and who is competent for the
purpose, the landlord is not liable
for the negligence of such person, he
having done his duty in sending
him to do the work.

²⁹² *Bayne v. Walker, 3 Dow, 233;*
Leavitt v. Fletcher, 92 Mass. (10
Allen) 119; Arbenz v. Exley, Wat-
kins & Co., 52 W. Va. 476, 44 S. E.
149, 61 L. R. A. 957.

²⁹³ *Brown v. Quilter, Amb. 619.*

²⁹⁴ *Leeds v. Cheetham, 1 Sim. 146;*
Lofft v. Dennis, 1 El. & El. 474;
Sheets v. Selden, 74 U. S. (7 Wall.)

²⁹⁵ *French v. Richards, 6 Phila.*
(Pa.) 547. The court is of that
opinion, though it rests its decision
partly upon a local statute provid-
ing for the removal of dangerous
walls.

²⁹⁶ *In Ganson v. Tift, 71 N. Y. 48,*
where there was such a covenant,
and it was also provided that if the
landlord failed to rebuild accord-
ly within six months after the fire
the tenant might elect to terminate
the lease, it was held that if the
landlord notified the tenant that he
did not intend to rebuild, the ten-
ant, without making any election or
offering to pay rent, could recover
damages for breach of the covenant.
Such a covenant, in connection

case of a lease of premises on which was a wooden building, became inoperative upon the passage of an ordinance forbidding the erection of wooden buildings, and did not require the erection of a building of another material.²⁹⁷ A covenant by the lessor to build on the premises has been held not to require him to rebuild on the destruction of the building first erected.^{298, 299}

An express covenant by the landlord to repair the premises is regarded as requiring him to rebuild any structures or parts of structures destroyed,³⁰⁰ the construction of such a covenant on the part of the landlord being the same as that of a similar one by the tenant.³⁰¹ And a covenant to repair the outside of the building requires him, it has been decided, in case of the fall of the building, to repair "the whole outer shell of the building, or external inclosure of roof and sides."³⁰² But it has been decided elsewhere that a covenant to make all inside and outside repairs does not apply to extraordinary repairs, such as the restoration of a building partially destroyed by fire.³⁰³ In one case it was held that the measure of damages for breach of a covenant to repair the outside of the building, where the tenant had covenanted to repair the inside, and the building was burned, was the total loss to the tenant by deprivation of occupancy, less what it would have cost the tenant to occupy, that is, the cost of repairing the inside. In this case it was also decided that the fact that the landlord had the right to terminate the tenancy on destruction

with other clauses, was held to require the lessor to rebuild a structure which fell after the making of the demise and before the beginning of the term. *Lightfoot v. West*, 98 Ga. 546, 25 S. E. 587.

Specific performance of a covenant by a lessor to repair damages caused by fire will not be decreed. *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430.

²⁹⁷ *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430.

In *Williams v. Tyas*, 4 Grant Ch. (Up. Can.) 533, a court of equity in such a case made a decree fixing an increased rent upon rebuilding with

a more expensive material, as required by ordinance.

^{298, 299} *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430.

³⁰⁰ *Reno v. Mendenhall*, 58 Ill. App. 87; *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 119; *Crocker v. Hill*, 61 N. H. 345, 60 Am. Rep. 322; *Myers v. Burns*, 33 Barb. (N. Y.) 401.

³⁰¹ See post, § 116 d.

³⁰² *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 119; *Green v. Eales*, 2 Q. B. 225; *Crocker v. Hill*, 61 N. H. 345, 60 Am. Rep. 322.

³⁰³ *May v. Gillis*, 169 N. Y. 330, 62 N. E. 385.

of the building was no defense to an action on the covenant so long as he did not terminate it.^{303a}

Although a landlord is, in most jurisdictions, under no obligation to rebuild structures which have been destroyed, and ordinarily the tenant's obligation for rent continues as before such destruction,³⁰⁴ there are in a number of states statutory provisions relieving the tenant from liability for rent in such case, or until the landlord rebuilds.³⁰⁵

It has been decided that a covenant by the landlord to rebuild the premises if destroyed or rendered untenable by the elements or act of God does not apply when, by gradual action of the elements and also by reason of frequent alterations, the building becomes so unsafe as to be condemned by the city authorities.^{305a} Elsewhere, a covenant to restore in case the premises are destroyed by fire or "injured by the elements so as to be untenable," was held not to refer only to injuries brought about by a sudden, unusual, forcible and unforeseen disturbance, but to include deterioration resulting from the ordinary action of rain, heat, cold and the like.^{305b}

h. Repairs and improvements required by public authorities. Conceding that the tenant is under an obligation to make "ordinary" repairs,³⁰⁶ such repairs, alterations or improvements as may be demanded by the public authorities in the interest of the public health and safety cannot usually, it is evident, be regarded as ordinary repairs, and the question as to whether the landlord or the tenant is bound to make them is one of some difficulty, to which the cases afford no satisfactory answer. The statute or ordinance under which the municipal authorities act ordinarily, it may be presumed, imposes the obligation on the "owner" or "proprietor" of property, but the question as to whether the landlord or the tenant is within the meaning of such an expression might well arise. It would ordinarily be said that, in the case of a lease for a year, or for a few years, the landlord is the owner or proprietor for this purpose, but whether he could be so con-

^{303a} *Crocker v. Hill*, 61 N. H. 345.
60 Am. Rep. 322.

³⁰⁴ See post, § 182 m (1).

³⁰⁵ See post, § 182 m (8).

^{305a} *Kirby v. Wylie* (Md.) 70 Atl.
213.

^{305b} *Hanchett v. O'Reilly* (N. J. Law) 68 Atl. 1066, citing *Van Wormer v. Crane*, 51 Mich. 363, 16 N. W. 686, 47 Am. Rep. 582, post, § 118 a, note 1048.

³⁰⁶ See post, § 113.

sidered in the case of a lease for forty or fifty years might be questioned, and it seems unlikely that he would be considered the owner or proprietor of a building for this purpose, in case the building was not in existence at the time of the lease but was subsequently constructed by the tenant. Perhaps this consideration, whether the building or other structure required to be altered or repaired, existed at the time of the lease, furnishes as satisfactory a criterion as can be found as to whether, apart from covenants bearing on the subject, the landlord or the tenant is the one to bear the expense, that is, the landlord should be responsible to the public authorities for the condition of structures which formed part of the property as leased and the tenant should be responsible for the condition of those thereafter erected by him. So in the case of an improvement, such as a drain or sewer, which is required by the public authorities, the question whether the landlord or the tenant shall be liable for the cost thereof might well be determined by the consideration whether its construction is necessitated by a condition of the property which existed at the time of the demise, or by a condition which thereafter arose by reason of a structure voluntarily erected by the tenant or of a peculiar use of the premises made by him. In the case of an improvement upon the premises which may be demanded by the public authorities without reference to any building or improvement which may previously exist upon the land, as when, in the course of a general scheme of public improvement, the owner of every lot, whether improved or unimproved, is required to construct a drain or sewer, or to pave the street in front of the lot, the demand by the authorities is evidently equivalent to a special assessment, the burden of which is ordinarily imposed on the reversioner.³⁰⁷ This question of the liability, as between the landlord and the tenant, for repairs, alterations or improvements, demanded by the municipal authorities, apart from any covenants bearing on the matter,^{307a} has not been the subject of judicial discussion, but in a few cases it has been assumed that the cost must fall upon the landlord.³⁰⁸ In each of these cases the structure required to be

³⁰⁷ See post, § 143 c (4).

Atl. 326; *Lindwall v. May*, 111 App.

^{307a} As to covenants by lessee assuming such liability, see post, at notes 1016-1020.

Div. 457, 97 N. Y. Supp. 821; *City of New York v. United States Trust Co.*, 116 App. Div. 349, 101 N. Y.

³⁰⁸ *Clark v. Gerke*, 104 Md. 504, 65 Supp. 574.

altered or repaired existed at the time of the lease, and they furnish no ground for questioning that the tenant would be liable for the cost in case the alteration or repair was demanded by reason of a condition created by himself.³⁰⁹

In case the municipal authorities in effect condemn the building, by requiring that it be either torn down or substantially reconstructed, the tenant cannot, it would seem, apart from covenant, demand that the landlord reconstruct the building,³¹⁰ or, which is the same thing, reconstruct it himself and demand reimbursement by the landlord.³¹¹ Such a case is analogous to that of the destruction of the building by the elements.³¹² The question occasionally arises whether the tenant has, by particular language in the instrument of lease, assumed the burden of making such alterations or improvements as may be required by the municipal authorities.³¹³

In England the statutes by force of which the burden of making particular alterations or improvements is imposed, while in terms requiring them to be made by the "owner," almost invariably define the word "owner," and define it in such a way as to impose the burden on the landlord rather than the tenant.^{313a} Consequently, it appears never to have been suggested in that jurisdiction that, apart from covenant, the expense of such works would be imposed upon the tenant. There has, however, been much litigation as to whether a particular covenant on the part of the

³⁰⁹ In *City of New York v. United States Trust Co.*, 116 App. Div. 349, 101 N. Y. Supp. 574, the view is expressed that the fact that the requirement of an alteration arose by reason of a structure existing at the time of the lease was a reason for imposing the cost on the landlord.

³¹⁰ *Torrens v. Walker* [1906] 2 Ch. 166.

³¹¹ This is apparently recognized in *Clark v. Gerke*, 104 Md. 504, 65 Atl. 326, where the obligation of the landlord to reimburse the tenant for the cost of repairs was based upon his request to the latter to make them.

³¹² See ante, § 87 d g; post, § 182 p.

³¹³ See post, at notes 1016-1018.

In *Keroes v. Richards*, 28 App. D. C. 310, the lessee had covenanted to make repairs, and, the authorities having required the reconstruction of a private sewer on the premises with a more expensive material than had been originally used, it was held that the lessee was liable under his covenant "at least" for what the reconstruction with the same material would have cost, thus indicating the view that the lessor would be bound for so much of the cost as fell outside the covenant.

^{313a} See *Stroud's Judicial Dictionary*, sub voce "Owner."

lessee was such as to render him liable to the particular charge in question, and there have been numerous decisions as to the construction of particular words in the covenant, such as "rates," "assessments," "impositions," "duties," "charges," and "outgoings."³¹⁴

B. AS TO ADJOINING PARTS, PLACES AND PREMISES.

§ 88. Parts of building not open to tenant.

The owner of a building frequently demises a part thereof, retaining the balance in his own control, with the purpose of occupying it himself, or of subsequently leasing it to another. Moreover, when he demises different parts of the building to various persons, there are almost invariably portions of the building which cannot be regarded as included in any one of the various demises, the roof for instance, or, in some cases, the foundation, as well as passage ways, approaches, or other places which are open to use by more than one tenant. We will consider in the next section the landlord's obligations as regards the condition of parts of the building, the possession of which is retained by him, but which are open to use by one or more tenants. In this we will consider his obligations as regards the condition of parts of the building not demised and not open to use by the tenants.

The general rule in this regard is that the landlord, thus retaining part of the building in his possession, is liable to the tenant, as he would be to a third person, for injury to the tenant's person or property caused by his, the landlord's, failure to exercise due care to prevent such injury by reason of a dangerous condition of that part of the property in his possession.³¹⁵ Accordingly, a landlord has been held liable for injury to the tenant caused by the fall of a sign board, appertaining to the part of the building retained by the landlord, which was inadequately secured,³¹⁶ and he has likewise been held liable for injury to the tenant of a lower floor caused by the collapse of an upper floor

³¹⁴ See the cases collected in *Faw. Nat. Bank v. Swope* (Tex. Civ. cett, Landl. & Ten. (3d Ed.) at p. App.) 18 Tex. Ct. Rep. 328, 101 S. 389; *Woodfall, Landl. & Ten.* (16th W. 872.

Ed.) at 589 et seq.

³¹⁵ *Payne v. Irvin*, 144 Ill. 482, 33

³¹⁶ There is no liability apart N. E. 756.

from negligence. *American Exch.*

owing to alterations made in the latter by a former tenant, the landlord having failed, after the departure of such former tenant, to exercise reasonable care to detect and eliminate the possibility of danger from such alterations.³¹⁷ And so he has been regarded as liable for injuries to the chattels belonging to the tenant of a part of the building, caused by the fall of a chimney, or other part of the building, not a part of the demised premises.³¹⁸

The ceiling of a particular apartment leased is part of the leased premises and is not within the landlord's control so as to subject him to liability for defects therein,³¹⁹ unless perhaps it is expressly excepted from the operation of the lease.³²⁰

The owner of a building, leasing a part thereof and retaining possession of another part, is bound to exercise ordinary care to avoid injury to his tenant by the manner in which he may use the part retained by him.³²¹ This duty does not grow out of the relation of landlord and tenant, but is merely one aspect of an obligation, generally incumbent upon one in possession

³¹⁷ *Quigley v. H. W. Johns Mfg. Co.*, 26 App. Div. 434, 50 N. Y. Supp. 98. In this case it was held that the fact that the tenant injured had the opportunity to examine the upper floor did not necessarily show that he was guilty of contributory negligence, since the jury might find that reasonable care on the part of the landlord involved a higher degree of diligence than reasonable care on the part of the tenant.

³¹⁸ *Eagle v. Swayze*, 2 Daly (N. Y.) 140; *Bold v. O'Brien*, 12 Daly (N. Y.) 161.

³¹⁹ *Dalton v. Gibson*, 192 Mass. 1, 77 N. E. 1035, 116 Am. St. Rep. 218; *Kushes v. Ginsberg*, 99 App. Div. 417, 91 N. Y. Supp. 216; *Boden v. Scholtz*, 101 App. Div. 1, 91 N. Y. Supp. 437; *Schiff v. Pottlitzer*, 51 Misc. 611, 101 N. Y. Supp. 249; *Pol-lak v. Stolzenberg*, 110 N. Y. Supp. 224.

³²⁰ See *Golob v. Pasinsky*, 178 N. Y. 458, 70 N. E. 973.

That the landlord has made repairs to the ceiling does not show any obligation upon his part to keep it in repair. *Dalton v. Gibson*, 192 Mass. 1, 77 N. E. 1035, 116 Am. St. Rep. 218; *Schiff v. Pottlitzer*, 51 Misc. 611, 101 N. Y. Supp. 249.

³²¹ See *Buckley v. Cunningham*, 103 Ala. 449, 15 So. 826, 49 Am. St. Rep. 42 (dictum); *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; *Railton v. Taylor*, 20 R. I. 279, 38 Atl. 980, 39 L. R. A. 246.

A covenant, by one leasing an upper floor, not to permit the lower floor to be used for any business of a noxious or offensive character, or which was hazardous, was held not to apply to a business carried on by the lessor at the time of the lease on such lower floor, as the lessee knew when taking the lease. *Neiman v. Butler*, 46 N. Y. St. Rep. 928, 19 N. Y. Supp. 403.

of property, to employ reasonable care to so use it as not to injure the owner or possessor of neighboring property.³²² On this principle a landlord has been held liable for injury to the tenant of a floor in his building by the leakage of water or other liquid from an upper floor occupied by the landlord, as a result of the use made by him of that floor.³²³ And the existence of such leakage is, it seems, *prima facie* evidence of negligence on the part of the landlord in the control of the upper floor.³²⁴ The question whether he could be held liable for such leakage, although not guilty of negligence, might arise in some jurisdictions.³²⁵

Though a landlord is, as above indicated, bound to exercise diligence to prevent injury to the person or property of the tenant of one part of a building by reason of the condition or use made by him of the other part, he has ordinarily been regarded as under no obligation to keep such part of the building in repair merely in order to protect such tenant from injury by extraneous agencies. Accordingly it has been decided that the tenant of a part of the building cannot demand that the landlord repair leaks in the roof, or hold him liable for injuries to the tenant's chattels upon his failure to do so and the consequent flooding of the premises by rain.³²⁶ The tenant has, however, an easement in the use

³²² See *Krueger v. Ferrant*, 29 Minn. 385, 13 N. W. 158, 43 Am. St. Rep. 223; 1 *Cyclopedia Law & Proc.* 769.

As to the right of the landlord, apart from any question of negligence, to use the adjoining parts of the building in a way injurious to the tenant, see post, §§ 135, 185 f (8).

³²³ *Hysore v. Quigley*, 9 *Houst. (Del.)* 348, 32 *Atl.* 960; *Stapenhorst v. American Mfg. Co.*, 36 N. Y. Super. Ct. (4 Jones & S.) 392, 15 *Abb. Pr. (N. S.)* 355.

³²⁴ *Levy v. Korn*, 30 *Misc.* 199, 61 N. Y. Supp. 1109. See cases post, notes 401, 402.

³²⁵ See the reference to the doctrine of *Rylands v. Fletcher*, L. R. 3 H. L. 330, post, at note 428.

³²⁶ *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47; *Simons v. Seward*, 54 N. Y. Super. Ct. (22 Jones & S.) 406; *Krueger v. Ferrant*, 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223; *Dalton v. Gibson*, 192 *Mass.* 1, 77 N. E. 1035, 116 Am. St. Rep. 218 (semble); *Jones v. Millsaps*, 71 *Miss.* 10, 14 *So.* 440, 23 *L. R. A.* 155; *Hanley v. Banks*, 6 *Okl.* 79, 51 *Pac.* 664; *Betcher v. Hagell*, 38 *Nova Scotia*, 517. See 1 *Wms. Saund.* 322, note to *Pomfret v. Ricroft*, by Sergeant Williams, where he expresses an opinion to this effect and refers to *Tenant v. Goldwin*, 6 *Mod.* 314, 1 *Salk.* 361, where a case in *Keilw.* 98 b, in which two judges are said to have expressed a contrary view, is questioned.

of the roof for his protection, and if the landlord impairs this by active interference, as by tearing off the roof, he is liable to the tenant for the resulting injury to the latter's goods.³²⁷ The tenant has, furthermore, it seems, a right to inspect the roof and to make repairs thereon, in accordance with the general rule that the owner of the dominant tenement may repair the subject of the easement.³²⁸ In two or three states a more stringent view as to the obligations of the landlord as regards the condition of the roof has been asserted, to the effect that if the control thereof remains in him, he is bound to exercise reasonable diligence to keep it sufficiently in repair to protect the property of the tenants from injury by the weather, and is liable in damages if he fails to do so.³²⁹ In New York it has been clearly decided by the

³²⁷ *Sulzbacher v. Dickie*, 6 Daly (N. Y.) 476; *Worthington v. Parker*, 11 Daly (N. Y.) 561; *Randolph v. Feist*, 23 Misc. 650, 52 N. Y. Supp. 109; *Pratt, Hurst & Co. v. Tailer*, 186 N. Y. 417, 79 N. E. 328; *Herbst v. Hafner*, 7 Pa. Super. Ct. 363. And see cases cited ante, notes 255, 274, 276.

³²⁸ See Sergeant Williams' note to *Pomfret v. Ricroft*, 1 Wms. Saund. 322; *Krueger v. Ferrant*, 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223; *Hanley v. Banks*, 6 Okl. 70, 51 Pac. 664.

³²⁹ *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54, is to this effect. This case is criticized in *Krueger v. Ferrant*, 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223, and in *Jones v. Millsaps*, 71 Miss. 10, 14 So. 440, 23 L. R. A. 155, in which latter case it is well said that "the vice of the opinion is that it confounds the passivity of the landlord with affirmative action on his part amounting to negligence."

In *Fairmount Lodge No. 590 v. Tilton*, 122 Ill. App. 636, the landlord is held to be under an obligation in such case to keep the roof

in repair. In *Rehbach v. Vogt*, 126 Ill. App. 613, he is said to be bound to exercise reasonable diligence to discover and repair defects. In *Bissell v. Lloyd*, 100 Ill. 214, there was a covenant by the lessee to repair the room leased, and the court says that "the fair implication from this express undertaking is that the lessor undertook to keep the residue of the building in repair." In *Trower v. Wehner*, 75 Ill. App. 655, a like undertaking was inferred from a covenant by the lessee to return in good condition the portion of the building leased. The propriety of thus inferring an intention to impose an obligation on the landlord from a covenant so clearly inserted for his protection may well be doubted.

In *Guthman v. Castleberry*, 49 Ga. 272, it was held that the landlord was liable for failure to repair the roof if he had notice of the need of repairs. But this was no doubt based on the statute of that state requiring the landlord to keep the premises in repair. Ante, § 87 c.

In *Kneeland v. Beare*, 11 N. D. 233, 91 N. W. 56, it is positively asserted

highest court that the landlord owes no obligation to the tenant of a part of the building to repair the roof so as to protect the tenant from injury by the action of the elements,³³⁰ but a later case in that court is perhaps calculated to raise some question in regard thereto,³³¹ and there are cases in the intermediate appellate court which cannot be reconciled with such a view.³³² It

that the landlord is bound to repair the roof, but there the injury was caused, not by failure to repair the roof, but by the landlord's negligence in failing to keep the water spout clear, so that water was collected upon the roof to such a depth as to pass through a hatchway. There is an element of active misfeasance in such a case. The occupant of property so constructed as to collect water to the injury of neighboring property unless drained off would seem to owe a duty of diligence to see that the drain is unobstructed. See somewhat analogous cases cited 3 Farnham, Waters, § 982, and Hargroves, Aronson & Co. v. Hartopp [1905] 1 K. B. 472, where the landlord was on this theory held liable for failure to clear out a gutter on the roof.

³³⁰ Doupe v. Genin, 45 N. Y. 119, 6 Am. Rep. 47.

³³¹ In Golob v. Pasinsky, 178 N. Y. 458, 70 N. E. 973, it was held that a complaint for personal injuries to a tenant caused by the fall of a ceiling was good on demurrer when it alleged that by the negligence of defendant landlord the roof was permitted to become dangerous and out of repair, and that this dangerous condition caused the plaster of the ceiling to fall. As the court says: "How the defective condition of the roof caused the ceiling to fall was a matter of proof, not of pleading." If the ceiling fell merely

by reason of the insufficiency of the roof to protect the ceiling from the rain, the landlord would not, under the doctrine of Doupe v. Genin, 45 N. Y. 119, 6 Am. Rep. 47, supra, be liable therefor, while if it fell, not by reason of the insufficiency of the roof as a protection, but because the landlord negligently allowed the roof to become so weak as to fall upon the ceiling, he would be liable.

³³² That he is under such an obligation is decided in Schwartz v. Monday, 49 Misc. 527, 97 N. Y. Supp. 978; Valentine v. Woods, 59 Misc. 471, 110 N. Y. Supp. 990. In Rauth v. Davenport, 60 Hun, 70, 14 N. Y. Supp. 69, the landlord was held liable for injuries to the tenant's property owing to leakage through the roof which was under the landlord's control. The decision seems to be based in part on the fact that the landlord promised to repair the roof if the tenant would remain. So far as it holds that apart from this promise the landlord is liable in such a case, it is, it seems, in conflict with Doupe v. Genin, 45 N. Y. 119, 6 Am. Rep. 47, though it attempts to distinguish the later case on the ground that there the defect in the roof was the result of fire. How the cause of the defect in the roof can affect the question does not appear. In Frank v. Simon, 109 App. Div. 38, 95 N. Y. Supp. 666, it is decided, without any mention of Doupe v. Genin, 45

is somewhat difficult to perceive upon what principle an obligation can be imposed on the landlord to repair the roof for the protection of the tenant from the elements. Such a duty cannot well grow out of the relation of landlord and tenant, since there is, as is well settled,³³³ no obligation on the former to keep the premises in good and suitable condition, and the fact that he is, as it were, the owner of adjoining property, which is a source of protection to the leased premises, would not ordinarily obligate him to make repairs on such property.³³⁴

It has been decided that, even conceding that the landlord is under an obligation to repair the roof which is under his control, he is under no such obligation as regards a part of the roof which covers only that part of the building included in the lease, since that is to be regarded as within the tenant's control.³³⁵ And the tenant could not recover for injuries to his property on the premises if he left it there knowing of the possibility of injury.³³⁶ It has also been recognized that such a liability for nonrepair of the roof, not based upon any express stipulations in the instrument of lease, if its existence is to be conceded, is to be regarded as tortious in character, arising from negligence, and not as arising from an "implied contract" to keep the roof in repair.³³⁷

On the same theory as that asserted in connection with the repair of the roof, that the landlord is under no obligation to repair parts of the building under his control, in order to protect the parts included in the lease, so long as the nonrepair does not make the former an actual source of danger to the latter, the tenant

N. Y. 119, 6 Am. Rep. 47, *supra*, that the landlord was liable for injury to a tenant caused by the fall of the ceiling in his apartment, resulting from leakage through the roof of the building, loosening the plaster. 321, note (1) to *Pomfret v. Riccroft*. In *Cheeseborough v. Green*, 10 Conn. 318, 26 Am. Dec. 396, he is said to be under no such obligation at law, whatever might be the case in equity.

³³³ See ante, § 87 a.

³³⁴ The owner in fee of the upper floor of a building has been regarded as under no obligation to repair the roof for the benefit of the owner of the lower floor. *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716; *Tenant v. Goldwin*, 6 Mod. 314, 1 Salk. 361, 2 Ld. Raym. 1091, 1 Wms. Saund.

³³⁵ *Lichtig v. Poundt*, 23 Misc. 632, 52 N. Y. Supp. 136; *Margolius v. Muldberg*, 88 N. Y. Supp. 1048.

³³⁶ *Klausner v. Herter*, 36 Misc. 869, 74 N. Y. Supp. 924; *Margolius v. Muldberg*, 88 N. Y. Supp. 1048.

³³⁷ *Kuhn v. Sol. Heavenrich Co.*, 115 Wis. 447, 91 N. W. 994, 60 L. R. A. 585.

of a part of the building, it has been decided, cannot, upon the fall thereof, recover of the landlord on account of the latter's failure to keep in repair the outside or other wall on which the leased premises were dependent for support, it being for the tenant to make repairs necessary for this purpose.³³⁸ The landlord is under no greater obligation to his tenant as regards such a wall than any owner of land is to repair a wall thereon which furnishes a support to a building on adjoining land, and no such obligation, it has been decided, exists as against an adjoining owner.³³⁹

In some jurisdictions, even though the landlord is under no obligation to keep in repair parts of the building in his control as a means of protection to the tenant, in the sense that he is liable for injuries caused by failure to repair, the latter may, presumably, abandon the premises and refuse to pay rent, if such lack of repair renders the premises untenable.³⁴⁰

If the landlord maintains a nuisance upon the premises of which he retains control, he is no doubt liable to the tenant of another part of the building, as he would be to any adjoining owner, and he is so liable if he authorizes another to maintain a nuisance thereon, or leases it for a purpose which involves the maintenance of a nuisance.³⁴¹

§ 89. Places open to use by tenant.

a. **Common approaches.** It frequently happens that the owner of a building demises separate parts thereof to different tenants, access to which parts is by means of a passage, stairway, or other means of approach, which, while intended for the use of the different tenants, is not in itself included in the demise to any one of them and consequently remains in control of the landlord. In such case the landlord in effect invites the use

³³⁸ *Colebeck v. Girdlers' Co.*, 1 Q. York v. Steward, 21 Mont. 515, 55 B. Div. 234; *Ward v. Fagin*, 101 Mo. Pac. 29, 43 L. R. A. 125; *Graves v.* 669, 14 S. W. 738, 10 L. R. A. 147, 20 *Berdan*, 26 N. Y. 498. Commented Am. St. Rep. 650; *Miles v. Tracey*, on in *Doupe v. Genin*, 45 N. Y. 28 Ky. Law Rep. 621, 89 S. W. 1128. 119, 6 Am. Rep. 47; *Johns v. Eichel-*

³³⁹ *Chauntler v. Robinson*, 4 Exch. berger, 109 Ill. App. 35. And see 163; *Pierce v. Dyer*, 109 Mass. 374, post, § 182 n.

12 Am. Rep. 716.

³⁴¹ *Winter v. Baker*, 3 Times Law

³⁴⁰ See *Bissell v. Lloyd*, 100 Ill. R. 569; *Jenkins v. Jackson*, 40 Ch. 214; *Vann v. Rouse*, 94 N. Y. 401; Div. 71.

of such passages or stairway by the tenants, and by other persons whose relations to the tenants involve their use of these approaches in order to obtain access to the rooms or apartments demised, and he is accordingly regarded as liable, both to the tenant and such other persons,³⁴² for any injury caused by his failure to exercise reasonable care to keep such parts of the building in proper repair,³⁴³ as is any owner of land or of structures

³⁴² As to the particular classes of persons to whom, besides the tenant, he owes the obligation to keep such places in repair, see post, § 98.

³⁴³ See *Gillvon v. Reilly*, 50 N. J. Law, 26, 11 Atl. 481; *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. 901, 15 Am. St. Rep. 199; *Dean v. Murphy*, 169 Mass. 413, 48 N. E. 283; *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293; *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124, 10 Am. St. Rep. 260, 3 L. R. A. 458; *Barman v. Spencer* (Ind.) 49 N. E. 9; *Pell v. Reinhart*, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843 (hole in stairway carpet); *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238 (defective ceiling, fall of plaster); *Wilber v. Follansbee*, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; *La Plante v. La Zear*, 31 Ind. App. 433, 68 N. E. 312; *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097 (unguarded elevator shaft); *Burke v. Hulett*, 216 Ill. 545, 75 N. E. 240; *Lewin v. Pauli*, 19 Pa. Super. Ct. 447; *Siggins v. McGill*, 72 N. J. Law, 263, 62 Atl. 411, 111 Am. St. Rep. 666; *Miller v. Hancock* [1893] 2 Q. B. 177; *Johnson v. Lembeck & Betz Brew. Co.* (N. J. Law) 68 Atl. 85.

In *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255, there is a dictum to the effect that the landlord is not responsible for the condition of a common passageway; but in *Bar-*

man v. Spencer (Ind.) 49 N. E. 9, a view in accordance with the weight of authority is apparently adopted, as it explicitly is in *La Plante v. La Zear*, 31 Ind. App. 433, 68 N. E. 312. And so, in *Missouri*, the dictum in *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 20 Am. St. Rep. 650, 10 L. R. A. 147, adverse to such responsibility, is evidently overruled by *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334. *Humphrey v. Wait*, 22 U. C. C. P. 580, is not in accord with the rule as stated in the text. *Cole v. McKey*, 66 Wis. 500, 29 N. W. 279, 57 Am. Rep. 293, refers to this case and also to the earlier *Indiana* case, but does not either adopt or repudiate their view. The later case of *Wilber v. Follansbee*, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559, approves the rule ordinarily adopted.

In *Schwandt v. Metzger Linseed Oil Co.*, 93 Ill. App. 365, the liability of the landlord is based, in part at least, upon his covenant to keep the premises in repair, and upon his promise to repair the particular defect in the common stairway which caused the accident. The former could, however, not affect his liability for such a defect not in or upon the leased premises.

In *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. 901, 15 Am. St. Rep. 199, one was held liable for such a

thereon as regards persons whom he expressly or impliedly invites to enter thereon.³⁴⁴ And he is obviously liable for negligent acts on his own part rendering the approaches unsafe, as when he or his servants leave hatchways or elevator shafts therein unguarded.³⁴⁵

On what may be regarded as the same principle, that the landlord is bound to keep the common approaches safe, the lessor of several mill sites has been held liable for injuries caused by defects in a bridge leading to such mill sites, which was built and maintained by him.³⁴⁶ The same principle will render one who leases separate buildings to different persons liable for negligence in failing to keep in repair a pathway or approach common to all the buildings.³⁴⁷ It has been decided, however, that in the case of what is sometimes known as a "double house," that is, a building constituting two semi-detached houses, a flight of steps extending in front of each house or "tenement" as a means of

defect in a common stairway, although not the owner but merely the husband of the owner, he having assumed to be the owner and conducted himself as such both before and after the accident, and having contracted with the tenant as if the owner.

The original lessor is obviously not liable for injuries to one of several subtenants of his lessee, caused by defects in a passageway used in common by such sublessees, if he has leased the building as a whole, since he has no control of the common passageway. *Marley v. Wheelwright*, 172 Mass. 530, 52 N. E. 1066. In such case the lessee of the building, as having control of the passageway, is the person liable. *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354.

³⁴⁴ As to the general duty of the occupant of land, inviting another, either expressly or by implication, to come upon the premises, to exercise reasonable diligence to have them safe, see *Pollock*, Torts (6th

Ed.) 489; 2 *Jaggard*, Torts, 889; 2 *Shearman & Redfield*, Neg. §§ 704-706. Compare ante, § 86 d.

³⁴⁵ *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846; *Wilber v. Follansbee*, 97 Wis. 577, 72 N. W. 741; *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655; *O'Dwyer v. O'Brien*, 13 App. Div. 570, 43 N. Y. Supp. 815.

³⁴⁶ *Nash v. Minneapolis Mill. Co.*, 24 Minn. 501, 31 Am. Rep. 349.

³⁴⁷ "When houses are rented for dwellings, which can only be reached by the use of a common passage, the necessity of such use for the beneficial enjoyment of the thing demised establishes a right to such use and imposes an obligation upon the landlord to take reasonable care to have and maintain the passage safe for such use." *Gleason v. Boehm*, 58 N. J. Law, 475, 34 Atl. 886, 32 L. R. A. 645. See *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421.

access to both is a part of the two houses, half being included in the lease of each house, and is not a common approach under the control of the landlord of the two houses, for the purpose of this rule.³⁴⁸

In such case of a common passageway or other approach, there is, it seems, an easement therein in favor of each tenant, arising by implied grant, as appurtenant to the premises leased to him,³⁴⁹ but the ordinary rule that the owner of the dominant tenement, and not of the servient tenement³⁵⁰ must, as between themselves, make the repairs necessary for the enjoyment of the easement, is excluded by the special circumstances of the case,³⁵¹ and the theory would seem to be that, all obligation on the part of the tenant to make repairs being thus excluded, the liability of the landlord is that, as previously indicated, of a landowner expressly or impliedly inviting others to come upon the land for their mutual advantage.³⁵²

It has been decided that the obligation on the landlord of an office building to keep the passageways and approaches in a reasonably safe and suitable condition did not extend so far as to render him liable because he kept a certain entrance door locked over Sunday and thereby rendered it impossible for the tenant to remove his furniture so as to prevent its destruction by fire.³⁵³ Under some circumstances, however, the landlord would no doubt be liable for injuries caused by failure to keep a door unlocked so as to enable a tenant to escape or to rescue his possessions from a fire.³⁵⁴

b. Places other than approaches. In England, while the

³⁴⁸ *Kearnes v. Cullen*, 183 Mass. 298, 67 N. E. 243. See, also, *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708, 124 Am. St. Rep. 575.

³⁴⁹ *Miller v. Hancock* [1893] 2 Q. B. 177. See post, § 128.

³⁵⁰ *Goddard*, *Easements* (5th Ed.) 21, 374; *Gale*, *Easements* (7th Ed.) 451 et seq.; 1 *Tiffany*, *Real Prop.* § 324.

³⁵¹ *Miller v. Hancock* [1893] 2 Q. B. 177.

³⁵² See *Miller v. Hancock* [1893] 2 Q. B. 177, supra, adopting the principle of *Smith v. London & St. Katharine Docks Co.*, L. R. 3 C. P. 326, and also Mr. Pollock's statement of these and similar cases (*Pollock*, *Torts* [6th Ed.] 493). See, also, *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. Rep. 260; *Gillvon v. Reilly*, 50 N. J. Law, 26, 11 Atl. 481.

³⁵³ *Whitcomb v. Mason*, 102 Md. 275, 62 Atl. 749, 4 L. R. A. (N. S.) 565.

³⁵⁴ See *Sewell v. Moore*, 166 Pa. 570, 31 Atl. 370.

landlord's liability for injuries caused by defects in common passageways and other necessary approaches has been recognized, he has been regarded as not liable by reason of defects in places which are merely open, by permission of the landlord, for use by all the tenants and their families and employees, if they so desire, but the use of which is not necessary to the enjoyment of the premises.³⁵⁵ In this country, however, the landlord has been regarded as under an obligation to repair such parts of the building or places connected therewith, although the tenants or their families are under no necessity of making use thereof for the purpose of access to their respective tenements. Accordingly he has been held liable for defects in a yard or platform appurtenant to a building, which was open to use by the various tenants of the building as a place for drying clothes, as a playground for their children, or for other purposes,^{356, 357} and for defects in the approaches to such a place,³⁵⁸ and also for defects in a cellar, or in the stairs leading thereto, open to use by the various tenants,³⁵⁹ as well as for defects in a watercloset open for their use.³⁶⁰

c. **No liability apart from negligence.** The landlord is thus liable for injuries caused by defects in a passage, stairway, or other place used in common by the tenants, only if guilty of negligence, and when he has no actual notice of the defect, and the defect is of such recent origin or is of such a character that he could not be expected, in the exercise of ordinary diligence, to be aware thereof, he is not liable for resulting injuries.³⁶¹ But

³⁵⁵ *Ivay v. Hedges*, 9 Q. B. Div. 80. 471. See *Mills' Adm'r v. Cavanaugh*,
^{356, 357} *Garrett v. Somerville*, 98 29 Ky. Law Rep. 685, 94 S. W. 651.
 App. Div. 206, 90 N. Y. Supp. 705; ³⁵⁸ *Looney v. McLean*, 129 Mass.
Canavan v. Stuyvesant, 7 Misc. 113, 33, 37 Am. Rep. 295; *Clarke v.*
 27 N. Y. Supp. 413; *Schmidt v. Cook*, Welsh, 93 App. Div. 393, 87 N. Y.
 12 Misc. 449, 33 N. Y. Supp. 624; Supp. 697.
Rouillon v. Wilson, 29 App. Div. 307, ³⁵⁹ *Donahue v. Kendall*, 50 N. Y.
 51 N. Y. Supp. 430; *Karlson v. Super. Ct. (18 Jones & S.)* 386;
Healy, 38 App. Div. 486, 56 N. Y. *Feinstein v. Jacobs*, 15 Misc. 474, 37
 Supp. 361; *Moynihan v. Allyn*, 162 N. Y. Supp. 345.
 Mass. 270, 38 N. E. 497; *Wilcox v.* ³⁶⁰ *Hess v. Hinkson's Adm'r*, 29
Zane, 167 Mass. 302, 45 N. E. 923; Ky. Law Rep. 762, 96 S. W. 436.
Wesener v. Smith, 89 App. Div. 211, ³⁶¹ *Gillvon v. Reilly*, 50 N. J. Law,
 85 N. Y. Supp. 837; *Widing v. Penn- 26, 11 Atl. 481; Handyside v. Powers,*
 sylvania Mut. Life Ins. Co., 95 Minn. 145 Mass. 123, 13 N. E. 462; *Bar-*
 279, 104 N. W. 239, 111 Am. St. Rep. *man v. Spencer (Ind.)* 49 N. E. 9;

notice to the landlord's agent is equivalent, for this purpose, to notice to the landlord.³⁶² And the fact that he had no actual notice of the defect is no defense if he should, in the exercise of reasonable diligence, have had such notice.³⁶³

It has been said that the landlord is not liable for his failure to remove "obstructions arising from natural causes, or the acts of other persons, and not constituting a defect in the passageway itself" and that "he would be liable for negligently leaving a coal scuttle in a dangerous position, but not for not removing one so placed by another person."³⁶⁴ That the landlord is under no obligation to remove an object negligently placed by another in a common passageway or approach, of which he is fully aware, seems, however, most doubtful. To hold him liable for injuries to one caused by tripping over a nail in an unlighted passageway or a hole in a stair carpet, and not liable for injuries caused by tripping over a log placed in the passageway by a third person, of which he has been informed, involves a rather subtle distinc-

Black v. Maitland, 11 App. Div. 188, 42 N. Y. Supp. 653; *Flood v. Huff*, 29 Misc. 351, 60 N. Y. Supp. 317; *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334; *Jucht v. Behrens*, 26 N. Y. St. Rep. 690, 7 N. Y. Supp. 195; *Schwartz v. Monday*, 49 Misc. 527, 97 N. Y. Supp. 978; *Boss v. Jarmulowsky*, 81 App. Div. 577, 81 N. Y. Supp. 400; *Idel v. Mitchell*, 158 N. Y. 134, 52 N. E. 740; *Feinstein v. Jacobs*, 15 Misc. 474, 37 N. Y. Supp. 345; *Flood v. Huff*, 29 Misc. 351, 60 N. Y. Supp. 517; *McCabe v. Castens*, 11 Misc. 272, 32 N. Y. Supp. 249; *Lynch v. Swan*, 167 Mass. 510, 46 N. E. 51; *Vorrath v. Burke*, 63 N. J. Law, 188, 42 Atl. 838; *Merchants' Loan & Trust Co. v. Boucher*, 115 Ill. App. 101; *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097.

Rep. 513, 27 N. Y. Supp. 413; *Dol-lard v. Roberts*, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238; *Widing v. Pennsylvania Mut. Life Ins. Co.*, 95 Minn. 279, 104 N. W. 239, 111 Am. St. Rep. 471.
³⁶³ *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. 901, 15 Am. St. Rep. 199; *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399; *Udden v. O'Reilly*, 180 Mo. 650, 79 S. W. 691; *Nadel v. Fichten*, 34 App. Div. 188, 54 N. Y. Supp. 551; *Olson v. Schultz*, 67 Minn. 494, 70 N. W. 779, 64 Am. St. Rep. 437.

In *Rouillon v. Wilson*, 29 App. Div. 307, 51 N. Y. Supp. 430, it was held that notice of a defect in a slat platform on the roof resulting from a cause which would naturally impair the whole of it if it impaired any part put the landlord on inquiry as to the condition of the whole platform.

³⁶² *Evers v. Weil*, 43 N. Y. St. Rep. 336, 17 N. Y. Supp. 29; *Canavan v. Stuyvesant*, 7 Misc. 113, 57 N. Y. St. 533.
³⁶⁴ *Watkins v. Goodall*, 138 Mass.

tion. In the one case as in the other, it seems, there is a dangerous condition which it is his duty to remove.³⁶⁵

d. **Conditions existing at the time of demise.** The landlord is under no obligation to the tenant to change the mode of construction of the passageways, stairs, or platforms, used in common by the tenants, and to construct them upon a different plan, in order to make them more safe, provided the mode of construction was apparent at the time of the letting.³⁶⁶ His obligation has been said to be merely to keep such a place "in such condition as it was in, or purported to be in, at the time of the letting," meaning thereby such condition as it would appear to be in to a person of ordinary observation, and having reference to the obvious condition of things existing at the time of the letting.³⁶⁷ Accordingly, it has been held, a landlord is not liable for injuries caused by the rotten condition of a platform which was evidently in that condition at the time of the lease.³⁶⁸ By a later case in the same jurisdiction it is apparently adjudged that the landlord is not liable even for a secret defect existing at the time of the demise, the existence of which he might have discovered, provided only it was not actually known to him,³⁶⁹ this view being based on the

³⁶⁵ *Wesener v. Smith*, 89 App. Div. 735; *Lindsey v. Leighton*, 150 Mass. 211, 85 N. Y. Supp. 837, is to the effect that the landlord is liable for obstructions created by third persons. And see *Boss v. Jarmulowsky*, 81 App. Div. 577, 81 N. Y. Supp. 400, where this seems to be conceded.

³⁶⁶ *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 45 Am. Rep. 344; *Lynch v. Swan*, 167 Mass. 510, 46 N. E. 51; *O'Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387; *Humphrey v. Wait*, 22 U. C. Rep. C. P. 580; *Rogers v. Sorell*, 14 Man. Rep. 450 (unglazed fanlight over door at end of hall by which water entered).

³⁶⁷ *Andrews v. Williamson*, 193 Mass. 92, 78 N. E. 737, 118 Am. St. Rep. 452. And see *Moynihan v. Allyn*, 162 Mass. 270, 38 N. E. 497; *Quinn v. Perham*, 151 Mass. 162, 23 N. E. 158.

³⁶⁸ *Moynihan v. Allyn*, 162 Mass. 270, 38 N. E. 497.

³⁶⁹ *O'Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387, where it is said: "The suggestion of a stricter rule in *Lynch v. Swan*, 167 Mass. 510, 46 N. E. 51, is merely a dictum, and is not sustained by the cases cited, which are cases dealing with knowledge of defects possibly arising after the letting. The duty to use reasonable care to keep a staircase safe, up to the standard of the date of the lease, might not be met by proof of ignorance that the staircase had decayed"

(citing *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. 901, 15 Am. St. Rep. 199; *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399; *Wil-*

theory that there is no requirement of diligence in discovering defects in the leased premises themselves,³⁷⁰ and that "it would be anomalous to apply one rule to the principal object demised and another and severer one to something incidentally annexed." It might, however, be suggested in favor of a different view that, conceding that the lessor is under no obligation to discover and to reveal to an intending lessee defects in the leased premises themselves, which the latter is supposed to examine for himself,³⁷¹ he might well be charged with a higher degree of diligence as regards the condition of parts of the premises which do not pass out of his own control. An intending lessee of an apartment should not, it seems, be required to inspect the various passages and stairways leading to the apartment with the same particularity as he is expected to use in examining the apartment itself.

e. **Obligation to light approaches.** The landlord is under no obligation, in the absence of statute or contract to that effect, to light common passages, stairways or other approaches,³⁷² unless perhaps there is special danger from unusual construction or by reason of traps and pitfalls.³⁷³ In New York City it is required by statute that all public hallways in tenement houses shall be lighted³⁷⁴ and failure to comply with this law raises at least a presumption of negligence on the landlord's part.³⁷⁵

cox v. Jane, 167 Mass. 302, 45 N. E. Atl. 847; Brugher v. Buchtenkirch, 167 N. Y. 153, 60 N. E. 420. In the former case it is said that Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140,

³⁷⁰ See ante, § 86 d.

³⁷¹ See ante, § 86 a.

³⁷² Gleason v. Boehm, 58 N. J. Law, 475, 34 Atl. 886, 32 L. R. A. 645; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; Brugher v. Buchtenkirch, 167 N. Y. 153, 60 N. E. 420; Dean v. Murphy, 169 Mass. 413, 48 N. E. 283; Muller v. Minken, 5 Misc. 444, 26 N. Y. Supp. 801; note 507.

Brancato v. Kors, 36 Misc. 776, 74 N. Y. Supp. 891. O'Sullivan v. Norwood, 8 N. Y. St. Rep. 388, to the contrary, is expressly disapproved in Muller v. Minken, 5 Misc. 444, 26 N. Y. Supp. 801.

³⁷³ Capen v. Hall, 21 R. I. 364, 43 Atl. 847; Brugher v. Buchtenkirch, 167 N. Y. 153, 60 N. E. 420. In the former case it is said that Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140, where a majority of the court decided that the jury might find that it was negligence to fail to light stairs of an office building, may perhaps be explained on this theory. And see Burner v. Higman & Skinner Co., 127 Iowa, 580, 103 N. W. 802, post, note 507.

³⁷⁴ Laws 1901, c. 334, § 80; Laws 1903, c. 179. See, also, the prior laws. Laws 1895, c. 567, § 9; Laws 1897, c. 378, § 1320.

³⁷⁵ Ziegler v. Brennan, 75 App. Div. 584, 78 N. Y. Supp. 342; Lichtman v. Rose, 110 N. Y. Supp. 935.

f. **Ice and snow on approaches.** The landlord has been held in several cases not to be liable for injuries caused to a tenant (or other person rightfully on the premises) by slipping on snow or ice on a common stair or passageway, on the ground that he is not bound to clear away the snow or ice,³⁷⁶ and this though the construction of the passage or steps is such that an accumulation of snow or ice tends to take place.³⁷⁷ It is said that the landlord owes to the tenant the same duty in this regard as a municipality owes to travelers as regards sidewalks,³⁷⁸ and this is, in most states, to remove ice and snow which has formed into mounds and ridges, but not ice or snow merely rendering the surface slippery.³⁷⁹ He has, however, been held liable for injuries to the tenant caused by slipping on ice which accumulated on the passageway and steps, owing to leakage from a break in a pipe connected with the roof of the building, he being in such case regarded as the active agent in producing the dangerous condition.³⁸⁰

g. **Negligence of independent contractor.** Since the landlord is under a legal obligation to exercise diligence to keep the common approaches, or other parts of the building used in common, in safe condition for use, he cannot, it would seem, relieve himself from liability for failure so to do by asserting that the defects or dangers therein were caused by an independent con-

See *Brown v. Wittner*, 43 App. Div. 135, 59 N. Y. Supp. 385; *Lendle v. Robinson*, 53 App. Div. 140, 65 N. Y. Supp. 894; *Aldrich v. Lane*, 110 N. Y. Supp. 897; *Gillick v. Jackson*, 40 Misc. 627, 83 N. Y. Supp. 29.

³⁷⁶ *Purcell v. English*, 86 Ind. 34; *Harkin v. Crumble*, 20 Misc. 568, 46 N. Y. Supp. 453 (injury to guest of tenant); *Little v. Wirth*, 6 Misc. 301, 26 N. Y. Supp. 1110. See *Lumley v. Backus Mfg. Co.*, 20 C. C. A. 1, 73 Fed. 767.

³⁷⁷ *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 44 Am. Rep. 262 note, 45 Am. Rep. 344.

³⁷⁸ *Harkin v. Crumble*, 20 Misc. 568, 46 N. Y. Supp. 453; *Watkins v. Goodall*, 138 Mass. 533.

³⁷⁹ See 15 Am. & Eng. Enc. Law (2d Ed.) 447.

³⁸⁰ *Watkins v. Goodall*, 138 Mass. 533.

In *Hoag v. Williamsburgh Sav. Bank*, 75 App. Div. 306, 78 N. Y. Supp. 141, it was held that where the tenant slipped on ice formed from water dripping from a defective closet, the landlord's liability was to be determined by the consideration of what was reasonable diligence in removing the defect in the closet, so as not to prevent leaking into the hall, which was kept at a freezing temperature, and not by the diligence required in removing the ice.

tractor, employed by him to make repairs, or were the result of the failure of such contractor to make the repairs.³⁸¹ His position in this regard would appear to be the same as that of a municipality, which, as bound to keep the highways in repair, is liable for negligence in failing to repair defects, in spite of the employment of an independent contractor.³⁸²

h. Contributory negligence of tenant. The tenant or other person injured by defects in such passageways or other places cannot recover if he was guilty of contributory negligence.³⁸³ But the mere fact that the person injured used particular parts of the building in the landlord's control, though knowing of defects therein, does not, it has been decided, necessarily render him guilty of contributory negligence, this being a question for the jury,³⁸⁴

³⁸¹ *Brennan v. Ellis*, 70 Hun, 472, 24 N. Y. Supp. 426. In *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421, the decision appears to be based partly on this theory and partly on

the theory that the work was in its nature likely to create a dangerous condition. In *Robbins v. Atkins*, 168 Mass. 45, 46 N. E. 425, it was held that the landlord was liable for injury caused by the removal, by an independent contractor employed to deepen the cellar, of earth supporting a stairway if he, the landlord, had reasonable cause to believe that this would be the effect of the work contracted for. This is in accordance with a well recognized exception to the exemption of the employer from liability for the negligence of a contractor. Ante, at note 273.

In *Mahon v. Burns*, 13 Misc. 19, 34 N. Y. Supp. 91, the landlord was relieved from liability partly on the ground that the obstruction was caused by an independent contractor and partly on the ground that he was not chargeable with notice of the obstruction owing to the brevity of its existence before the accident. The latter seems the preferable

ground on which to base the decision. The same may be said of *Boss v. Jarmulowsky*, 81 App. Div. 577, 81 N. Y. Supp. 400.

³⁸² See 16 Am. & Eng. Enc. Law (2d Ed.) 197.

³⁸³ *Gallagher v. Button*, 73 Conn. 172, 46 Atl. 819; *Town v. Armstrong*, 75 Mich. 580, 42 N. W. 983; *Mospens v. Konz*, 32 Ky. Law Rep. 80, 105 S. W. 381; *Mullen v. Rainear*, 45 N. J. Law, 520; *Vorrath v. Burke*, 63 N. J. Law, 188, 42 Atl. 838; *Gleason v. Boehm*, 58 N. J. Law, 475, 34 Atl. 886, 32 L. R. A. 645 (injury to tenant's guest); *McCarthy v. Foster*, 156 Mass. 511, 31 N. E. 385; *Freeman v. Hunnewell*, 163 Mass. 210, 39 N. E. 1012.

³⁸⁴ *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238; *Peil v. Reinhart*, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; *Collier v. Collins*, 58 App. Div. 550, 69 N. Y. Supp. 94; *Karlson v. Healy*, 38 App. Div. 486, 56 N. Y. Supp. 361; *Keating v. Mott*, 92 App. Div. 156, 86 N. Y. Supp. 1041; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Whitaker v. Inhabitants of West Boylston*, 97 Mass. 273.

and such has been held to be the case though he was without a light to reveal the defects.³⁸⁵ In other cases, however, it has apparently been decided that the use by the tenant of a stairway which he knew to be unsafe prevents recovery by him.³⁸⁶

i. **Improper user by tenant.** The landlord is, it seems, liable for injuries to the tenant, or to a member of the tenant's family or to one visiting the tenant, caused by defects in a passage, stairway, or other place used in common by the various tenants, only when the person injured was at the time making a proper use of such part of the building, or at least such use as the landlord could anticipate would be made of it, and whether such use of it was being made has been regarded as a question for the jury.³⁸⁷ So it has been recognized that if the tenants of a building are given the right to use the roof for certain restricted purposes, a tenant or a member of a tenant's family cannot recover for injuries received while using it for another purpose.³⁸⁸ And so, a fire escape being intended for a particular purpose, there can be no recovery for injuries received while utilizing it for another purpose.³⁸⁹ And on the same theory a right of recovery for injuries caused by

³⁸⁵ *Kenney v. Rhinelander*, 163 N. Y. 576, 57 N. E. 1114, afg. 28 App. Div. 246, 50 N. Y. Supp. 1088; *Lendle v. Robinson*, 53 App. Div. 140, 65 N. Y. Supp. 894; *Lee v. Ingraham*, 106 App. Div. 167, 94 N. Y. Supp. 284.

³⁸⁶ *Town v. Armstrong*, 75 Mich. 580, 42 N. W. 983; *McGinn v. French*, 107 Wis. 54, 82 N. W. 724. And see *O'Dwyer v. O'Brien*, 13 App. Div. 570, 43 N. Y. Supp. 815, where, knowing that a walk was defective, plaintiff failed to look.

³⁸⁷ In *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334, it was held to be a question for the jury whether the children of a tenant who were sitting on a common stairway eating their lunch were making such use thereof as the landlord had a right to anticipate.

³⁸⁸ In *Wholey v. Kane*, 16 App. Div. 166, 78 N. Y. St. Rep. 649, 44 N. Y. Supp. 649, it was held that

when a grown member of a tenant's family was injured while witnessing a display of fireworks from the roof of the building, it was for the jury whether he had a right to be upon the roof, the plaintiff testifying that the roof was ordinarily used for purposes of recreation and even for sleeping, and the defendant testifying that the right was given to the tenants to use the roof only for drying clothes.

³⁸⁹ See *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555, where it was held that the landlord was under no obligation to keep the platform of a fire escape safe for the child of a tenant going thereon for his own amusement; and that he is not bound to keep a fire escape safe for the tenant to use in drying clothes is decided in *Mayer v. Laux*, 18 Misc. 671, 43 N. Y. Supp. 743.

the breaking of the railing upon a balcony was denied, when the balcony was intended merely as a thoroughfare, and the breakage was caused by the action of the tenant in leaning against it while hanging clothes.³⁹⁰

j. **Places not used in common.** It has been apparently decided in several cases that though the landlord owes to his tenants the duty to keep the common passageways, stairs, platforms and the like in safe condition for the use of the various tenants and their guests, there is no analogous obligation in the case of a passageway or platform, the use of which is not common to two or more tenants, but which one tenant alone has the right to use, although such passageway or platform is not a part of the leased premises, but is retained by the landlord, and the tenant is given merely the right to make use thereof.³⁹¹ In these cases, apparently, the strict rule of law was applied, that the owner of a tenement subject to an easement owes no duty to repair the tenement for the benefit of the owner of the easement, but that he himself must make the repairs,³⁹² a rule which the courts have refused to apply in the case of places used in common by various tenants, on the ground apparently that there is a necessary implication

³⁹⁰ *Walsh v. Frey*, 116 App. Div. 527, 101 N. Y. Supp. 774. Compare *Clarke v. Welsh*, 93 App. Div. 393, 87 N. Y. Supp. 697.

In *Glain v. Sparandeo*, 119 La. 339, 44 So. 120, it was held that a tenant injured by the giving way of a balcony by reason of the pressure of a rope "run" over it, by which a heavy weight was being lowered, could not recover.

Where a tenant has the right to use a roof just below her windows for drying clothes, the landlord owes no duty to keep a skylight in the roof protected by a grating so that one falling out of a window would not fall through the skylight. "If the defendant owes no duty to build a

roof or wall or any other structure under these windows to catch people who fall out of them, how is his liability increased when he builds a structure with a roof but which

does not absolutely prevent one from falling through it because of a skylight?" *Miller v. Woodhead*, 104 N. Y. 471, 11 N. E. 57. In other words, the landlord owes no duty to keep a roof intended for drying clothes in condition for falling on.

³⁹¹ *O'Dwyer v. O'Brien*, 13 App. Div. 570, 43 N. Y. Supp. 815; *Culver v. Kingsley*, 78 Ill. App. 540 (platform used by tenant). So in *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695, a case of injury to a third person using a walk leading to the leased premises, it was held that the walk was under the lessee's and not the lessor's control, and that consequently the latter was not liable.

³⁹² *Goddard, Easements* (5th Ed.) 21, 374; *Gale, Easements* (7th Ed.) 451 et seq.; 1 *Tiffany, Real Prop.* § 324.

otherwise, under such circumstances.³⁹³ But the landlord is liable, it seems, for any active misfeasance on his part rendering a passage or platform, which is subject to the use of a single tenant and his family or guests, unsafe for use.³⁹⁴ It might be questioned, it is conceived, whether the lessor, retaining possession and control of an approach to a single tenement, necessary for access thereto, should not be under the same duty of exercising diligence to keep it safe as in the case of an approach to several tenements, since he invites its use by the tenant and the tenant's visitors.

As regards an approach or platform on a part of the land which is to be regarded as included in the lease, the landlord obviously owes no duty to the tenant or persons claiming under him, greater than that which he owes as to any other part of the leased premises. There have been occasional decisions as to whether the particular place in which the accident occurred was within the leased premises so as to exempt the landlord from liability.³⁹⁵

³⁹³ See *Miller v. Hancock* [1893] 2 Q. B. 177; *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124, 10 Am. St. Rep. 260, 3 L. R. A. 458.

³⁹⁴ So in *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732, one who had leased a part of his building for use as a lodge room, left on a walk, which was the ordinary approach to such lodge room, a barrel over which one intending to go to the lodge room fell, and the lessor was held liable. The court says: "Where an owner leases property to a tenant, and licenses the tenant, or those having rights under the tenant, to use a way of ingress and egress to the demised premises, he has no right, by obstructing the way, to make its use dangerous to the tenant or those having rights under him. In *Totten v. Phipps*, 52 N. Y. 354, a landlord was held liable for injury to a tenant of part of the building caused by leaving open a hatchway in a hall which led to such part and also to a part retained by the landlord. And in *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282, the owner of an assembly hall who had leased it to another was held liable for leaving open, on the passage leading to the hall, a door which opened on an awning merely, through which a guest at the hall passed and consequently fell into the street. See, also, *Edwards v. New York & H. R. Co.*, 98 N. Y. 255, 50 Am. Rep. 659; *Cole v. McKey*, 66 Wis. 500, 29 N. W. 279, 57 Am. Rep. 293.

³⁹⁵ A step leading to a semi-detached house, though but a continuation of a step leading into the adjoining house, was regarded as part of the house into which it led. *Kearines v. Cullen*, 183 Mass. 298, 67 N. E. 243. And the same view was taken of an approach leading from the sidewalk to a house, though there were adjoining houses owned by the same landlord. *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956. And see *Mellen v. Morrill*, 126 Mass. 545. Likewise a platform con-

§ 90. Adjoining buildings and grounds.

We have before referred to various decisions bearing upon the question whether the covenant for quiet enjoyment covers acts by the landlord upon premises owned by him, adjoining those leased.³⁹⁶ Apart from the liability under such a covenant, so far as it may exist in the particular case, the landlord may, *prima facie*, make such use of adjoining premises as he may desire, although such use to some extent interferes with the tenant's enjoyment of the premises leased. The tenant may have, however, as appurtenant to the leased premises, an easement in adjoining property, giving him a right to make use thereof for a certain purpose, or excluding a particular use thereof by another,³⁹⁷ and such easement is obviously enforceable against such property in the hands of the landlord as well as in the hands of another, the grant of such an easement being indeed quite frequently implied from the fact that the lessor is the owner of the adjoining property at the time of the lease.³⁹⁸ The landlord, as the owner of adjoining property, is also, as is any other owner of such property, bound to refrain from the maintenance of a nuisance thereon, and is also liable for any injury to the tenant of the leased premises caused by negligence in the course of his utilization of the adjoining property.³⁹⁹

C. AS TO APPLIANCES.

§ 91. Appliances under landlord's control.

The landlord is liable for injuries to a tenant, as to any other

nected with an apartment, which was used by the tenant of the apartment for storing fuel, and on which was located the water closet, was regarded as a part of the apartment leased, though it was connected by stairways with the platforms belonging to other apartments and with the yard. *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N. E. 326, 108 Am. St. Rep. 469.

³⁹⁶ See ante, § 79 d (2).

³⁹⁷ See post, §§ 131-135.

³⁹⁸ See post, § 128.

³⁹⁹ See *Smith v. Faxon*, 156 Mass. 589, 31 N. E. 687.

In New York, it having been decided in *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49, that the owner of a building which takes fire through his negligence is not liable for the consequent destruction of another building, it was decided in *H. L. Judd & Co. v. Cushing*, 50 Hun, 181, 22 Abb. N. C. 358, 2 N. Y. Supp. 836, that the owner of a building is liable to a tenant therein who is injured by fire resulting

person rightfully on the premises,⁴⁰⁰ caused by the former's neglect to remedy defects in, or by his improper management of, appliances of which he retains control. Accordingly he has been held liable for injuries caused by leakage from water pipes or other plumbing attachments in his control,⁴⁰¹ or by overflow from such attachments,⁴⁰² for injuries from defects in, or unskillful management of, a heating apparatus,⁴⁰³ an elevator for carrying

from the landlord's negligence in the repairing of an adjoining building owned by him only if the two buildings are used as a single building.

⁴⁰⁰ In this section not only cases are cited in which the person seeking to recover for injuries was the tenant, but also a number in which a member of his family or other person rightfully on the premises was the complaining party. As stated post (§§ 98-100) the obligations of the landlord are the same in both cases.

⁴⁰¹ *Priest v. Nichols*, 116 Mass. 401 (leakage from landlord's engine pumps and waste pipes on the upper floor); *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 651, 64 N. E. 906, 95 Am. St. Rep. 330 (leaking gas pipes); *Levine v. Baldwin*, 87 App. Div. 150, 84 N. Y. Supp. 92 (leaking water pipe); *Rubenstein v. Hudson*, 86 N. Y. Supp. 750 (ditto); *Levin v. Habicht*, 45 Misc. 381, 90 N. Y. Supp. 349 (ditto); *Kecoughtan Lodge No. 29 v. Steiner*, 106 Va. 589, 56 S. E. 569 (bursting of water pipe).

⁴⁰² *Pike v. Brittan*, 71 Cal. 159, 11 Pac. 890, 60 Am. Rep. 527 (stop cock negligently left open by landlord's janitor); *Sheridan v. Forsee*, 106 Mo. App. 495, 81 S. W. 494; *Eugene*

C. Lewis Co. v. Metropolitan Realty Co., 112 App. Div. 385, 98 N. Y. Supp. 391; *Id.*, 189 N. Y. 534, 82 N. E. 1126 (overflow from water tank); *James Sheehan & Co. v. Barberis*, 41 Wash. 671, 84 Pac. 607.

⁴⁰³ In *McNichol v. Malcolm*, 39 Can. Sup. Ct. 265, a landlord was held liable for the act of his caretaker in turning on the steam without first seeing that the radiator in plaintiff's apartment was closed, the steam having been turned off for repairs. And in *Bryant v. Carr*, 52 Misc. 155, 101 N. Y. Supp. 646, the landlord was held liable for the escape of steam from a radiator in the course of repairs thereon.

In *Railton v. Taylor*, 20 R. I. 279, 38 Atl. 980, 39 L. R. A. 246, it was held that where the lease provided that the property of the lessee on the premises was to be at the risk of the lessee in regard to damage by fire, water, "or in any other way or manner," the words in quotations were restricted by the particular words "fire" and "water," and did not relieve the landlord from liability for injuries from smoke and excessive heat caused by the negligent management of the heating apparatus.

freight or passengers,⁴⁰⁴ a dumb waiter,⁴⁰⁵ and machinery transmitting power.⁴⁰⁶

Since the landlord is under an obligation to exercise diligence to keep appliances under his control in proper repair, he cannot rid himself of the obligation by delegating the task to an independent contractor.⁴⁰⁷ It has been said that he is liable for the negligence of the contractor in such case as if it were his own.⁴⁰⁸ But it may be questioned whether the landlord is under an obligation to do more than use reasonable diligence to see that the appliances are not left by the contractor in such a condition as to injure the tenant, since, as regards anything beyond his legal duty he is entitled to assert the intervention of an independent contractor. In the same state in which this statement was made it has been held that the landlord was not liable for the manner in which a contractor employed by him made repairs on a boiler which subsequently burst.⁴⁰⁹

Occasionally there is an express provision in the lease affecting the landlord's liability for the flooding of the leased premises. A provision that the lessors are not liable for damage caused by the leakage or bursting of water pipes was held to apply to damage caused by the bursting of water pipes in a part of the building not leased, this clause being, in view of other clauses, superfluous if construed as applying only to leakage or bursting on the de-

⁴⁰⁴ *Griffen v. Manice*, 166 N. Y. v. *Farrell*, 34 Misc. 515, 69 N. Y. 188, 59 N. E. 925, 52 L. R. A. 992, Supp. 886; *Timlan v. Dillworth* (N. 82 Am. St. Rep. 630; *Bogendoerfer J. Law*) 67 Atl. 433.

v. Jacobs, 97 App. Div. 355, 89 N. Y. Supp. 1051; *Stewart v. Harvard College*, 94 Mass. (12 Allen) 58; *Ellis v. Waldron*, 19 R. I. 369, 33 Atl. 869; *Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464.

⁴⁰⁶ *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272; *Davis v. Pacific Power Co.*, 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156.

⁴⁰⁷ See *Wagner v. Welling*, 84 N. Y. Supp. 979; 16 Am. & Eng. Enc. Law (2d Ed.) 197.

So where certain obligations imposed by statute as to guarding elevator shafts were neglected. *Malloy v. New York Real Estate Assn.*, 13 Misc. 496, 34 N. Y. Supp. 679; *Weinberger v. Katzenstein*, 71 App. Div. 155, 75 N. Y. Supp. 537.

⁴⁰⁸ *Blake v. Fox*, 43 N. Y. St. Rep. 527, 17 N. Y. Supp. 508. *Worthington v. Parker*, 11 Daly (N. Y.) 545, goes perhaps to this extent.

⁴⁰⁹ *Perkins v. Eighmie*, 24 N. Y. St. Rep. 728, 6 N. Y. Supp. 156, *affd.*, without opinion, 125 N. Y. 706, 26 N. E. 752.

⁴⁰⁵ *Blake v. Fox*, 43 N. Y. St. Rep. 527, 17 N. Y. Supp. 508; *Hirtenstein*

mised premises.⁴¹⁰ But a clause in a lease of a building exempting the lessor from liability for injury by fire or water was held not to apply to damage, to one who had taken a sublease of a room in the building, caused by the flow of water from adjoining land which was owned by the landlord, the liability in such case being based on his ownership of such land and not on his ownership of the building.⁴¹¹ A provision in a lease of a lower floor exempting the landlord from liability for damage by leakage of water has been held to apply to leakage from pipes in an upper floor to which the lessee had access and which he had agreed to repair.⁴¹² But it has been decided that the landlord is not relieved from liability for leakage resulting from his own negligence, by a provision in terms exempting him from liability for "injury by water which may be sustained by the said tenant or other persons, or for any other damage or injury from the carelessness, negligence or improper conduct on the part of any tenant,"⁴¹³ nor by a clause exempting him from liability "for any damage caused by leakage of water or for any other cause or event,"⁴¹⁴ nor by a provision that the landlord shall not be answerable "for damages caused by the elements by leakages in roof, or piping."⁴¹⁵

It has been decided that a clause exempting the landlord from liability for injuries caused "by the elevators" does not relieve him from liability for those caused by the negligence of an elevator operator.^{415a}

§ 92. Appliances not under landlord's control.

The landlord's liability is based on his right of control over the appliances, and he is not liable for injuries from defects in

⁴¹⁰ *Fera v. Child*, 115 Mass. 32.

⁴¹¹ *Smith v. Faxon*, 156 Mass. 589, 31 N. E. 687.

⁴¹² *Taylor v. Bailey*, 74 Ill. 178.

⁴¹³ *Levin v. Habicht*, 45 Misc. 381, 90 N. Y. Supp. 349.

⁴¹⁴ *Randolph v. Feist*, 23 Misc. 650, 52 N. Y. Supp. 109. But see *Sonn v. Weissmann*, 29 Misc. 622, 61 N. Y. Supp. 78.

⁴¹⁵ *Worthington v. Parker*, 11 Daly (N. Y.) 545.

And to the same effect, that such a clause does not exempt the landlord from injuries by leakage which is directly caused by him, see *Eugene C. Lewis Co. v. Metropolitan Realty Co.*, 112 App. Div. 385, 98 N. Y. Supp. 391, *afd.*, without opinion, 189 N. Y. 534, 82 N. E. 1126. ^{415a} *Cunningham v. Mutual Reserve Life Ins. Co.*, 125 App. Div. 688, 109 N. Y. Supp. 1070.

appliances located on the leased premises if he does not reserve control thereof, and accordingly it has been held that he is not liable for defects in water pipes in an apartment, when the only purpose of such pipes is to supply and distribute water for the apartment, they constituting a part of the demised premises, as to which the landlord is under no obligation to the tenant,⁴¹⁶ while on the other hand he is liable for defects in pipes on the leased premises if he retains control of these as being intended to supply water to other parts of the same building.⁴¹⁷ And even in the case of pipes or other appliances upon the leased premises which are used for the purpose of supplying water or heat to those very premises, he is liable in case he assumes control for a particular purpose, as for the making of specific repairs, and by his negligence causes a leakage,⁴¹⁸ and so he would be liable if he is negligent in the management of the supply of water or steam.⁴¹⁹ The landlord is not liable for injuries to a tenant in a building caused by the improper use of appliances within the exclusive control of a tenant of another part of the building, as when water fixtures on the premises of one tenant are improperly used by the latter so as to cause a flooding of the premises of another tenant.⁴²⁰ Nor is the landlord liable when the injuries result from defects in appliances on premises leased by him to another, when these defects arise after the lease without the landlord's fault,⁴²¹ though he is

⁴¹⁶ *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389; *Whitehead v. Comstock & Co.*, 25 R. I. 423, 56 Atl. 446. In the latter case it was decided to be immaterial in this respect that the landlord was bound to furnish water.

⁴¹⁷ *Priest v. Nichols*, 116 Mass. 401. So in *Levine v. Baldwin*, 87 App. Div. 150, 84 N. Y. Supp. 92, it was held that a pipe passing from the roof through the cellar, constructed for the purpose of carrying off water from the roof, being for the benefit of the whole building, was under the landlord's control, and was not included in the lease of the cellar, and that consequently the landlord was liable for defects therein.

⁴¹⁸ *Bryant v. Carr*, 52 Misc. 155, 101 N. Y. Supp. 646.

⁴¹⁹ *McNichol v. Malcolm*, 39 Can. Sup. Ct. 265, ante, note 403.

⁴²⁰ *Kenny v. Barns*, 67 Mich. 336, 34 N. W. 587; *McCarthy v. York County Sav. Bank*, 74 Me. 315, 43 Am. Rep. 591; *Mendel v. Fink*, 8 Ill. App. (8 Bradw.) 378 (semble); *Greene v. Hague*, 10 Ill. App. (10 Bradw.) 598 (upper tenant allowing pipes to freeze). But he might become liable therefor by express contract. *Dunn v. Robins*, 48 N. Y. St Rep. 45, 20 N. Y. Supp. 341.

⁴²¹ *Haizlip v. Rosenberg*, 63 Ark. 430, 39 S. W. 60; *Leonard v. Gunther*, 47 App. Div. 194, 62 N. Y. Supp. 99.

liable if the damage is caused by defects existing at the time of such lease,⁴²² on principles hereafter discussed.⁴²³

§ 93. Liabilities apart from negligence.

The landlord is not liable, at least as a general rule, for injuries caused by defects in appliances under his control, unless he is negligent in this regard.⁴²⁴ Accordingly, it has been held that the landlord was not liable for injury by leakage from a water closet in an upper floor, the landlord having used ordinary care and diligence in looking after the closet,⁴²⁵ or for the negligence of a person unknown in stopping the outlet of a sink.⁴²⁶ And the fact that an overflow occurs by reason of the use of a faucet within the control of the landlord has been decided not to show negligence on his part, when the faucet is accessible to and utilized by other tenants, who might have caused the overflow.⁴²⁷

In any jurisdiction ⁴²⁸ where the doctrine is in force that one who accumulates on his premises, for his own purposes, a thing

⁴²² *Ingwersen v. Rankin*, 47 N. J. against them and using them as a Law, 18, 54 Am. Rep. 109; *Citron v. backrest while glazing the window. Bayley*, 36 App. Div. 130, 55 N. Y. ⁴²³ See post, § 103 f.

Supp. 382. In the case last cited it ⁴²⁴ See *Bertsch v. Unterberg*, 88 N. Y. Supp. 983; *Greene v. Hague*, 10 Ill. App. (10 Bradw.) 598; *Becker v. Bullowa*, 36 Misc. 524, 73 N. Y. Supp. 944; *Russo v. McLaughlin*, 51 Misc. 34, 99 N. Y. Supp. 839; *Hanselman v. Broad*, 113 App. Div. 447, 99 N. Y. Supp. 404; *Timlan v. Dillworth* (N. J. Law) 67 Atl. 433; *Rice v. Trustees of Boston University*, 191 Mass. 30, 77 N. E. 308; *Mills' Adm'r v. Cavanaugh*, 29 Ky. Law Rep. 685, 94 S. W. 651. ⁴²⁵ *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873. ⁴²⁶ *Rosenfield v. Newman*, 59 Minn. 156, 60 N. W. 1085. ⁴²⁷ *Aschenbach v. Keene*, 46 Misc. 600, 92 N. Y. Supp. 764, citing *Moore v. Goedel*, 34 N. Y. 527. ⁴²⁸ That is, in jurisdictions where the doctrine of *Rylands v. Fletcher*, L. R. 3 H. L. 330, is adopted.

In *Shillak v. White*, 38 N. Y. St. Rep. 483, 14 N. Y. Supp. 637, *afid*. 136 N. Y. 625, 32 N. E. 1014, it was held that a landlord was under no obligation to see that window guards were strong enough to sustain the weight of a grown person leaning

which is likely to do injury if it escapes, is bound at his peril to prevent its escape, the landlord might be liable for defective appliances even apart from negligence. The doctrine referred to has been ordinarily enunciated, and has been applied, as between adjoining land owners, and not as between the owners of different parts of the same building, but the same reasons for its application apparently exist in the latter case as in the former. Occasionally it appears to have been regarded as applicable as between a tenant of part of a building and the landlord retaining control of another part, in which he introduced or collected water which escaped, its application in those particular cases, however, being excluded on the ground that the introduction or collection of the water by the landlord was not for his own exclusive benefit, but was for the benefit of the building as a whole.⁴²⁹ Admitting that the doctrine applies as between owners or tenants of different parts of the same building, the language of the leading case on the subject of this absolute liability would seem to justify the view that a landlord introducing water, in the ordinary way, in the part of the building in his control, would be liable, irrespective of negligence, in case a leakage occurs to the injury of the tenant of another part of the building.⁴³⁰ Such an introduction of water in moderate quantity for the ordinary uses incident to a building of that character would, however, it is likely, be regarded as a "natural user" of the part of the building retained by the landlord, within an exception which has apparently been established to the rule of absolute liability.⁴³¹ This doctrine of the liability of a landowner apart from negligence has not, it is proper to remark, been accepted in most

⁴²⁹ *Anderson v. Oppenheimer*, 5 Q. B. Div. 602; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Tennant v. Hall*, 27 New Br. 499. In *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736, there are expressions to the effect that the doctrine is applicable as against a landlord in favor of the tenant. In *Langabaugh v. Anderson*, 68 Ohio St. 131, 67 N. E. 286, 62 L. R. A. 948, however, the decision in the prior case adverse to the landlord is said to be based on a finding of negligence.

⁴³⁰ See the opinion of Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Exch. 278 approved in *Rylands v. Fletcher*, L. R. 3 H. L. 330.

⁴³¹ *Wilson v. Waddell*, 2 App. Cas. 95. See the rule in *Rylands v. Fletcher* and the exceptions thereto discussed in *Pollock's Torts*, c. 12.

of the jurisdictions of this country in which it has been the subject of consideration.⁴³²

In one state in this country, without express reference to the doctrine just considered, of liability apart from negligence, the landlord has been held liable for injuries caused a tenant by leakage from water appliances to which the landlord has a right of access, although the injuries result from their misuse by third persons.⁴³³

§ 94. Contributory negligence of tenant.

One injured by defects in appliances under the landlord's control cannot recover damages if he himself was guilty of negligence contributing to the injury,⁴³⁴ or if he had no right to use them, or was, at the time of the injury, where he had no right to be.⁴³⁵ A landlord has been held not to be liable for the bursting of a pipe in the part of the premises retained by him, causing injury to the tenant of another part, resulting from the failure to turn off the water from the building in cold weather, when the only stop cock for this purpose was outside the building, and under the control of the city, it being quite as much within the power of the tenant as of the landlord to have the water turned off.⁴³⁶ Likewise he has been held not to be liable for loss of the tenant's property caused by failure to clean a chimney flue connected

⁴³² See *Shearman & Redfield, Neg.* 107 Cal. 563, 40 Pac. 950, 48 Am. St. (5th Ed.) § 701; *Burdick, Torts*, Rep. 156 (employee of tenant injured); *Huber v. Ryan*, 57 App. Div. 447.

⁴³³ *Marshall v. Cohen*, 44 Ga. 489, 34, 67 N. Y. Supp. 972.

9 Am. Rep. 170; *Freidenburg v. Jones*, 63 Ga. 612; *Jones v. Freidenburg*, 66 Ga. 505, 42 Am. Rep. 86. ⁴³⁵ *Stewart v. Harvard College*, 94 Mass. (12 Allen) 58.

These decisions go, in their results, even beyond the doctrine of *Rylands v. Fletcher*, L. R. 3 H. L. 330, which has been decided not to apply when the immediate cause of injury is the act of a stranger. *Box v. Jubb*, 4 Exch. Div. 76. ⁴³⁶ *Buckley v. Cunningham*, 103 Ala. 449, 15 So. 826, 49 Am. St. Rep. 42. In *Taylor v. Bailey*, 74 Ill. 178, the same view was taken, though there the appliance for turning off the water was in the hall. See, as to the effect of a covenant by the tenant to turn off the water, *Moore v. Goedel*, 34 N. Y. 527; *Walker v. Globe Mfg. & Importing Co.*, 56 N. Y. Super Ct. (24 Jones & S.) 431, Atl. 819; *Davis v. Pacific Power Co.*, 4 N. Y. Supp. 193.

⁴³⁴ *Taylor v. Bailey*, 74 Ill. 178, 54 L. R. A. 780, 92 Am. St. Rep. 205; *Gallagher v. Button*, 73 Conn. 172, 46 Atl. 819; *Davis v. Pacific Power Co.*, 4 N. Y. Supp. 193.

with the tenant's apartment, when this flue could have readily been cleaned by the tenant without affecting the flues used by other tenants, and the landlord had not undertaken to clean the flue, nor retained any control thereover.⁴³⁷

§ 95. Effect on liability for rent.

Apart from the question of the tenant's right to recover for damage from defects in appliances under the landlord's control, he is, in some states, if such defects render the premises untenable, entitled to relinquish possession and thereby free himself from liability for rent.⁴³⁸ And he has been held to have this right when the landlord turned off the water from the leased premises.⁴³⁹ In some jurisdictions the failure to make proper repairs might be referred to as an "eviction," for the purpose of relieving the tenant from liability for rent.^{439a}

II. LANDLORD'S OBLIGATIONS TOWARDS THIRD PERSONS.

A. TO PERSONS ON PREMISES LEASED.

§ 96. Conditions existing at time of demise.

a. **Ordinarily no obligation.** We have before considered the question of the liability of the landlord for injuries to the person or property of the tenant caused by defects in the leased premises, and have found that, as a general rule, the landlord is so liable only when the defects existed at the time of the demise, and, even then, only if they were so hidden that the lessor could be regarded as under an obligation to notify the lessee of their existence.⁴⁴⁰ Considering now the liability of the landlord for injuries to persons, other than the tenant, rightfully on the premises, by the tenant's request or permission, we shall find that ordinarily, at least, if not in every case, the landlord is liable in so far as he would be liable to the tenant, and no further.

As regards defects existing at the time of the demise, the gen-

⁴³⁷ *Cooper v. Lawson*, 139 Mich. Pac. 29, 43 L. R. A. 125. See post, 628, 103 N. W. 168. § 182 n.

⁴³⁸ *Fitch v. Armour*, 59 N. Y. ⁴³⁹ *West Side Sav. Bank v. New-*
Super. Ct. (27 Jones & S.) 413, 39 N. ton, 76 N. Y. 616.

Y. St. Rep. 246, 14 N. Y. Supp. ^{439a} See post, §§ 182 n, 185 f (4).
319; *Vann v. Rouse*, 94 N. Y. 401; ⁴⁴⁰ See ante, §§ 86, 87.

York v. Steward, 21 Mont. 515, 55

eral rule is that the landlord, whether the original lessor or his transferee, is not liable for injuries to the person or property of any person who may thereafter be on the premises.⁴⁴¹ He has a perfect right to lease premises in a "tumbledown" or otherwise dangerous condition, if any person cares to take a lease of them⁴⁴² and, as he incurs no liability to the tenant by so doing, so he can incur no liability to persons who go on the premises merely "in right of" the tenant. Otherwise the tenant, by inviting persons on the premises, could impose liabilities on the landlord to an indefinite extent.⁴⁴³ As has been well said, "the general rule of law undoubtedly is, that persons who claim damages on the account that they were invited into a dangerous place, in which they received injuries, must seek their remedy against the person who invited them. There is nothing in the relation of landlord and tenant which changes this rule.* * * While such persons may reasonably expect the exercise of care for their safety by the person who invites them, they have no right to ex-

⁴⁴¹ *Schwalbach v. Shinkle, Wilson & Kreis Co.*, 97 Fed. 483; *Dyer v. Robinson*, 110 Fed. 99; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *McCain v. Majestic Bldg. Co.*, 120 La. 306, 45 So. 258; *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N. E. 326, 108 Am. St. Rep. 469; *Peterson v. Smart*, 70 Mo. 34; *Henson v. Beckwith*, 20 R. I. 165, 37 Atl. 702, 38 L. R. A. 716, 78 Am. St. Rep. 847; *Lane v. Cox* [1897] 1 Q. B. 415; *Copp v. Aldridge & Co.*, 11 Times Law R. 411; *Wilson v. Treadwell*, 81 Cal. 58, 22 Pac. 304; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Folsom v. Parker*, 31 Misc. 348, 64 N. Y. Supp. 263; *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469; *Whitmore v. Orono Pulp & Paper Co.*, 91 Me. 297, 39 Atl. 1032, 40 L. R. A. 377, 64 Am. St. Rep. 229; *State v. Boyce*, 73 Md. 469, 21 Atl. 322; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Eyer v. Jordan*, 111 Mo. 424, 19 S. W. 1095, 33 Am. Rep. 543; *O'Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387; *Clyne v. Helmes*, 61 N. J. Law, 358, 39 Atl. 767; *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492; *Ryan v. Wilson*, 87 N. Y. 471, 41 Am. Rep. 384; *Montieth v. Finkbeiner*, 66 Hun, 633, 21 N. Y. Supp. 288; *Smith v. State*, 92 Md. 518, 48 Atl. 92; *Cole v. McKee*, 66 Wis. 500, 29 N. W. 279, 57 Am. Rep. 293; *Anderson v. Hayes*, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930; *Metzger v. Schultz*, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619, 59 Am. St. Rep. 323; *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. 393; *Lane v. Cox* [1897] 1 Q. B. 415.

⁴⁴² *Robbins v. Jones*, 15 C. B. (N. S.) 221.

⁴⁴³ *Henson v. Beckwith*, 20 R. I. 165, 37 Atl. 702; *Smith v. State*, 92 Md. 518, 48 Atl. 92, 51 L. R. A. 772.

pect like care from his landlord, with whom they are not in privity."⁴⁴⁴ There are, however, occasional decisions to the effect, apparently, that the lessor, if he knows of defects or dangers at the time of the lease, is liable for any resulting injuries to persons who may go on the premises by the tenant's invitation.⁴⁴⁵

The question whether the lessor, by making, at the time of the lease or subsequently, a contract to repair the premises, renders himself liable to a third person on the premises, for injuries received by the latter from defects existing at the time of the demise, which would not have continued to exist had the contract been performed, will be discussed in connection with that of the lessor's liability for injuries caused by defects arising after the lease, the principle involved being the same in both cases.⁴⁴⁶

b. **Concealed defects and dangers.** To the above rule of exemption of the landlord from liability to third persons on the premises for pre-existing defects, there is one exception, similar to that which exists as regards his liability to the tenant himself.⁴⁴⁷ The lessor is liable to such persons rightfully on the premises for injuries caused by defects or dangerous conditions existing at the time of the demise, which, while not apparent to the lessee, were known to the lessor, and of which he failed to inform the lessee. That is, the lessor, by failing to inform the lessee of such hidden defects, incurs a liability to such third

⁴⁴⁴ *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767, per McIlvaine, J. To the same effect, see *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. St. 722, 29 Pac. 451; *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469.

⁴⁴⁵ In *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384, it was assumed that a lessor is liable for an injury, caused by a defect of which the lessor knew at the time of the lease, to one coming on the premises to deliver goods to the tenant. There was no discussion of the question, apparently, either by the court or counsel. There was an oral promise by the lessor's agent to repair, but no reference is made thereto in the

opinion. On the authority of this case, in part at least, a lessor was held liable for injuries to a guest of the lessee, in *Donk Bros. Coal & Coke Co. v. Leavitt*, 109 Ill. App. 385.

In *Patterson v. Jos. Schlitz Brew. Co.*, 16 S. D. 33, 91 N. W. 336, the landlord was held liable for injuries to the tenant's employee, the court stating broadly that a landlord is liable for an injury to a stranger caused by a dangerous condition of which he had, or might have had, notice, a rule properly applicable only as regards injuries to third persons not on the premises by the tenant's invitation. See post, § 101.

⁴⁴⁶ See post, § 97 c.

⁴⁴⁷ See ante, § 86 d.

persons injured by such defects.⁴⁴⁸ And his liability extends not only to dangerous conditions of which he actually knows, but also to those the existence of which he has reasonable ground to suspect.⁴⁴⁹

One leasing premises performs his full duty if he informs the lessee of any hidden danger or defect of which the lessee is ignorant, and he is not liable to a third person on the premises because the latter is not informed of the danger by the lessee. This is clearly implied by the decisions, though not explicitly stated.⁴⁵⁰

⁴⁴⁸ *Whitmore v. Orono Pulp & Paper Co.*, 91 Me. 297, 39 Atl. 1032, 64 Am. St. Rep. 229; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397; *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591; *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96; *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499; *Holzhauser v. Sheeny*, 31 Ky. Law Rep. 1238, 104 S. W. 1034; *Moore v. Parker*, 63 Kan. 52, 64 Pac. 975, 53 L. R. A. 778; *Davis v. Smith*, 26 R. I. 129, 58 Atl. 630.

In *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731, it was held that one who built a light and unsubstantial building and leased it for purposes of heavy storage was liable for injuries to a laborer therein caused by the fall of the building, and the same lessor was, in *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404, held liable for injuries to goods stored in the building. The liability was placed on the ground of negligence in leasing a building for such a purpose, knowingly, or, as having built it, having reason to know, its insufficiency; and though these cases do not, as do the later cases, base the lessor's liability on his failure to inform the lessee of the defects, they say that he would have been relieved from liability if he had stipulated against any use of the premises for heavy storage.

These cases have been criticised (*Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438) and there is a *dictum* clearly opposed to them in *Schwalbach v. Shinkle, Wilson & Kreis Co.*, 97 Fed. 483. They are not in accord with the current of authority to the effect that the lessor is liable for injuries only if they are caused by hidden defects of which the lessor knew and which he failed to disclose.

⁴⁴⁹ *Metzger v. Schultz*, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619, 59 Am. St. Rep. 323; *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. 393; *Stenberg v. Willcox*, 96 Tenn. 163, 33 S. W. 917; *Willcox v. Hines*, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761; *Willcox v. Hines*, 100 Tenn. 538, 46 S. W. 297, 66 Am. St. Rep. 770; *Borman v. Sandgren*, 37 Ill. App. 160; *Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159. But he is not liable if he did not have reasonable ground to suspect such conditions. *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96.

⁴⁵⁰ See *Schwalbach v. Shinkle, Wilson & Kreis Co.*, 97 Fed. 483; *Whitmore v. Orono Pulp & Paper Co.*, 91 Me. 297, 39 Atl. 1032, 64 Am. St. Rep. 229; *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913; *O'Brien v. Capwell*, 59 Barb. (N. Y.) 497; *Akerley v. White*, 58 Hun, 362, 12 N. Y. Supp.

The lessee's knowledge is in effect imputed to the person injured, or rather, perhaps, it is the lessee's duty, not the lessor's, to inform persons, entering on the premises by the former's invitation or permission, of the dangerous condition. A different rule, requiring the lessor to give such information to every person whom the lessee may allow upon the premises, would impose on the lessor the duties of an occupant while divested of the benefits, and would in effect prevent the leasing of any premises in which there is a concealed source of danger to persons who might enter thereon.

As has been before indicated, in connection with the question of the lessor's liability to the tenant himself, for injury by concealed defects of which he knows,⁴⁵¹ the preferable theory of liability is in effect the same as that by which one who sells an article which he knows to be dangerous, without disclosing its dangerous character, is held liable to any person injured thereby.⁴⁵² For the purpose of the application of such a principle, it is immaterial whether the thing thus disposed of to another without any notification of its dangerous characteristics is a piece of land, a house, or a chattel, or whether it is disposed of for a limited period or permanently. In any jurisdiction in which the lessor's liability for injuries caused by concealed defects of which he knew at the time of the lease is based exclusively on the theory of fraud,⁴⁵³ the question might arise whether a third person, not a party to the lease, could recover by reason of such defects, on the theory that the concealment was intended to deceive such a third person as well as the lessee, the general rule being that there can be no recovery in an action for deceit unless the defendant intended that

149; *Anderson v. Hayes*, 101 Wis. 538, 77 N. W. 891; *Roche v. Sawyer*, 176 Mass. 71, 57 N. E. 216; *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 909.

⁴⁵¹ See ante, at notes 35-39.

⁴⁵² "A person, who sells or rents an article, which he knows, or is legally bound to know, is imminently dangerous to life or limb, to another, without giving notice of its qualities, is liable to any person who suffers injury therefrom, which might have been reasonably anticipated." *Burdick*, Torts, 453. "A person who knowingly sells or furnishes an article which, by reason of defective construction or otherwise, is imminently dangerous to life or property, without notice or warning of the defect or danger, is liable to third parties who suffer therefrom." *Cooley*, Torts (3d Ed.) 1489. See, also, *Huset v. J. I. Case Threshing Mach. Co.*, 57 C. C. A. 237, 120 Fed. 865.

⁴⁵³ See ante, note 40.

the plaintiff, or persons of the class to which plaintiff belongs, should act on the false representation.⁴⁵⁴

A liability on the part of the lessor, for injuries caused by concealed defects, known to and not disclosed by him, has been asserted in favor of members of the tenant's family residing with him on premises leased for residence purposes,⁴⁵⁵ and also in favor of employees of the tenant.⁴⁵⁶ It would seem to exist also in favor of any persons whose presence on the demised premises might have been anticipated by the lessor as a result of the making of the lease, such as business visitors, or social guests.⁴⁵⁷ Likewise the lessor owes such a duty, it would seem, to a sublessee or assignee of the leasehold as well as to persons coming on the premises by invitation of such sublessee or assignee,⁴⁵⁸ provided, it seems, the sublease or assignment is not prohibited by the lease, and not if it is so prohibited, since the presence of the

⁴⁵⁴ In *Lovitt v. Creekmore*, 26 Ky. Law Rep. 234, 80 S. W. 1184, it is decided, without any discussion of the matter, that the lessee's servant could not recover in the absence of allegations of fraud on the part of the lessor. It was not decided whether he could recover on the ground of fraud.

As to the general rule referred to, see *Kerr, Fraud & Mistake* (3d Ed.) 402; *Bigelow, Torts* (7th Ed.) § 164; *Burdick, Torts*, 374.

⁴⁵⁵ *Moore v. Parker*, 63 Kan. 52, 64 Pac. 975, 53 L. R. A. 778; *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397. See *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96.

⁴⁵⁶ *Harrison v. Jelly*, 175 Mass. 292, 56 N. E. 283; *Anderson v. Hayes*, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930. See *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731.

In *Perez v. Rabaud*, 76 Tex. 191, 13 S. W. 177, it is said that the employee of the tenant stands in place of the tenant as regards a defect in

the leased premises. Here, however, the landlord was held not liable under the general rule that the lessor is not liable for defects in the premises. The court does not refer to the obligation of the lessor to reveal hidden defects. It would appear that the lessor knew of the defect before the injury but not before the lease. As to the sufficiency of such knowledge to impose liability, see ante, notes 57, 58.

⁴⁵⁷ *McConnell v. Lemley*, 48 La. Ann. 1433, 20 So. 887, holding the landlord exempt from liability to a guest of the tenant, was decided entirely upon the local statute, without reference to any common-law authorities.

⁴⁵⁸ See *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438, for a dictum that the lessor owes the same duty to the sublessee as to the lessee. But that he owes no duty to the sublessee's licensee, see *Malone v. Laskey* [1907] 2 K. B. 141, post, note 473.

sublessee or of persons invited by him could not have been anticipated by the lessor if such prohibition existed.⁴⁵⁹

It does not seem that, in this connection, the distinction which exists, with reference to the liability of a landowner, between persons invited on the premises by him and "mere licensees," has any place. The lessor is liable to persons on the leased premises on account of concealed defects therein, not as having invited them on the premises, nor because the lessee has invited them thereon, but because he had reason to anticipate their presence, and consequently had no right to subject them to danger by failing to warn the lessee, so that the latter might guard against the danger, or in turn warn such persons of the existence of the danger.

The liability imposed, as stated above, on a lessor who leases premises in which there are concealed defects or dangers, which he fails to divulge to the lessee, being based on the lessor's negligence in so doing, cannot, it would appear, be extended to a subsequent transferee of the reversion. That is, the liability is imposed on one as lessor rather than as landlord.⁴⁶⁰

c. **Premises of public or quasi public nature.** The lessor of premises used for a public or quasi public purpose, such as a wharf or pier,⁴⁶¹ or a public hall,⁴⁶² has been held liable to

⁴⁵⁹ In *Cole v. McKey*, 66 Wis. 500, 29 N. W. 279, 57 Am. Rep. 293; *Donaldson v. Wilson*, 60 Mich. 86, 26 N. W. 842, 1 Am. St. Rep. 487, it was held that the landlord owed no duty to a sublessee when subleasing was forbidden by the lease. But the lessor was held not to be liable for defects in a pier, of which defects he did not know at the time of the demise and could not have known in the exercise of reasonable diligence. *State v. Boyce*, 73 Md. 469, 21 Atl. 322. In *Cannavan v. Conklin*, 1 Daly (N. Y.) 509, 1 Abb. Pr. (N. S.) 271, the lessors of a pier reserved the right to use and occupy so much as their business would require, and it was held that they and their lessee were in joint possession and so were jointly liable for defects. It would seem more properly that the lessee was in possession, while the lessor merely had a license to use it.

⁴⁶⁰ *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778, seems to decide this in effect, but the case is complicated, and needlessly so, it appears, by the introduction of the theory of nuisance. See post, §§ 102-104.

⁴⁶¹ *Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620; *Eckman v. Atlantic Lodge No. 276*, 68 N. J. Law, 10, 52 Atl. 293. ⁴⁶² *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92; *Fox v. Buffalo Park*, 21

persons rightfully there for defects existing therein at the time of the demise, and there are occasional expressions to the effect that there is a duty upon the lessor of such premises, which does not exist in the case of other premises, to see that they are, at the time of the demise, safe for use by the public or by such portion of the public as may have occasion to enter thereon.⁴⁶³

App. Div. 321, 47 N. Y. Supp. 788, *affd.* 163 N. Y. 559, 57 N. E. 1109; *Camp v. Wood*, 76 N. Y. 92; *Copley v. Balle*, 9 Kan. App. 465, 60 Pac. 656 (hotel); *May v. Ennis*, 78 App. Div. 552, 79 N. Y. Supp. 896 (*ditto*).

In *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92, it was held that where a building was leased for a public exhibition, the lessor was liable to one injured by the fall of a platform in front of the building while waiting for the exhibition to open, since the lessor "must be taken, or at least might have been found, to have contemplated the use of the stairs and platform, as they were, by the public for the purpose of going to the show. If the jury found that the use actually made of the platform was something which the defendant was bound to have contemplated, he was liable for any neglect of proper precautions to make it safe, * * * just as in the case of premises let with a nuisance upon them." In *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 909, this case is distinguished, apparently, on the ground that the person injured, in the later case, was not of a class whose presence on the premises could have been anticipated by the lessor.

In *Edwards v. New York & H. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659, where a hall was leased for the purpose of a walking match, and a gallery therein fell when filled by a large and unruly crowd, the majority

of the court (four judges) decided that the lessor was not liable, since he had no reason to suppose that the gallery would be so filled, it having been originally built and always used merely for the serving of refreshments to a limited number of persons, of which fact the lessee might have known by the presence of the tables and chairs, it appearing furthermore that the lessor had no knowledge of any weakness in its construction. The minority of the court (three judges) thought that the condition of the gallery when leased was not such as to necessarily charge the lessee with notice that the gallery was not intended to be used as other parts of the house and filled to its utmost capacity, but that this was a question for the jury.

⁴⁶³ In *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594, it is said: "There are cases" (referring to *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295) "where the use to which an owner of property puts it is of such a public character that he is bound to observe reasonable care in keeping it in such a condition as to save, harmless, those who are invited to come onto it for the benefit and profit of the owner." And in *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, *affd.* without opinion, 163 N. Y. 559, 57 N. E. 1109, the court

The idea is, perhaps, that owing to the fact that the lessor knows that persons will come upon the premises in large, or at least considerable, numbers, without having had, or seeking, direct communication with the tenant, it cannot be anticipated that they will be informed by the tenant of the existence of dangerous conditions, and perhaps also it is thought that in the case of such a place persons coming thereon will be less likely

says: "While it is undoubtedly true, in ordinary cases, in the leasing of buildings, that there is no implied warranty on the part of the lessor that the buildings are fit and safe for the purposes for which they are leased, the rule is different in regard to buildings and structures in which public exhibitions and entertainments are designed to be given, and for admissions to which the lessors directly or indirectly receive compensation. In such cases the lessors or owners of the buildings or structures hold out to the public that the structures are reasonably safe for the purposes for which they are let or used and impliedly undertake that due care has been exercised in the erection of the buildings." The cases cited in support of this statement are, however, inapplicable.

In *Smith v. State*, 92 Md. 518, 48 Atl. 92, it is said that "if the property be of a public character, he (the owner) cannot with impunity rent it in an unsafe condition, and, if he does, may be required to answer to those who are brought upon it, at the instance of his lessee, for injuries they sustain;" citing and quoting *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, *supra*, where it is said: "A wharf furnishing the only mode of ingress and egress to a summer resort, where crowds are invited to come, if in an unsafe and danger-

ous condition, is certainly a nuisance of the worst character. It will not do for the owner, knowing its condition, or having, by the exercise of any reasonable care, the means of knowing it, to rent it out and receive rent for it, but escape all liability when the crash comes. He who solicits and invites the public to his resorts must have them in a reasonably safe condition, and not in a condition to risk the lives and limbs of his visitors."

In *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829, it is said that "if the premises are rented for a public use for which the lessor knows that they are unfit and dangerous, he is guilty of negligence and may become responsible to persons suffering injury while rightfully using them," and one who had leased to another a bathing establishment, appurtenant to which was a tobaggan slide "designed for the use of the public," was held liable for injuries to a guest of the establishment caused by the defective construction of the slide.

In *Copley v. Balle*, 9 Kan. App. 465, 60 Pac. 656, it was said that the lessor of a hotel "was negligent in leasing the property to be used for a public purpose without providing for the protection of patrons from the danger of injuries by reason of the excavation thereon."

to be on the alert to avoid danger. These considerations would seem, however, to apply to the same extent to premises used for any private business, such as a department store, on which persons are likely to enter in considerable numbers. And if such a store is to be regarded as a public place within the meaning of the view asserted in the cases referred to, the question arises as to how large and how popular a store must be in order to constitute a public place. The cases make no suggestions as to the basis of the rule, otherwise than occasional statements that such a dangerous condition, existing on premises of a public or quasi public character, constitutes a "nuisance," nor do they undertake to say what class of use is public or quasi public so as to render the rule applicable. Occasionally, as in the case of a public hall "leased" to one for a few nights only, the owner's liability, it is submitted, might be more properly placed on the ground that he has not given a lease but merely a license, and consequently retains the full possession and control of the premises and, because the licensee is in no position to look to the physical condition of the premises, the lessor, so called, owes the duty of keeping the premises safe for all such as he may expect to come thereon by invitation of the so called lessee.⁴⁶⁴ Occasionally the view that a distinction exists between a building devoted to public purposes and one devoted to private purposes, seems to have been expressly repudiated.⁴⁶⁵ If

⁴⁶⁴ See *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92, and ante, § 7 b.

⁴⁶⁵ In *Willcox v. Hines*, 100 Tenn. 538, 46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770, it is said there is no ground for the application of a different rule in the case of a lease of premises for public purposes from that applicable in the case of a lease for private purposes, since "the obligation not to expose the individual to danger is the same as that not to expose the public to danger."

In *Edwards v. New York & H. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659, Earl, J., says: "If one builds a house for public amusements or en-

tainments, and lets it for those purposes, knowing that it is so imperfectly and carelessly built that it is liable to go to pieces in the ordinary use for which it was designed, he is liable to the persons injured through his carelessness. And this rule of responsibility goes far enough for the protection of lessees and of the public generally. It is but a just and reasonable application of the maxim, *sic utere tuo ut alienum non laedas*." And it is said elsewhere in the opinion as to the liability of the landlord, that "there is no distinction stated in any authority between cases of a demise of

such a distinction is to be generally recognized, it is desirable that the reasons therefore may be presented judicially, and that the line between public and private use may be indicated with some degree of clearness. To say that the lessor is liable for such a condition upon premises leased for use for public purposes, because such a condition upon such premises constitutes a nuisance, seems little more than a statement that he is liable, and, furthermore, it seems hardly correct, since liability for the maintenance of a nuisance is independent of negligence,⁴⁶⁶ ⁴⁶⁷ and the cases referred to above ordinarily assert a liability as for lack of due care.

§ 97. Conditions arising after demise.

a. **Ordinarily no obligation.** The lessor is ordinarily under no obligation towards persons on the premises for defective or dangerous conditions which may have arisen after the demise, he being in no position to discover such conditions or to remove them, and the obligation in that regard being upon the tenant in control of the premises. Accordingly he has been held not to be liable for injuries to one, rightfully on the premises, which were caused by a lack of repair, such repair not having become necessary till after the demise,⁴⁶⁸ for those caused by defective repairs or improvements made by the tenant,⁴⁶⁹ or for those caused by the tenant's negligence in leaving open hatchways,

dwelling houses and of buildings to be used for public purposes." In *Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; this case the "lease" was of "Gilmore's Garden" for a pedestrian expedition, and was legally no more than a license. The decision was, properly no doubt, that the lessor was not liable because not guilty of negligence.

⁴⁶⁶, ⁴⁶⁷ See post, § 102.

⁴⁶⁸ *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 472, 33 N. E. 499; *Dalton v. Gibson*, 192 Mass. 1, 77 N. E. 1035, 116 Am. St. Rep. 218; *Cummings v. Ayer*, 188 Mass. 292, 74 N. E. 336; *Clyne v. Helmes*, 61 N.

J. Law, 358, 39 Atl. 767; *Clancy v. Canandaigua v. Foster*, 150 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575; *Curran v. Flammmer*, 49 App. Div. 293, 62 N. Y. Supp. 1061; *Leaux v. New York*, 87 App. Div. 398, 84 N. Y. Supp. 514; *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492, 46 L. R. A. 748; *Perez v. Rabaud*, 76 Tex. 191, 13 S. W. 177; *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956; *Lane v. Cox* [1897] 1 Q. B. 415.

⁴⁶⁹ *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310.

elevator doors and the like,⁴⁷⁰ in not lighting passage ways,⁴⁷¹ or in using defective machinery.⁴⁷²

b. **Negligent acts.** To the rule exempting the landlord from liability for a defect or danger arising after the demise, there is, apparently, an exception when the defect or danger is the creation of the lessor himself, in the course of repairs or alterations made by him during the tenancy. He is liable therefor as for any negligent act on his part resulting in injury to another.⁴⁷³ And on somewhat the same principle he is liable for injuries caused by defects in machinery which he retains under his exclusive control for his own purposes.⁴⁷⁴

⁴⁷⁰ *Handyside v. Powers*, 145 Mass. 123, 13 N. E. 462; *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87; *Texas Loan Agency v. Fleming*, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279; *De Graffenried v. Wallace*, 2 Ind. T. 657, 53 S. W. 452; *Dood v. Rothschild*, 31 Misc. 721, 65 N. Y. Supp. 214.

⁴⁷¹ *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Eyer v. Jordan*, 111 Mo. 424, 19 S. W. 1095, 33 Am. St. Rep. 543.

One who has leased a building as a whole is not liable to one to whom his lessee subleased a part of the building for defects in a passageway used by the sublessees in common, since such original lessor has no control thereof. *Marley v. Wheelwright*, 172 Mass. 530, 52 N. E. 1066.

⁴⁷² *Johnson v. Tacoma Cedar Lum-ber Co.*, 3 Wash. St. 722, 29 Pac. 451.

In *Crusselle v. Pugh*, 67 Ga. 430, 44 Am. Rep. 724, the exemption of the lessor from liability was held to extend to a case where the person injured supposed that he was still in the lessor's employ, not knowing that the premises had been leased and that he was in reality working for the lessee. This was a case of injuries from blasting.

⁴⁷³ See *Barman v. Spencer* (Ind.) 49 N. E. 9; *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96, 7 L. R. A. (N. S.) 965, 114 Am. St. Rep. 631; *Leslie v. Pounds*, 4 Taunt. 649. But in *Malone v. Laskey* [1907] 2 K. B. 141, it was decided that the landlord was not liable for injury to a licensee of a sublessor caused by defective repairs made by workmen employed by him and supposed by him to be competent. The decision seems to be based chiefly on the theory that there was no invitation on the part of the landlord to such licensee to use the premises, and that in the absence of such invitation he owed no duty to exercise care as regards such licensee.

⁴⁷⁴ *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272; *Davis v. Pacific Power Co.*, 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156, in both of which cases the machinery was used for transmitting power to an adjoining building occupied by the landlord. In the latter case it was decided that the plaintiff who, having gotten something in his finger, went to the only place where there was sufficient light for the purpose of extracting it, and was there injured, was not a "mere vol-

c. **Contract by lessor to repair.** It has been judicially asserted that, if the lessor agrees with the lessee to make repairs, and a third person is injured by defects which would not have existed if the lessor had performed such agreement, such person may recover against the lessor. This view has usually been asserted in connection with injuries to persons not on the premises,⁴⁷⁵ and has been in terms based upon the theory that "circuity of action" is thereby avoided, since the person injured could have recovered against the tenant, and the tenant could in turn have recovered on the lessor's agreement to repair.⁴⁷⁶ This theory of avoidance of circuity of action has apparently been but seldom suggested in connection with an action by a person on the premises by invitation from the tenant,⁴⁷⁷ and its soundness is open to question.⁴⁷⁸ In a few states there are decisions that the lessor thus contracting to repair is liable to a person upon the premises by invitation from the tenant, who is injured by the lack of repair, without any statement of the theory of liability.⁴⁷⁹ And there are occasional statements to the effect

untenant" while there, since he was engaged in the removal of an obstacle to the performance of his work.

⁴⁷⁵ See post, § 107.

⁴⁷⁶ *Gridley v. City of Bloomington*, 68 Ill. 47; *Boyce v. Tallerman*, 183 Ill. 115, 55 N. E. 703; *City of Lowell v. Spaulding*, 58 Mass. (4 Cush.) 277, 50 Am. Dec. 775; *Inhabitants of Milford v. Holbrook*, 91 Mass. (9 Allen) 17, 85 Am. Dec. 735; *Szathmary v. Adams*, 166 Mass. 145, 44 N. E. 124; *Frischberg v. Hurter*, 173 Mass. 22, 52 N. E. 1086; *Fleischner v. Citizens' Real Estate & Inv. Co.*, 25 Or. 119, 35 Pac. 174; *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 311.

In *Payne v. Rogers*, 2 H. Bl. 350, on which all the later decisions are directly or indirectly based, but one of the four judges mentioned the avoidance of circuity of action as a

ground for imposing liability on the landlord. The others give no reason. The case is referred to in rather disparaging terms in *Russell v. Shenton*, 3 Q. B. 449.

⁴⁷⁷ In *Perez v. Rabaud*, 76 Tex. 191, 13 S. W. 177, 7 L. R. A. 620, an action for injuries to the tenant's servant, it is referred to as one exception to the general rule of non-liability on the part of the landlord.

In *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 117, 124 Am. St. Rep. 575, it is decided that liability on the part of the landlord for injuries to the tenant's wife could not be sustained on this theory, since she could not have sued the tenant, her husband.

⁴⁷⁸ See post, § 107.

⁴⁷⁹ *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Baron v. Liedloff*, 95 Minn. 474, 104 N. W. 289; *Sontag v. O'Hare*, 73 Ill.

that he is so liable on the ground of negligence, if he fails to make repairs within a reasonable period after he knows of the need of repair.⁴⁸⁰ In one case the view that a lessor is liable if he covenants to repair has been extended to the case of a warranty by him as to the safe condition of the premises, a member of the tenant's family having been injured by an unsafe condition.⁴⁸¹

In a number of cases a right of recovery against the landlord, in favor of a person upon the premises by the tenant's invitation, injured by reason of defects or dangers which would have been obviated had the lessor performed his covenant to repair, is explicitly denied,⁴⁸² while in others it is in effect decided that he has no such right of recovery unless the landlord had notice of the need of repairs.⁴⁸³

App. 432; *Stillwell's Adm'r v. South v. Ennis*, 78 App. Div. 552, 79 N. Y. *Louisville Land Co.*, 22 Ky. Law Rep. Supp. 896.

785, 58 S. W. 696, 52 L. R. A. 325.

⁴⁸¹ *Moore v. Steljes*, 69 Fed. 518.

In *Olson v. Schultz*, 67 Minn. 494, 70 N. W. 779, 36 L. R. A. 790, 64 Am. St. Rep. 437, it was held that under a covenant "to keep the elevator and approaches in constant repair and perfect condition," the lessor was liable for injuries to the employe of one of the tenants arising from defects in the elevator irrespective of the lessor's actual knowledge of the defects, provided, it seems, he could have discovered them in the exercise of reasonable diligence; and that it was not sufficient to keep it in such repair as it was in at the date of the demise. The court emphasizes the covenant as a basis of liability, but it might as well have been based on the fact that the elevator was under the lessor's control, it not being included in the demise, but being used in common by all the tenants of the building. See post, § 99.

⁴⁸² *Clyne v. Helmes*, 61 N. J. Law, 358, 39 Atl. 767; *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708, 124 Am. St. Rep. 575; *Quay v. Lucas*, 25 Mo. App. 4; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Brady v. Klein*, 133 Mich. 422, 95 N. W. 557, 103 Am. St. Rep. 455; *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220; *Cavaller v. Pope* [1906] App. Cas. 428, afg. [1905] 2 K. B. 757; *Willcox v. Hines*, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761; *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594; *Flynn v. Hatton*, 43 How. Pr. (N. Y.) 333; *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855; *Dood v. Rothschild*, 31 Misc. 721, 65 N. Y. Supp. 214; *Miller v. Rinaldo*, 21 Misc. 470, 47 N. Y. Supp. 636; *Stelz v. Van Dusen*, 93 App. Div. 358, 87 N. Y. Supp. 716; *Sherlock v. Rushmore*, 99 App. Div. 598, 91 N. Y. Supp. 152.

⁴⁸⁰ *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580; May

⁴⁸³ *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580;

A lessee who has made a sublease cannot, it has been decided, be subjected to liability to a third person by reason of his covenant with his lessor to keep the premises in repair. The theory of avoidance of circuity of action is inapplicable for the purpose of imposing such liability, since such lessee is not by his covenant bound to indemnify the sublessee, who is primarily liable to the person injured.⁴⁸⁴

In one jurisdiction there are statements to the effect that the fact that the lessor has covenanted to repair, or that he has reserved a right to enter to repair, does not impose upon him a liability for injuries to a person on the premises by reason of the lack of repair, unless this constitutes a "nuisance."⁴⁸⁵ It is somewhat difficult to understand what is meant by the expression "nuisance" in this connection. A defect or danger on private premises cannot well constitute a nuisance as regards one coming thereon by license,⁴⁸⁶ since it does not affect him in the enjoyment of property or in the exercise of a common

Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. 127; *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 472, 33 N. E. 499; *Marley v. Wheelwright*, 172 Mass. 530, 52 N. E. 1066; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 12 Am. St. Rep. 778; *Ploen v. Staff*, 9 Mo. App. 309. In *Sinton v. Butler*, 40 Ohio St. 158, it was regarded as a question of the construction of the lease whether the lessor is liable, by reason of his agreement to repair, in the absence of notice to him of the need of repairs.

The implication in these cases other than the one first cited, that the lessor is liable in case he has notice of the need of repairs, would seem hardly reconcilable with other decisions in the same jurisdictions cited in the next preceding note. The first of the Massachusetts cases above cited, *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. 127, purports to be based on the decision

in *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465, which, however, makes no reference to the question of notice of the need of repairs, but is explicitly to the effect that a mere failure by the lessor to perform his contract to repair imposes on him no liability for personal injuries received by the lessee.

⁴⁸⁴ *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391.

⁴⁸⁵ *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. Rep. 778; *Quay v. Lucas*, 25 Mo. App. 7. And see *Brady v. Klein*, 133 Mich. 422, 95 N. W. 557, 62 L. R. A. 909, 103 Am. St. Rep. 455.

⁴⁸⁶ See *Burdick v. Cheadle*, 26 Ohio St. 392, 20 Am. Rep. 767, an able opinion by McIlvaine, J.

right.⁴⁸⁷ This exception in favor of the liability of a lessor would seem to be inapplicable unless perhaps the premises are of a public character.

The person injured cannot, it seems clear, recover by reason of the lessor's breach of his contract to repair, if the injuries can be attributed to contributory negligence on the part of the former.⁴⁸⁸

B. TO PERSONS IN PLACES OR USING APPLIANCES UNDER THE LANDLORD'S CONTROL.

§ 98. Persons in places under landlord's control.

We have before considered the liability of a landlord to his tenant for injuries to the latter caused by defects and dangerous conditions, not in the premises leased to the tenant, but in places adjacent thereto which are retained and controlled by the landlord, though used in common by such tenant and other tenants of the same landlord in connection with their respective tenements, a doctrine applied with the greatest frequency in the case of common passages and stairways used in connection with the various apartments in a building leased to different persons,⁴⁸⁹ but which is also applicable in case of defects in a common approach to separate buildings, as well as in the case of yards, spaces and platforms intended for use by the various tenants of the person in control.⁴⁹⁰ The landlord is liable to the various tenants for defects in such approaches, or other places adjacent to the leased premises and used by the various tenants, on the ground that, either by making the lease, or by acquiring such places, subject to the rights of the tenants to make use thereof, he impliedly invites each tenant to enter on such places, so far as this may be necessary in the reasonable use of the demised premises, and, like any other landowner expressly or impliedly inviting a person to enter on his land or on a certain part thereof, he is bound to exercise reasonable diligence, to make the premises safe for the person so entering thereon. On the same principle the landlord is liable for defects in such common

⁴⁸⁷ See post, § 102, at note 555. *McGinn v. French*, 107 Wis. 54. 82 N.

⁴⁸⁸ See *Thompson v. Clemens*, 96 W. 724.

Md. 196, 53 *Atl.* 919, 60 *L. R. A.* 580; ⁴⁸⁹ See ante, § 89 a.

⁴⁹⁰ See ante, § 89 b.

approaches, or other places controlled by the landlord, to such persons, generally speaking, other than the tenant, as are rightfully in such places as having family; business or social relations with the tenant, the lease being in effect an implied invitation to them to enter on such places, as it is to the tenant himself.⁴⁹¹ It is impossible to state with exactness the classes of persons to whom the landlord is thus under an obligation to keep safe the passageways or other places used in common by the tenants, as having impliedly invited them to use such places. It seems that they should be such persons as the landlord would have reason, in view of the nature of the premises leased to the individual tenants, the circumstances of the leasing, and the nature of the place in question, to expect to be in such place. This is perhaps the general tendency of the decisions, though as a matter of fact the question has rarely arisen whether a particular person bore such a relation to the tenant that he was within the scope of the landlord's implied invitation to use the common passageways or other common places. There is no doubt that a member of the family of one of the tenants, residing on the leased premises, is entitled to recover against the landlord in case of injuries from defects in a common passageway or other means of approach,⁴⁹²

⁴⁹¹ See *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399; *Marwedel v. Cook*, 154 Mass. 235, 28 N. E. 140; *Harrison v. Jelly*, 175 Mass. 292, 56 N. E. 283; *Hamilton v. Taylor*, 195 Mass. 68, 80 N. E. 592; *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708, 124 Am. St. Rep. 575; *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334; *Gillvon v. Reilly*, 50 N. J. Law, 26, 11 Atl. 481; *Brady v. Valentine*, 3 Misc. 20, 21 N. Y. Supp. 766; *Brugher v. Buchtenkirch*, 29 App. Div. 342, 51 N. Y. Supp. 464; *Burner v. Higman & Skinner Co.*, 127 Iowa, 580, 103 N. W. 802; *Burke v. Hulett*, 216 Ill. 545, 75 N. E. 240; *Gleason v. Boehm*, 58 N. J. Law, 475, 34 Atl. 886, 32 L. R. A. 645; *Readman v. Conway*, 126 Mass. 374; *Widing v. Pennsylvania Mut. Life Ins. Co.*, 20 S. D. 279, 104 N. W. 239; *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293; *Canavan v. Stuyvesant*, 7 Misc. 113, 27 N. Y. Supp. 413; *Schmidt v. Cook*, 12 Misc. 449, 33 N. Y. Supp. 624.

⁴⁹² *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334; *Wessel v. Gerken*, 36 Misc. 221, 73 N. Y. Supp. 192; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238; *Canavan v. Stuyvesant*, 7 Misc. 113, 27 N. Y. Supp. 413; *Schmidt v. Cook*, 12 Misc.

and likewise on account of defects in platforms or yards intended for general use by the tenants of the building and their families,⁴⁹³ though this might not, it seems, be the case, if the premises were such that the landlord could not have anticipated their use for residence purposes. So the landlord is liable for injuries to an employee of one of his tenants caused by defects in a common passageway,⁴⁹⁴ or in another place used in common by the tenants, and which the tenant's employees might naturally be expected to use.⁴⁹⁵ In the case of a lease of premises which might be expected to be used for business purposes, a customer or other person, approaching such premises by a common passageway for purposes connected with the business conducted on the premises, would be entitled to assert a liability against the landlord if the passageway were unsafe,⁴⁹⁶ and the same right would

449, 33 N. Y. Supp. 624; *Schwandt v. Metzger Linseed Oil Co.*, 93 Ill. App. 365.

Boarders and lodgers can assert such liability. *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293.

In *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153, it was held to be a question for the jury whether the children of a tenant, who were sitting on a common stairway eating their lunch, were making such a use of the stairway as the landlord had a right to anticipate, so as to render him liable.

⁴⁹³ *Schmidt v. Cook*, 12 Misc. 449, 33 N. Y. Supp. 624 (injury to tenant's child playing in yard of tenement house); *Canavan v. Stuyvesant*, 7 Misc. 113, 27 N. Y. Supp. 413 (ditto). See *Moynihan v. Allyn*, 162 Mass. 270, 38 N. E. 497.

So the landlord is liable to a member of a tenant's family for injuries caused by a defective water closet controlled by the landlord and open to the use of the various tenants and their families. *Domenicis v. Flei-*

sher, 195 Mass. 281, 81 N. E. 191; *Hess v. Hinkson's Adm'r*, 29 Ky. Law Rep. 762, 96 S. W. 436.

⁴⁹⁴ *Harrison v. Jelly*, 175 Mass. 292, 56 N. E. 283; *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097.

⁴⁹⁵ One requested by a tenant to go on a platform on the roof which was used in common by the tenants, to do some work there for the tenant (shaking rugs), was, though working gratuitously, in effect a servant or agent of the tenant, and was entitled to recover for injuries from defects in the common platform. *Wilcox v. Zane*, 167 Mass. 302, 45 N. E. 923.

⁴⁹⁶ *Miller v. Hancock* [1893] 2 Q. B. 177; *Readman v. Conway*, 126 Mass. 374 (semble). So a letter carrier, falling into an open elevator shaft while entering the hallway to leave mail for one of the tenants, can recover against the landlord. *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846.

exist in favor of tradesmen delivering goods on premises used for residence purposes.⁴⁹⁷ Likewise a sublessee or his employee, or a member of his family, would be so entitled,⁴⁹⁸ but not, it seems, if the sublease was forbidden by the terms of the lease, since the landlord could not, in that case, have anticipated the presence of such persons. A social guest of the tenant has likewise been regarded as entitled to assert this liability on the part of the landlord,⁴⁹⁹ and a peace officer, summoned to make an arrest, has been decided to be entitled to an extraordinary degree of diligence on the part of the landlord in this respect.⁵⁰⁰

To persons who are without any invitation, express or implied, from any of the tenants, to visit the building, and are without any invitation from the landlord to use the common approach or other place under his control, the landlord would seem to owe no duty as to the condition thereof. So it has been in one state decided that the landlord was not liable for injuries received by one while leaving a "wake" held on the occasion of the death of a person who was not an acquaintance of the person injured, and to which wake such person went without an invitation,⁵⁰¹ and it was, likewise, in the same jurisdiction, decided that one thus injured on a common approach could not recover

⁴⁹⁷ *Wright v. Perry*, 188 Mass. 268, 74 N. E. 328. And see *Burke v. Hullett*, 216 Ill. 545, 75 N. E. 240; *Hamilton v. Taylor*, 195 Mass. 68, 80 N. E. 592.

"When houses are rented for dwellings which can only be reached by the use of a common passage, the necessity of such use for the beneficial enjoyment of the thing demised establishes a right to such use, and imposes an obligation upon the landlord to take reasonable care to have and maintain the passage safe for such use. But the use of such rooms for dwellings equally necessitates the use of the passage by tradesmen in delivering goods, by persons having other business with the occupant, or by those who visit him for social reasons. With re-

spect, therefore, to all persons visiting a tenant upon any lawful occasion, the duty of the landlord is similar to that which he owes to the tenant." Per *Magie, J.*, in *Gleason v. Boehm*, 58 N. J. Law, 475, 34 Atl. 886, 32 L. R. A. 645.

⁴⁹⁸ See *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *O'Sullivan v. Norwood*, 8 N. Y. St. Rep. 338 (injury to sublessee's guest).

⁴⁹⁹ *Gleason v. Boehm*, 58 N. J. Law, 475, 34 Atl. 886, 32 L. R. A. 645; *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580; *Brady v. Valentine*, 3 Misc. 20, 21 N. Y. Supp. 766; *Henkel v. Murr*, 31 Hun (N. Y.) 28.

⁵⁰⁰ See post, note 507.

⁵⁰¹ *Hart v. Cole*, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557.

if he was going to see one of the tenants, his brother, merely on his own business, to try to borrow money from him, without any invitation, express or implied, to call for such a purpose, he being in such case a "mere licensee."⁵⁰² These decisions are based on the view that the landlord is liable for defects in a common approach only to persons coming thereon by reason of an invitation, express or implied, given by one of the tenants to visit the part of the building in the tenant's possession, and not to persons visiting the tenant as "mere licensees." This seems the equivalent of a statement that the landlord owes a duty towards third persons visiting the tenant, as regards the condition of such approach, only when the tenant himself owes a duty as regards the condition of the leased premises themselves.⁵⁰³ This is perhaps as satisfactory a criterion for determining the persons to whom the landlord owes a duty of care as any which could be suggested. It would, in England, and any other jurisdiction in which a social guest is regarded as a mere licensee,⁵⁰⁴ leave such guest without any redress against

⁵⁰² *Ganley v. Hall*, 168 Mass. 513, 47 N. E. 416.

⁵⁰³ In *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463, it was held that there could be no recovery by one who went into a building "to inquire about a matter which concerned herself alone" and "not to transact with any occupant of the building any kind of business in which he was engaged, or in the transaction of which the building was used or designed to be used," she being a "mere licensee."

⁵⁰⁴ See *Burdick*, Torts, 457.

In *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293, the landlord was held to be liable for injuries to one passing over a platform used in common by the tenants when "on a visit to one of the tenants, made on his express invitation to come on a particular day for a particular purpose." It does not appear whether the purpose was

social. In this case it is said, per Knowlton, J., that "the duty of the defendant to keep the platform safe for the tenant, and for those claiming under him, grew out of the contract of hiring. It was a part of the contract that the platform should be kept reasonably safe for the tenant for use in connection with his tenement. The contract impliedly included, not only the tenant himself, but the members of his family, and his servants and agents who might rightfully occupy and use the tenement with him. It included boarders and lodgers, if, in a proper use of the tenement, such persons might be received there by the tenant. It included all persons who, in connection with the use of the tenement by the tenant, might properly pass over the platform under the express authority of the tenant and in his right. To all such persons, by virtue of her contract with the ten-

the landlord for a defective condition not constituting a trap or pitfall. Even to members of the tenant's family the landlord is not liable for defects in a part of the building on which he had no reason to expect the tenant or members of his family to enter, never having given an express or implied invitation to them to use such places. They are at most, with reference thereto, mere licensees.^{504a}

The extent of the landlord's liability to persons such as those above named, rightfully in the common passages or other places used in common by the tenants, is the same as that under which he stands as regards the tenants themselves, and this has been previously considered at length.⁵⁰⁵ He is bound merely to exercise reasonable diligence to discover and remedy defects,⁵⁰⁶ and he is not bound to change the mode of construction of such places from that which existed at the time of the demise,⁵⁰⁷ nor

ant, the landlord owed the same duty that she owed to the tenant personally, to keep the platform reasonably safe." This language, in suggesting that the landlord's liability in such a case is contractual, is, it is submitted, incorrect, and as a matter of fact this very case was an action of tort and not of contract. The law does not imply a contract by the lessor as to the condition of the passageways and approaches, that is, there is no liability in *quasi* contract; nor, it would seem, is the making of the lease ground for an implication *in fact* of a contract such as is mentioned in the opinion. Moreover, even had there been an express and explicit contract of the character mentioned, it seems questionable, in view of the Massachusetts cases adverse to the right of the beneficiary of a contract, not a party thereto, to sue thereon, whether any person other than the tenant could avail himself thereof.

^{504a} Flaherty v. Nieman, 125 Iowa, 456, 101 N. W. 280; Dalin v. Worcester Consol. St. R. Co., 188 Mass. 344.

74 N. E. 597. In *Widing v. Pennsylvania Mut. Life Ins. Co.*, 20 S. D. 279, 104 N. W. 239, it was held that if the children of the various tenants of the building were in the habit of playing on the porches annexed to the various apartments, without reference to whether any particular porch was adjacent to the apartment of the child's parents, a child of a tenant was not a mere licensee while on a porch adjacent to the apartment of another tenant.

⁵⁰⁵ See ante, § 89.

⁵⁰⁶ *Gillvon v. Reilly*, 50 N. J. Law, 26, 11 Atl. 481; *Jucht v. Behrens*, 26 N. Y. St. Rep. 690, 7 N. Y. Supp. 195; *Evers v. Weil*, 43 N. Y. St. Rep. 336, 17 N. Y. Supp. 29; *Idel v. Mitchell*, 158 N. Y. 134, 52 N. E. 740; *Lynch v. Swan*, 167 Mass. 510, 46 N. E. 51. And according to *O'Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387, he is under no obligation to discover defects existing at the time of the demise. See ante, note 369.

⁵⁰⁷ *Roche v. Sawyer*, 176 Mass. 71, 57 N. E. 216. In *Learoyd v. Godfrey*,

is he bound, as a general rule, to light passageways in order to make them safe.⁵⁰⁸

It is a defense to an action for injuries to a third person, as well as to one for injuries to the tenant, that there was contributory negligence on the part of the person injured,⁵⁰⁹ as it is apparently, that the person injured, though he had a right to go for some purposes upon the place where the accident happened, had no right to be there for the particular purpose for which he was there.^{510, 511}

As regards the condition of an approach or platform used by a single tenant in connection with the premises leased to him, the landlord owes to a third person who is there by the tenant's

138 Mass. 315, the landlord was held liable for injuries to an officer, summoned to make an arrest, caused by his falling into a well in the common passageway; and this is explained in the case of *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 909; as follows: "The plaintiff in *Learoyd v. Godfrey*, 138 Mass. 315, did not enter on the common passageway on the invitation of the tenant alone, but he came there as a public officer in the discharge of his duty. As the passageway was one within the control of the defendant and was the way provided by him for access to the tenement let by him, to which the plaintiff's duty called him, the defendant was under the duty of using due care to make the way safe as against the plaintiff, even if it were necessary to change the construction, although he was not under such an obligation as against a tenant and those coming under the tenant's rights." The correctness of the decision is perhaps open to question.

In *Burner v. Higman & Skinner Co.*, 127 Iowa, 580, 103 N. W. 802, the landlord was held liable for an injury caused by failure to guard an

elevator shaft. Such a "trap" in a passageway might well be regarded as demanding a light to insure a moderate degree of safety to persons using the hallway, and in this case there was no light. (See ante, at note 373). The court bases the landlord's liability upon his obligation to keep the elevator under his control in a safe condition. But it was the passageway rather than the elevator which was unsafe, and the decision seems not in accord with the view that the landlord is under no obligation to change the construction.

⁵⁰⁸ *Gleason v. Boehm*, 58 N. J. Law, 475, 34 Atl. 886, 32 L. R. A. 645; *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580. See ante, § 89 e.

⁵⁰⁹ *Vorrath v. Burke*, 63 N. J. Law, 188, 42 Atl. 838; *Gleason v. Boehm*, 58 N. J. Law, 475, 34 Atl. 886, 32 L. R. A. 645; *Robinson v. Crimmins*, 120 App. Div. 250, 104 N. Y. Supp. 1076; *McCarthy v. Foster*, 156 Mass. 511, 31 N. E. 385; *Chicago, P. & St. L. R. Co. v. Doyle*, 119 Ill. App. 303. See *Hamilton v. Taylor*, 195 Mass. 68, 80 N. E. 592.

^{510, 511} See ante, § 89 i.

invitation as great a degree of diligence at least as he owes the tenant. Conceding that the landlord is not liable for injuries to the tenant himself caused by defects in a passageway leading to the latter's apartment alone,⁵¹² a different view might perhaps be taken as regards injuries to one visiting the tenant so caused, since the landlord has in effect invited him to use the passageway, and there is no duty on him to make repairs. The landlord is liable, it seems, if by active intervention he makes an approach to the premises unsafe, though he is not bound to keep it in repair.⁵¹³

§ 99. Persons using appliances under landlord's control.

On the same principle on which the landlord is held liable for injuries to persons by defects in places still under the landlord's control, though used by his various tenants, the landlord is liable for injuries to persons who are, in right of the tenant, using appliances under his control, caused by defects in such appliances. So the landlord has been held liable for injuries to one using, in right of the tenant, an elevator intended for use by the various tenants of the building and by other persons having reason to visit the tenant, the person injured not being a trespasser or "mere licensee."⁵¹⁴ And the landlord has been held liable for injuries, caused by defects in a hoisting machine intended for the use of the tenants, to an employee of a tenant or a person properly using the machine for the delivery of goods to a tenant.⁵¹⁵ But, as in the case of dangerous places, the landlord is liable for injuries from dangerous appliances only if he failed to exercise reasonable diligence to discover and remedy the defects,⁵¹⁶

⁵¹² See ante, § 89 j.

⁵¹³ See *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695.

⁵¹⁴ *Stewart v. Harvard College*, 94 Mass. (12 Allen) 58; *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Bogendoerfer v. Jacobs*, 97 App. Div. 355, 89 N. Y. Supp. 1051; *Springer*

v. Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464; *Rhodus v. Johnson*, 24 Ind. App. 401, 56 N. E. 942; *Rosenberg v. Schoolherr*, 116 App. Div. 289, 101 N. Y. Supp. 505; *Marker v. Mitchell*, 54 Fed. 637; *Olson v. Schultz*, 67 Minn. 494, 70 N. W. 779, 36 L. R. A. 790, 64 Am. St. Rep. 437.

⁵¹⁵ *O'Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387.

⁵¹⁶ *Olson v. Schultz*, 67 Minn. 494,

and the person injured must no doubt have had a right to use the appliance, and must have been free from contributory negligence, in order to recover.⁵¹⁷ The landlord is under no obligation to change the plan of construction in order to make the appliance safe.⁵¹⁸

The landlord should not, it seems, be relieved from liability to third persons for injuries caused by the nonrepair of appliances under his control by the fact that the lessee has contracted to keep such appliances in repair, as he would not be by a contract to that effect made by a third person.⁵¹⁹ Nor can he relieve himself from such liability to third persons by inserting in the lease a clause exempting him from liability for any injuries caused by a particular appliance, such third person not being a party to the lease and consequently not bound by such a provision.^{520, 522}

§ 100. Statutory obligations.

As before stated⁵²³ there are in one or two states statutory

70 N. W. 779, 36 L. R. A. 790, 64 Am. St. Rep. 437; *Rice v. Trustees of Boston University*, 191 Mass. 30, 77 N. E. 308; *Russo v. McLaughlin*, 51 Misc. 34, 99 N. Y. Supp. 839.

In the case of passenger elevators, however, a higher degree of diligence is by some cases, required, the owner and operator of the elevator being regarded as a carrier of passengers. See 10 Am. & Eng. Enc. Law (2d Ed.) 945; *Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 807, 82 Am. St. Rep. 464; *Marker v. Mitchell*, 54 Fed. 637, *supra*.

⁵¹⁷ *Stewart v. Harvard College*, 94 Mass. (12 Allen) 58; *Rhodium v. Johnson*, 24 Ind. App. 401, 56 N. E. 942; *Freeman v. Hunnewell*, 163 Mass. 210, 39 N. E. 1012; *Missell v. Lennox (C. C. A.)* 156 Fed. 347.

⁵¹⁸ *Freeman v. Hunnewell*, 163 Mass. 210, 39 N. E. 1012. But see *Burner v. Higman & Skinner Co.*, 127

Iowa, 580, 103 N. W. 802, *ante*, note 507, where the landlord was held liable for failure to guard the shaft used for an elevator under his control though there was apparently no guard for the shaft at the time of making the lease. Such a shaft in a hallway would seem to impose the obligation at least of keeping the hallway lighted, which was not done in this case. See *ante*, at note 373.

⁵¹⁹ See *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046, 14 L. R. A. 123, 26 Am. St. Rep. 272, and *post*, at notes 640-643 a.

⁵²⁰⁻⁵²² *Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464; *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097; *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630.

⁵²³ See *ante*, § 87 c.

obligations upon the landlord to make repairs, and failure to comply with such an obligation may render him liable to a person on the premises injured by the lack of repair.

In several cases the question has arisen whether a statutory obligation to furnish fire escapes requires this to be done by the landlord or the tenant. It has been held that a statute making it the duty of "any agent or owner of any factory, workshop, tenement house, inn or public house" to provide fire escapes, imposed such duty on one occupying a part of a building, as a tenant thereof, and using such part for factory purposes, and not upon the owner of the building.⁵²⁴ And a similar construction was placed upon a statute imposing the duty upon owners, superintendents or managers of factories, the owners or keepers of hotels, and the owners or landlords of tenement houses and their agents,⁵²⁵ and so it has been held that the proprietor of a hotel, and not the owner of the hotel building, was bound to provide the escapes under a statute requiring this to be done by "the owner, proprietor, lessee or keeper of every hotel, boarding and lodging house, school house, opera house, theatre, music hall, factory or office building."⁵²⁶ On the other hand it was held that the owner of the building was bound to erect fire escapes when the statute provided that all buildings over a certain height should be provided with a fire escape and that the municipal authorities should serve notice on "the owner or owners, trustees, lessee or occupant" to erect such escapes, and further provided that all such buildings thereafter erected should be, upon or before their completion, provided with fire escapes,⁵²⁷ and the same construction was placed upon a statute requiring every building in which any manufacture or business is carried on, requiring the presence of workmen above the first story, as well as certain other classes of buildings, to be furnished with fire escapes, and providing that the municipal authorities should

⁵²⁴ Lee v. Smith, 42 Ohio St. 458, 51 Am. Rep. 839. Co., 117 Tenn. 470, 101 S. W. 428, 121 Am. St. Rep. 1002, to the same effect.

⁵²⁵ Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201; Keely v. O'Conner, 106 Pa. 321. ⁵²⁷ Landgraf v. Kuh, 188 Ill. 484, 59 N. E. 501. But see, as to the construction of the Illinois Statute, McCulloch v. Ayer, 96 Fed. 178.

⁵²⁶ Johnson v. Snow, 102 Mo. App. 233, 76 S. W. 672, 10 L. R. A. 254. And see Adams v. Cumberland Inn

notify the occupant and also "the owner thereof, if known," of the need of such escape.⁵²⁸ The landlord is not liable for injuries to a tenant's employee caused by his inability to make use of the fire escape owing to the action of another tenant in locking the door which furnished access to the fire escape.⁵²⁹

In New York there are rigid statutory requirements as to the mode of construction and maintenance of tenement houses for the protection of the life and health of the inmates and defining the size of the halls, stairways and rooms, the character of openings for air and light and the materials for the construction of various parts of the building.⁵³⁰

C. TO PERSONS OWNING OR USING NEIGHBORING PROPERTY OR HIGHWAY.

§ 101. General rule of liability.

Having considered the question of the landlord's liability to a tenant for injuries resulting from physical conditions existing on or near the premises leased, and also of his liability for such injuries to a third person rightfully on the premises leased, or in a place adjacent thereto which is under the landlord's control, it remains to consider his liability for such injuries to a third person who is not within this description. Such class of persons, not bearing any relation to the landlord or to the tenant, based either on contract or conveyance, or on an invitation to use the landlord's or tenant's property, may be conveniently designated by the term "strangers," and they are necessarily either the owners or occupants of nearby property, persons temporarily on such property, or persons on a neighboring highway or other public place.

The rule generally applicable in determining the liability of the lessor⁵³¹ of land for injuries to strangers occurring during

⁵²⁸ Carrigan v. Stillwell, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163. who is not the lessor, but merely a transferee of the reversion, see post,

⁵²⁹ Sewell v. Moore, 166 Pa. 570, § 104.

⁵³¹ Atl. 370.

⁵³⁰ N. Y. Laws 1901, c. 334, as amended by Laws 1903, c. 179 (Tenement House Law). If the lease is merely colorable, the nominal lessor retaining the full possession and control of the premises as before, the making of the

⁵³¹ As to the liability of a landlord lease does not affect his liability for

the tenancy, as a result of the condition of the premises, or of the use made thereof by the tenant, is that he is liable for injuries caused by conditions which existed at the time of the demise,⁵³² and for injuries arising from the character of the use of the premises made by the tenant, if this use can be regarded as having been intended or contemplated by the lessor,⁵³³ while he is not liable for injuries caused by a condition on the premises arising after the demise,⁵³⁴ or for injuries caused by the tenant's mode of using the premises, if he cannot be regarded as having connived at or authorized the creation of such conditions or such mode of use.⁵³⁵

The rule as to the lessor's liability, above stated, that he is liable for a condition existing at the time of the demise or

subsequent injuries to strangers. See *Spaine v. Stiner*, 51 App. Div. 481, 64 N. Y. Supp. 655, *affd.*, without opinion, 168 N. Y. 666, 61 N. E. 1135.

⁵³² *Todd v. Flight*, 9 C. B. (N. S.) 377; *Durant v. Palmer*, 29 N. J. Law, 544; *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800; *Davenport v. Ruckman*, 37 N. Y. 568; *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429; *Matthews v. De Groff*, 13 App. Div. 356, 43 N. Y. Supp. 237; *Waterhouse v. Joseph Schlitz Brew. Co.*, 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157, 76 Am. St. Rep. 616; *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224; *Mylander v. Beimschla*, 102 Md. 689, 62 Atl. 1038, 5 L. R. A. (N. S.) 316.

⁵³³ *Lufkin v. Zane*, 157 Mass. 117, 31 N. E. 757, 17 L. R. A. 251, 34 Am. St. Rep. 262; *Boston Beef Packing Co. v. Stevens*, 12 Fed. 279; *Wunder v. McLean*, 134 Pa. 334, 19 Atl. 749, 19 Am. St. Rep. 702; *Jackman v. Arlington Mills*, 137 Mass. 277; *House v. Metcalf*, 27 Conn. 631; *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593; *Fleischner v. Citizens' Real Estate Inv. Co.*, 25 Or. 119, 35 Pac. 174; *Board of Chosen Freehold-*

ers of Hudson County v. Woodcliff Land Imp. Co., 74 N. J. Law, 355, 65 Atl. 844.

⁵³⁴ *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. 188, 54 Am. Rep. 672; *Curran v. Flammer*, 49 App. Div. 293, 62 N. Y. Supp. 1061; *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Johnson v. McMillan*, 69 Mich. 36, 36 N. W. 803; *Adams v. Fletcher*, 17 R. I. 137, 20 Atl. 263, 33 Am. St. Rep. 859; *Fehlauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843; *Mylander v. Beimschla*, 102 Md. 689, 62 Atl. 1038, 5 L. R. A. (N. S.) 316.

⁵³⁵ *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568; *Baker v. Allen*, 66 Ark. 271, 50 S. W. 511, 74 Am. Dec. 93; *Jansen v. Varnum*, 89 Ill. 100; *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Saltonstall v. Bunker*, 74 Mass. (8 Gray) 195; *Metropolitan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90; *Lufkin v. Zane*, 157 Mass. 117, 31 N. E. 757, 17 L. R. A. 251, 34 Am. St. Rep. 262; *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582; *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

for any use of the premises by the tenant which may have been contemplated by him, and not otherwise, though simple and reasonable in itself, is sometimes difficult of application. The simplest case is when the injury results from a condition which existed on the premises at the time of the lease, without reference to the mode in which the tenant uses the premises, or to whether he uses them at all, as when the lessor is held liable for injuries caused by the fall of a chimney, owing to the structural defects existing at the time of the demise, or for those caused by the defective condition at that time of the fastenings of the cover to a coal hole in the sidewalk. In such a case a condition which existed at the time of the demise is evidently the sole cause of the injury. A more difficult question arises when the particular mode of use which the tenant makes of the premises results in injury to a stranger. In such a case a condition existing at the time of the demise has ordinarily some connection with the injury, since it is in the course of the utilization of the premises in the condition in which they then were that the injury occurs. But the mere fact that the tenant causes the injuries while using the premises in the condition in which they were at the time of the demise is not sufficient to impose any liability on the lessor, but for this purpose it is necessary that the injuries be directly chargeable to such condition. That is, the lessor is liable if the condition of the premises at the time of the demise is such that, when used as it was apparently intended by the parties to the lease that they should be used, injuries to third persons result,⁵³⁶ while on the other hand he is not liable merely

⁵³⁶ *Boston Beef Packing Co. v. Mass.* 277), or where "the owner Stevens, 12 Fed. 279; *Wunder v. leases premises which are a nuisance or in the nature of things must become so by their user*" (*Maenner v. Carroll*, 46 Md. 216; *Metropolitan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90), or where "the structure was

So it is said that the lessor is liable where "the houses, drains and wells" in questions "were adapted to be used and intended to be used in the manner in which they were used," thereby producing the injury (*Jackman v. Arlington Mills*, 137 Am. Rep. 568).

because the premises are susceptible of a use which may cause injuries to others, and the tenant makes such use, this not being such a use as he had reason to contemplate.⁵³⁷ Applying this distinction, the lessor has been held liable for the frightening of a horse by the tenant's operation of a waterwheel in a mill near the highway, the wheel being "in the same condition as when the lease was made," and it being "used in the manner contemplated and intended by the parties,"⁵³⁸ and likewise for injury to goods on adjoining premises caused by the tenant's lighting of a fire in a cooking stove, placed by the lessor in such a position that a fire therein would have that effect,⁵³⁹ and for injuries to adjoining property from the use of a kiln erected on the premises by the lessor for drying lumber.⁵⁴⁰ On the other hand it was decided that a lessor was not liable for injuries

⁵³⁷ See *Gould v. Stafford*, 91 Cal. 146, 27 Pac. 543; *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568; *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582; *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

"If a landlord lets premises not in themselves a nuisance, but which may or may not become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are or not, he cannot be made responsible for the acts of his tenant." Per Creswell, J., in *Rich v. Basterfield*, 4 C. B. 783.

"The landlord will not be liable for the use of the premises in such a way as to do harm merely because there was a manifest possibility of their being used in such a way. The liability will stop with the tenant whose intervening wrong is the immediate cause of the damage." Per Holmes, J., in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279. "If the premises are a nuisance, not in themselves, but in consequence of the use

made of them by the tenant, then the question is whether this use is authorized by the landlord. If the premises can be used by the tenant in the manner intended by the landlord, either as shown by the construction of the premises, or by the terms of the lease, or by other evidence, without becoming a nuisance, the landlord is not liable for the acts or neglect of the tenant which create the nuisance. If the tenant creates the nuisance without authority of the landlord, and after he has entered into occupation as tenant, the landlord is not liable." Per Field, C. J., in *Lufkin v. Zane*, 157 Mass. 117, 31 N. E. 757, 17 L. R. A. 251, 34 Am. St. Rep. 262.

"The landlord is not liable unless he knew the use to which the premises would be applied, and that such use would be a nuisance." Muller v. Stone, 27 La. Ann. 123.

⁵³⁸ *House v. Metcalf*, 27 Conn. 631.

⁵³⁹ *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593.

⁵⁴⁰ *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189.

caused by smoke issuing from a chimney, if the injuries could have been avoided by the tenant's use of a particular kind of fuel,⁵⁴¹ or for injuries caused by the slippery condition of the pavement, resulting from the flow of water from a gutter on the premises, which condition would not have existed had the tenant refrained from pouring water into the gutter during the prevalence of freezing weather.⁵⁴²

Without reference to the condition of the premises at the time of the demise, if one demises them to be used for a particular purpose, having reason to believe that this use of the premises is likely to injure a stranger, the lessor is liable for such injuries. This case differs from that previously referred to merely in the fact that the lessor's complicity in the noxious use is inferred, not from the condition of the premises which renders such use possible and probable, but from the lessor's knowledge of such intended use when placing the premises in the lessee's control. Accordingly one leasing premises for the purpose of making boilers is, it is said, liable if he knows, or has reason to believe, that the making of boilers on the premises is likely to prove injurious to an adjoining owner,⁵⁴³ and one leasing premises for use as a bawdy house is liable to the adjoining owner injured by such use.⁵⁴⁴ So one leasing a floor of a building for warehouse purposes, knowing it to be too weak to be safely used for such purposes, is liable to the tenant of a lower floor injured by the giving away of the upper floor.⁵⁴⁵ It has even been decided that one leasing premises to another for the purpose of blasting rock therefrom is liable for an interference with an easement of support to which such premises are subject, result-

⁵⁴¹ *Rich v. Basterfield*, 4 C. B. 783. 48 Am. Rep. 272. But it was held this case is, however, questioned in *Harris v. James*, 45 Law J. Q. B. 545, and with reason, it would seem.

⁵⁴² *Gardener v. Rhodes*, 114 Ga. 929, 41 S. E. 63, 57 L. R. A. 749. Compare post, note 586.

⁵⁴³ *Fish v. Dodge*, 4 Denio (N. Y.) 311, 47 Am. Dec. 254. So where premises were leased for use as a lime quarry. *Harris v. James*, 45 Law J. Q. B. 545.

⁵⁴⁴ *Marsan v. French*, 61 Tex. 173, 48 Am. St. Rep. 748.

⁵⁴⁵ *Brunswick-Balke Collender Co. v. Rees*, 69 Wis. 442, 34 N. W. 732, 2 Am. St. Rep. 748.

ing from such blasting.^{545a} Furthermore the landlord, whether the original lessor or not, is liable, as would be any other person, if he aids or advises the tenant to create a condition on, or to make a use of, the premises, likely to injure a third person.⁵⁴⁶

Not only when the injury arises exclusively from the use made of the premises by the tenant, is the lessor free from liability,⁵⁴⁷ but also when it is caused by the latter's failure to repair defects arising after the time of the demise, this not being regarded as a result of the condition at the time of the demise within the rule of liability,⁵⁴⁸ and it is immaterial that the lessor knew that if the tenant failed to make repairs as they became necessary, danger to third persons might arise.⁵⁴⁹ Every lessor or vendor of property knows that.

The lessor is obviously not liable for acts of the tenant on the premises, not abetted by him and having no connection whatever with the condition of the premises, as when the lessor throws or shoots missiles therefrom,⁵⁵⁰ or allows dangerous matter to escape therefrom.⁵⁵¹

^{545a} Board of Chosen Freeholders of Hudson County v. Woodcliffe Land Imp. Co., 74 N. J. Law, 355, 65 Atl. 844. 188, 54 Am. Rep. 672; Lindstrom v. Pennsylvania Co. for Ins. on Lives & Granting Annuities, 212 Pa. 391, 61 Atl. 940.

⁵⁴⁶ Baker v. Allen, 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93; Riley v. Simpson, 83 Cal. 217, 23 Pac. 293, 7 L. R. A. 622; Twiss v. Baldwin, 9 Conn. 291, 23 Am. Dec. 339; Scott v. Bay, 3 Md. 431; Meadows v. Truesdell (Tex. Civ. App.) 56 S. W. 932. ⁵⁴⁹ See Deller v. Hofferberth, 127 Ind. 414, 26 N. E. 889; 2 Shearman & Redfield, Neg. § 708.

⁵⁵⁰ See Leonard v. Hornellsville, 41 App. Div. 106, 58 N. Y. Supp. 266; Walter v. Dennehy, 93 Mo. App. 7.

⁵⁵¹ Langabaugh v. Anderson, 68 Ohio St. 131, 67 N. E. 286, 62 L. R. A. 948.

⁵⁴⁸ Russell v. Shenton, 3 Q. B. 449; Nelson v. Liverpool Brewery Co., 2 C. P. Div. 311; Borman v. Sandgren, 37 Ill. App. 160; Hull v. Sherrod, 97 Ill. App. 298; Frischberg v. Hurter, 173 Mass. 22, 52 N. E. 1086; Harris v. Cohen, 50 Mich. 324, 15 N. W. 493; Ingwersen v. Rankin, 47 N. J. Law, 18, 54 Am. Rep. 109; Pope v. Boyle, 98 Mo. 527, 11 S. W. 1010; Gridley v. City of Bloomington, 68 Ill. 47; City of Lowell v. Spaulding, 58 Mass. (4 Cush.) 277, 50 Am. Dec. 775; Wolf v. Kilpatrick, 101 N. Y. 146, 4 N. E. The landlord is not liable for injuries caused by the negligence of the tenant in leaving open an aperture in a sewer through which tide water consequently flows, to the injury of an adjoining owner, because this was done while the tenant was making repairs, towards which repairs the landlord had agreed with the tenant to pay a specified sum. Murray v. Richards, 83 Mass. (1 Allen) 414.

The lessor's liability on account of conditions existing at the time of the lease is not affected by the fact that the tenant is also liable, as having failed to make necessary repairs, or as having used the premises while thus in a defective or dangerous condition.⁵⁵²

§ 102. Theory of liability.

The theory on which the lessor is held liable for injuries arising from a condition of the premises which existed at the time of the demise is ordinarily stated to be that such a condition, liable to cause injury to another, is a "nuisance," and that one whose land is subject to a nuisance cannot relieve himself from liability therefor by making a lease of the land.⁵⁵³ It appears to the

⁵⁵² *Durant v. Palmer*, 29 N. J. Law, 544; *Walsh v. Mead*, 8 Hun (N. Y.) 387; *Mancuso v. Kansas City*, 74 Mo. App. 138; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620, 2 Am. St. Rep. 295; *Schwalbach v. Shinkle, Wilson & Kreis Co.*, 97 Fed. 483; *Wunder v. McLean*, 134 Pa. 334, 19 Atl. 749, 19 Am. St. Rep. 702; *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046, 14 L. R. A. 123, 26 Am. St. Rep. 272; *Matthews v. DeGross*, 13 App. Div. 356, 43 N. Y. Supp. 237.

⁵⁵³ *Roswell v. Prior*, 12 Mod. 635, 1 Ld. Raym. 713, 2 Salk. 460; *Todd v. Flight*, 9 C. B. (N. S.) 377; *Metro-politan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90; *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Wenzler v. McCotter*, 22 Hun (N. Y.) 60; *Fleischner v. Citizens' Real Estate Co.*, 25 Or. 119, 35 Pac. 174; *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628; *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568; *City of Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800; *Ugla v. Brokaw*, 117 App. Div. 586, 102 N. Y. Supp. 857.

A somewhat analogous rule has

been applied in the case of a conveyance in fee simple, one who creates a nuisance being held liable for its continuance even after he makes such a conveyance. See *Clerk & Lindsell, Torts* (3d Ed.) 393; *Joyce, Nuisance*, § 454; *Dorman v. Ames*, 12 Minn. 451; *Plumer v. Harper*, 3 N. H. 89, 14 Am. Dec. 333; *Curtice v. Thompson*, 19 N. H. 471; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Blunt v. Aikin*, 15 Wend. (N. Y.) 522, 30 Am. Dec. 75.

In New York it is held that the grantor is not liable for the nuisance unless he affirms and upholds the nuisance, as by covenants for the quiet enjoyment of the premises in the particular condition which constitutes the nuisance. *Waggoner v. Jermaine*, 3 Denio (N. Y.) 306, 45 Am. Dec. 474; *City of Albany v. Cunliff*, 2 N. Y. (2 Comst.) 165, 174. And to the same effect, apparently, see *East Jersey Water Co. v. Bigelow*, 60 N. J. Law, 201, 38 Atl. 631. In the case of a lease the receipt of rent has been regarded as equivalent to such a covenant for the purpose of imposing liability on the lessor. *City of Albany v. Cunliff*, 2 N. Y. (2

present writer that while in some cases the liability of the lessor to a stranger by reason of conditions on the property at the time of the lease is properly based on the theory of nuisance, in others it may more properly be based on the theory of negligence.

The word "nuisance" is not infrequently used in a sense so broad as to make it almost equivalent to the word "tort"⁵⁵⁴ but, it is conceived, a nuisance is properly either an interference with a "common right," such as that to use a highway, or an interference with the enjoyment of property.⁵⁵⁵ Furthermore, in order that a nuisance may be created, there must be a more or less continuous interference with the enjoyment of a common right or of particular property, and the mere fact that, by reason of a condition existing in connection with one's property, some single isolated, and approximately instantaneous, event occurs, resulting in immediate injury to the person or property of another, does not, it is submitted, render such condition, or the property in connection with which it exists, a nuisance.^{555a} For instance, the fact that A's wall falls on B's property does not render that wall, as it existed before it fell, a nuisance. If it did, the peculiar result would frequently arise that whether a particular condition of property involves a nuisance could not be discovered until that condition ceases to exist. Furthermore,

Comst.) 165, 174; *Hanse v. Cowing*, 1 Lans. (N. Y.) 288.

⁵⁵⁴ Thus, in Cooley, *Torts* (2d Ed.) 670, "actionable nuisance" is defined as "any thing wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." This definition is substantially adopted by Mr. Jaggard (*Torts*, 744). And see the numerous judicial definitions collected in Joyce, *Nuisances*, p. 2 et seq.

⁵⁵⁵ "Nuisance is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property or, in some cases, in the exercise of a common right." Pollock, *Torts* (6th Ed.) 385. See, also, Burdick, *Torts*, 295, for a substantially similar definition.

In Abbott's *Law Dictionary* *sub voce* "Nuisance," the definitions of a nuisance as anything which injures another are criticized, and it is said that "the notions presented by the term, properly used, seem to be, first, that there is some use of one's property or rights; and second, that it is carried beyond the limits which a just regard to the welfare of the community or of individuals affected prescribes."

^{555a} "It appears to be of the essence of a nuisance that there should be some duration of mischief. A wrong producing damage instantaneously, as in the case of an explosion, could hardly be a nuisance." Bigelow, *Torts* (7th Ed.) 299.

if a particular condition existing in connection with one's property constitutes a nuisance, merely because it results eventually in some catastrophe injuriously affecting others, there is no reason for the consideration of the question of negligence in connection with the owner's liability for such injuries, since the question of due care has no bearing on that of the existence of a nuisance.⁵⁵⁶ But that the owner or occupant of land is not subject to such an absolute liability, irrespective of negligence, for injuries to strangers, is unquestionable.⁵⁵⁷ It may, moreover, be remarked that the word "nuisance" itself involves the idea of an actual present injury, and a private, as distinguished from a public nuisance, cannot exist, it is conceived, apart from a right of action in favor of some particular person or persons for the recovery of damages. But one cannot recover damages as against a property owner because a condition exists in connection with such property which may or will, in the future, cause the former some injury, as for instance, by the fall of a wall; and consequently such a condition, not affecting the rights of the public as to the enjoyment of a common right, cannot well be a nuisance, even if it does subsequently result in an injury to some person or persons.

The question of what constitutes a nuisance has been referred to for the reason that it has a direct bearing upon the theory on which, in many cases, a lessor's liability for injuries to a stranger is to be based. If these injuries are in their nature continuous, or at least, repeated, and they consist in interference with the enjoyment of another's property, and they are, furthermore, the result of conditions existing at the time of the lease, then the lessor's liability may unquestionably be based on the theory of nuisance. For instance, if one leases to another property which is so constructed as constantly to flood a neighbor's premises with water or filth, or to obstruct or pollute a watercourse to the detriment of another, or which, when used in the manner called for by the condition of the property, interferes with the right of a neighbor to a reasonable degree of immunity from noxious and disagreeable odors and from noise, the injury

⁵⁵⁶ Burdick, Torts, 405; 2 Jaggard, Torts, 747; 21 Am. & Eng. Enc. Law (2d Ed.) 688.

⁵⁵⁷ See Shearman & Redfield, Neg. c. 36; 1 Thompson, Neg. §§ 694-714, 1055, 1064; Burdick, Torts, p. 445.

is in its nature a nuisance, and it is proper to base the lessor's liability on the theory of nuisance, as it would be to base the lessee's liability, or, if the property were not under lease, the liability of the tenant in fee simple in control. But when there is no such continuous or repeated interference with one's enjoyment of his property, but merely an injury to a person or property, caused by an event of brief duration, which results from a condition existing in connection with neighboring property, the person injured can properly, it is submitted, recover damages on the ground only of a lack of due care, and this whether the liability is asserted against a lessor of the property, the defective condition of which caused the injury, against a lessee of such property, or against one having an estate of fee simple in possession. As before suggested, if a lessor is to be held liable in such a case on the theory that the existence of such condition constitutes a nuisance, that theory is a *fortiori* applicable as against one in actual control and possession of the property. The sounder theory, it is submitted, on which to base the liability of one who leases to another property in connection with which there exists a condition which is likely, at some time in the future, to result in injury to a third person or persons not claiming in right of the lessee, is that he is negligent in putting out of his own control a thing which he knows, or should know, to be a source of danger to others, and that he cannot protect himself from liability to such strangers for injury therefrom as he can from liability to persons entering on the premises in right of the lessee,⁵⁵⁸ by informing the lessee of the dangerous condition, since a stranger cannot be regarded, in favor of the lessor, as charged with notice of what the tenant knew, and since furthermore, even if he did know, he could avoid the danger only by the sacrifice of his right to use adjoining property. That the liability of the lessor for a dangerous condition existing on the premises at the time of the lease, which results subsequently in injury to a stranger, is to be based on the theory of negligence and not of nuisance, seems clearly involved in occasional decisions that the lessor is liable only if he knew of such condition at the time of the lease.⁵⁵⁹

⁵⁵⁸ See ante, § 96 b.

N. Y. 514, 27 N. E. 786, 22 Am. St.

⁵⁵⁹ Timlin v. Standard Oil Co., 126 Rep. 845; Borman v. Sandgren, 37

In the case of one conveying land in fee, the theory of liability on his part, on account of the continuance of a nuisance existing at the time of the conveyance, is based upon the ground that he was the creator of the nuisance, and that he cannot relieve himself from the consequences of his wrong by conveying the premises to another,⁵⁶⁰ and the same ground of liability is asserted in the first and leading case upon the liability of the lessor, that he himself created the nuisance.⁵⁶¹ This suggests the question whether liability can properly be imposed on the lessor for injury accruing after the date of the lease, on the theory of nuisance, if the injurious condition was created by the lessor's grantor, or by some other third person.

Occasionally it is said that the lessor is liable for injuries due to a condition on the premises which existed at the time of the lease, because by making the lease he authorizes a continuance of such condition,⁵⁶² or authorizes their use in that condition.⁵⁶³ If we adopt the theory above suggested, that the lessor is liable for injuries caused by a casualty resulting from a condition thus existing at the time of the lease, because he was negligent in

Ill. App. 160; *Griffith v. Lewis*, 17 Mo. App. 605; *Curran v. Flammer*, 49 App. Div. 293, 62 N. Y. Supp. 1061; *Monroe v. Carlisle*, 176 Mass. 199, 57 N. E. 332; *Patterson v. Jos. Schlitz Brew. Co.*, 16 S. D. 33, 91 N. W. 336; *Waterhouse v. Jos. Schlitz Brew. Co.*, 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157; *Id.*, 16 S. D. 592, 94 N. W. 587.

In *Leonard v. Hornellsville*, 41 App. Div. 106, 58 N. Y. Supp. 266, it is apparently intimated that the lessor's knowledge of the tenant's dangerous mode of using the premises would render the lessor liable, though such knowledge was acquired after the demise. This is evidently not so.

⁵⁶⁰ See cases cited ante, note 553, and also an excellent note in 86 Am. St. Rep. 509, upon the subject of an owner's liability for a nuisance created by another. It is there said:

"The real basis of liability for the consequences flowing from a nuisance rests neither on the ownership nor the occupancy of the premises upon which it exists. The occupant, as such, is not answerable for the nuisance; neither is the owner, as such, answerable. It is the one who creates a nuisance, or who knowingly continues it if created by another, that is answerable for the consequences."

⁵⁶¹ *Roswell v. Prior*, 12 Mod. 635.

⁵⁶² *Nugent v. Boston, C. & M. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; *Lufkin v. Zane*, 157 Mass. 117, 31 N. E. 757, 17 L. R. A. 251, 34 Am. St. Rep. 262; *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429.

⁵⁶³ *Boston Beef Packing Co. v. Stevens*, 12 Fed. 279; *House v. Metcalf*, 27 Conn. 631; *Jackman v. Arlington Mills*, 137 Mass. 277.

leasing the premises while subject to such condition, there is no occasion to resort to this theory of authorization. The fact that the lessor negligently leases the premises in such a condition that, if the lessee negligently fails to remove such condition, a third person is injured, renders the lessor liable, not because he authorized the lessee to be negligent, but because his, the lessor's negligence, was an effective cause of the injury. It is a case of joint negligence of a successive, as distinguished from a simultaneous, character.⁵⁶⁴ Even if the lessor's liability, in the particular case, for injuries resulting from a condition existing on the premises at the time of the lease, is properly based on the theory of nuisance, it would seem, as is suggested above, that he is ordinarily liable because he created the nuisance, and did nothing to abate it, and it seems questionable whether, using the word "authorize" in its ordinary sense, a lessor can be regarded as authorizing the lessee to maintain the premises in the same condition as at the time of the lease, for the purpose of imposing liability on the lessor. As a matter of fact the lessor or grantor of property, in connection with which a nuisance exists, does not, by making the lease or other conveyance of the property, intend to authorize the continuance of the nuisance, nor does the lessee regard him as so intending, and the doctrine of "apparent authority," recognized in the law of agency, is inapplicable to such a case, for the reason, firstly, that such doctrine has no bearing upon the liability of one person for another's torts, other than deceit,⁵⁶⁵ and secondly, the person injured was not as a matter of fact misled by any appearance of authority.⁵⁶³ It would rather seem as if, by the statement that the landlord is liable for a dangerous or injurious condition existing at the time of the lease, because by making the lease he authorizes a continuance of such condition, or a use of the property in that condition, is meant merely that, by thus putting the land out of his control, he puts it in the power of the lessee to maintain such a condition, irrespective of the landlord's desire to end it. In the first and leading case upon the subject of a lessor's liability for injuries caused by a condition on the premises existing at

⁵⁶⁴ Pollock, *Torts* (6th Ed.) 454.

⁵⁶⁶ *Huffcut, Agency* (2d Ed.) § 53.

⁵⁶⁵ See *Huffcut, Agency* (2d Ed.)

the time of the lease, such condition in that case involving the obstruction of ancient lights upon neighboring property,⁵⁶⁷ there are, unquestionably, expressions to the effect that the making of the lease, reserving rent, involved an agreement for its continuance, but the language of the opinion as a whole seems to base the lessor's liability upon the theory that he cannot, after erecting a nuisance, free himself from liability by granting the property over. It does not seem that any appreciable advantage is to be gained by introducing the fiction of authorization in this connection.

Occasionally it is intimated that the receipt of rent by the lessor is a consideration tending to show authority from him to the lessee to continue the condition which caused the injury, so as to render him liable for the injury.⁵⁶⁸ In reference to this statement, as to the statement that the making of the lease shows such authority, it may be said that, as a matter of fact, a lessor

⁵⁶⁷ *Roswell v. Prior*, 12 Mod. 635. There it is said: "And surely this action is well brought against the erector, for before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over, and more especially here, where he grants over, reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz., the rent, for the same; for surely when one erects a nuisance, and grants it over in that manner, he is a continuor with a witness. And suppose in this case the lessor or assignor had been seised in fee, and had erected this nuisance, and then infeoffed another over, he had conveyed this as a nuisance, and *causa causae est causa causati*. And if a wrongdoer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it. * * * And it is a fundamental principle in law and

reason that he that does the first wrong shall answer for all consequential damages; and here the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it be abated."

⁵⁶⁸ See *Roswell v. Prior*, 2 Salk. 459, 12 Mod. 635; *Board of Health of New Rochelle v. Valentine*, 57 Hun, 591, 11 N. Y. Supp. 112; *Stephani v. Brown*, 40 Ill. 428; *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593. So it is said that the person who parts with the possession of the land remains liable for a nuisance created by him only if he receives a benefit from its continuance, as by receiving rent, or if he upholds the nuisance by a covenant for its continuance. *City of Albany v. Cunliff*, 2 N. Y. (2 Comst.) 174; *Hanse v. Cowing*, 1 Lans. (N. Y.) 288.

does not ordinarily intend, by receiving rent, to authorize the continuance of a pre-existing condition, and there is nothing in such course of action to justify a third person in supposing that he does so intend. The receipt of rent might as well show an authority to continue a condition created after the demise as one created prior thereto.

§ 103. Applications of rule.

a. **Dangerous conditions in highway.** The question of the lessor's liability for injuries to strangers has arisen most frequently, perhaps, in connection with uncovered or defectively covered openings made for the benefit of the leased premises in the highway on which they abut. Applying the general rule above stated, the lessor is liable in case he leases the premises with an area way or cellar entrance inadequately guarded, and one subsequently passing falls therein,⁵⁶⁹ but he is not, as a general rule, liable if such place is sufficiently guarded at the time of the lease, and the guard or covering becomes out of repair during the tenancy,⁵⁷⁰ or it is temporarily left unguarded by the tenant or some third person.⁵⁷¹ So the lessor is liable if the defective construction of a "coal hole," or a defective condition existing therein at the time of the demise, results in injury to a third person,⁵⁷² while he is not so liable if the coal hole is in the ten-

⁵⁶⁹ *Stephani v. Brown*, 40 Ill. 428; *ran v. Flammer*, 49 App. Div. 293, 62 City of Peoria v. Simpson, 110 Ill. N. Y. Supp. 1061.

294, 51 Am. Rep. 683; *McIlvaine v. Wood*, 2 Handy (Ohio) 166; *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800; *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Davenport v. Ruckman*, 37 N. Y. 568; *McGrath v. Walker*, 64 Hun, 179, 18 N. Y. Supp. 915; *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066; *Durant v. Palmer*, 29 N. J. Law (5 Dutch.) 544; *Kirchner v. Smith*, 207 Pa. 431, 56 Atl. 947.

⁵⁷⁰ *Gridley v. City of Bloomington*, 68 Ill. 47; *City of Lowell v. Spaulding*, 58 Mass. (4 Cush.) 277, 50 Am. Dec. 775; *Gelof v. Morgenroth*, 58 Misc. 557, 109 N. Y. Supp. 880; *Cur-*

⁵⁷¹ *Rider v. Clark*, 132 Cal. 382, 64 Pac. 564 (leaving cellar doors open); *Fehlauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843 (ditto); *Duffin v. Dawson*, 211 Pa. 593, 61 Atl. 76; *Opper v. Hellinger*, 116 App. Div. 261, 101 N. Y. Supp. 616.

⁵⁷² *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. Rep. 429; *Stoetzele v. Swearingen*, 90 Mo. App. 588; *Mancuso v. Kansas City*, 74 Mo. App. 138; *Anderson v. Dickie*, 24 N. Y. Super Ct. (1 Rob.) 238; *Matthews v. DeGroff*, 13 App. Div. 356, 43 N. Y. Supp. 237.

ant's control, and the latter fails to make repairs thereon, the necessity of which arises after the demise,⁵⁷³ or fails to properly close or fasten it.⁵⁷⁴

In the case of an opening or excavation thus existing in the highway, for whatever purpose made, it has been held that if there is a statutory requirement that, before it is made, permission must be obtained from the state or municipal authorities, and no such permission has been given, the person making it is guilty of creating a public nuisance, and for injuries resulting from such nuisance he will be liable, without reference to the fact that the direct cause of the injuries is the failure of another person in control of the excavation to properly guard the opening. This principle has been applied so as to render the abutting owner liable for the negligence of an independent contractor in failing to guard such an excavation,⁵⁷⁵ and it will be applied as against one who demises the premises after having made the excavation, and the fact that the absence of sufficient protection is owing to the fault of the lessee or of a third person will constitute no defense.⁵⁷⁶ In one state it has apparently been decided that an opening or excavation in the highway, if made without permission, is a nuisance, even though there is no express statutory requirement of such permission;⁵⁷⁷ and there is

⁵⁷³ Gridley v. City of Bloomington, Rep. 422; West Chicago Masonic 68 Ill. 47; Wolf v. Kilpatrick, 101 N. Ass'n v. Cohn, 192 Ill. 210, 61 Y. 146, 4 N. E. 188, 54 Am. Rep. 672; N. E. 439, 55 L. R. A. 235, 85 Am. West Chicago Masonic Ass'n v. Cohn, St. Rep. 327. In Holroyd v. Sheridan, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 535, 85 Am. St. Rep. 327; Frischburg v. Hurter, 173 Mass. 22, 52 N. E. 1086. Supp. 442, a like principle was applied as a basis for holding a lessor

⁵⁷⁴ Stewart v. Putnam, 127 Mass. 403; Frischberg v. Hurter, 173 Mass. 22, 52 N. E. 1086; Johnson v. McMillan, 69 Mich. 36, 36 N. W. 803; Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263, 33 Am. St. Rep. 859; Gordon v. Peltzer, 56 Mo. App. 599. liable for injuries from doors swinging over the sidewalk, these being regarded as a nuisance as having been erected without municipal permission. The liability, however, might as well have been placed on the ground that they were on the premises when leased.

⁵⁷⁵ Congreve v. Morgan, 18 N. Y. 84, 72 Am. Dec. 495; Congreve v. Smith, 18 N. Y. 79; Creed v. Hartmann, 29 N. Y. 591, 86 Am. Dec. 341. ⁵⁷⁷ Congreve v. Morgan, 18 N. Y. 84, 72 Am. Dec. 495; Congreve v. Smith, 18 N. Y. 79; Clifford v. Dam,

⁵⁷⁶ Owings v. Jones, 9 Md. 117; Fisher v. Thirkell, 21 Mich. 1, 4 Am. N. Y. 52; Creed v. Hartmann, 29 N. Y. 591, 86 Am. Dec. 341. But see

a suggestion to the same effect in another state.⁵⁷⁸ By other decisions, however, it is considered that, in the absence of a statutory requirement, no permission or authority is required before making an excavation of an ordinary character in or under the sidewalk, for the purpose of storing coal or of access to parts of the premises.⁵⁷⁹ Even where there is such a statutory requirement, permission may, it has been held, be inferred from the existence of the excavation for a considerable period of time without objection by the municipality.⁵⁸⁰

It appears to be immaterial, in determining the lessor's liability for injuries caused by an excavation in the sidewalk, whether the place where the excavation is made belongs to such abutting owner or to the city, as the owner of the fee,⁵⁸¹ and for the purposes of such determination, places which are in effect made by the abutting owner to constitute a part of the sidewalk, are regarded as being such.⁵⁸²

In one state it has been decided that the lessor remains liable for any injuries caused by such an excavation, although it was lawfully made, and although he parts with the entire use and control thereof in favor of one to whom he leases a part of the abutting land and building, the case being distinguished from that in which he makes a lease of the entire premises.⁵⁸³ The decision is based on the theory that, as a matter of public policy,

Bond v. Smith, 113 N. Y. 378, 21 N. E. 128. 66 Am. St. Rep. 575; Gridley v. City of Bloomington, 68 Ill. 47.

⁵⁷⁸ West Chicago Masonic Ass'n v. Cohn, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235, 85 Am. St. Rep. 327. ⁵⁸¹ In 2 Shearman & Redfield, Neg. (5th Ed.) § 703, the New York cases, before referred to, in which an excavation without permission is regarded as a nuisance, rendering the owner liable without reference to negligence, are sought to be based on the ground that in those cases the "fee" of the highway belonged to the municipality. The cases do not, however, mention such a distinction.

⁵⁷⁹ Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422; Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263, 33 Am. St. Rep. 859; King v. Thompson, 87 Pa. 365, 30 Am. Rep. 364; Gordon v. Peltzer, 56 Mo. App. 599; Nelson v. Godfrey, 12 Ill. 20 (semble); Buesching v. St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503. ⁵⁸² Tomle v. Hampton, 129 Ill. 379, 21 N. E. 800, where the opening was in a platform, along the wall of the building, which was open to use by the public.

⁵⁸⁰ Jennings v. Van Schaick, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459; Babbage v. Powers, 130 N. Y. 281, 29 N. E. 132; Canadaigua v. Foster, 156 N. Y. 354, 50 N. E. 971, ⁵⁸³ Canadaigua v. Foster, 156 N.

it is necessary to hold the abutting owner responsible for the condition of the excavation so long as he retains possession of any part of the land or building, but it does not clearly appear why a different rule should apply from that applicable when he parts with the entire abutting property.⁵⁸⁴ The decision is at variance with a decision in another jurisdiction.⁵⁸⁵

It has been decided that a lessor is liable for injuries to a pedestrian caused by ice formed as a result of the construction of a water pipe with its outlet above the pavement.⁵⁸⁶ Elsewhere it has been decided that if the formation of ice would not have occurred had the tenant refrained from discharging water from the premises in cold weather, the lessor is not liable.⁵⁸⁷ And he has been regarded as exempt from liability for ice on the side-

Y. 354, 50 N. E. 971, 66 Am. St. Rep. 575.

⁵⁸⁴ The language of the court is perhaps hardly broad enough to impose liability on one who, after erecting two houses side by side on the land, with a coal vault or other excavation in front of each of them, demises one of them, retaining possession of the other, when an injury results from the act of his tenant in leaving open the covering in front of the one demised. Such a state of affairs is not considered, but the only difference between such a case and that where the use and control of the excavation goes to the lessee of one or two floors, as in the principal case, is that the excavation may possibly, so far as appearances go, be used, in the latter case, in connection with the whole building.

The later cases, in the supreme court of New York, of *Schroeck v. Reiss*, 46 App. Div. 502, 61 N. Y. Supp. 1054; *Finigan v. Biehl*, 30 Misc. 735, 63 N. Y. Supp. 147; *Sturm-wold v. Schreiber*, 69 App. Div. 476, 74 N. Y. Supp. 995, seem rather to ignore the above decision in *Canandaigua v. Foster*, 156 N. Y. 354, 50

N. E. 971, 66 Am. St. Rep. 575. *Curran v. Flammer*, 49 App. Div. 293, 62 N. Y. Supp. 1061, involved injuries to a guest of the tenant, and *Canandaigua v. Foster* is distinguished on that ground.

⁵⁸⁵ *West Chicago Masonic Ass'n v. Cohn*, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235, 85 Am. St. Rep. 327, apparently disapproves the New York view. In *Boston v. Gray*, 144 Mass. 53, 10 N. E. 509, it was held that the lessor was not liable, the excavation passing with the lease of the ground floor and basement. Here, however, the residue of the building was not retained by the lessor but was leased to other tenants.

⁵⁸⁶ *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224; *Wenzler v. McCotter*, 22 Hun (N. Y.) 60; *Brown v. White*, 202 Pa. 297, 51 Atl. 962, 53 L. R. A. 321; *Organ v. City of Toronto*, 24 Ont. 318. And see *Leahan v. Cochran*, 178 Mass. 566, 60 N. E. 382, 53 L. R. A. 891, 86 Am. St. Rep. 506, where such a condition of things is regarded as a public nuisance.

⁵⁸⁷ *Gardner v. Rhodes*, 114 Ga. 929, 41 S. E. 63, 57 L. R. A. 749.

walk caused by the overflow of a gutter on the roof as a result of the failure of the tenant to clear out the gutter.⁵⁸⁸

b. **Fall of building or part thereof.** In case a building, or a part of a building, falls on private property adjoining, the person injured by reason of such fall has a right of action against the person in control of the building, if the latter failed to exercise reasonable diligence in discovering its dangerous condition, or in preventing the fall. There is no liability apart from negligence, it seems,⁵⁸⁹ and consequently the right of action is not for the maintenance of a nuisance.⁵⁹⁰ There being thus no right of action against a person actually in control of the building, apart from negligence on his part, the lessor cannot well be liable apart from negligence on his part. If the unsafe condition of the premises does not constitute a nuisance for the purpose of imposing an absolute liability upon the person in control, it cannot constitute a nuisance for the purpose of imposing an absolute liability upon a person not in control. The few decisions bearing upon the liability of the lessor in such case are ordinarily opposed to the idea of any liability apart from negligence, even when they refer to the condition of the building as constituting a nuisance.⁵⁹¹

If the fall of the building or of a part thereof does not result from a condition which existed at the time of the lease, the

⁵⁸⁸ *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584.

⁵⁸⁹ See 2 *Shearman & Redfield*, Neg. § 343 ad. fin.; 2 *Jaggard*, Torts, 839; 1 *Cyclopedia Law & Proc.* 774; *Ainsworth v. Lakin*, 180 Mass. 397, 62 N. E. 746, 57 L. R. A. 132, 91 Am. St. Rep. 314.

⁵⁹⁰ See ante, § 102.

⁵⁹¹ In *Waterhouse v. Jos. Schlitz Brew. Co.*, 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157, 76 Am. St. Rep. 616; *Id.*, 16 S. D. 592, 94 N. W. 587; and *Patterson v. Jos. Schlitz Brew. Co.*, 16 S. D. 33, 91 N. W. 336, the lessor's liability is based upon the lessor's failure to exercise reasonable care previous to the lease to discover

the defective condition of the building. In *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845, though the court speaks of the lessor being liable as for a nuisance, it is expressly declared that he was not liable unless, at the time of the lease, he "knew, or ought to have known, or had notice" that the wall was in a dangerous condition. Likewise in *Todd v. Flight*, 9 C. B. (N. S.) 377, though the opinion proceeds on the theory of nuisance, it expressly refers to the fact that "the defendant let the house when the chimneys were known by him to be ruinous and in danger of falling."

lessor is not liable therefor⁵⁹² unless, according to the view adopted in some jurisdictions, he has contracted to keep the premises in repair.⁵⁹³ Accordingly he is not liable by reason of the fall of a structure erected by the tenant,⁵⁹⁴ or if the fall is the result of the tenant's improper use of a part of the building leased.⁵⁹⁵

As regards the fall of a building or of a part thereof upon a highway, it is somewhat difficult to say whether there is any absolute obligation upon the person in control to prevent such fall, in other words, whether a building which is likely, either in part or as a whole, to fall upon the highway, is a public nuisance, so as to entitle one injured by its fall to recover damages, irrespective of the question of negligence. A building which is in such a state of disrepair as to be apt to fall upon the highway has been regarded as a public nuisance on which an indictment may be based⁵⁹⁶ and there are occasional decisions in which the liability of the person in control, for injuries caused by the fall of a wall or other part of a building, or of an object attached thereto, has been referred to as a liability for the maintenance of a nuisance.⁵⁹⁷ Even these latter cases, however, ordinarily discuss such person's liability as existing by reason of lack of due care,⁵⁹⁸ and in other cases his liability is placed exclusively upon the ground of negligence,⁵⁹⁹ the mere fall of the

⁵⁹² *Grogan v. Broadway Foundry Co.*, 87 Mo. 321; *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628. the circumstances, as a question for the jury.

⁵⁹³ *Boyce v. Tullerman*, 183 Ill. 115, 55 N. E. 703; *Boyce v. Snow*, 187 Ill. 181, 58 N. E. 403, 79 Am. St. Rep. 214. See post, § 107.

⁵⁹⁴ *Grogan v. Foundry Co.*, 87 Mo. 321.

⁵⁹⁵ *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568.

In *Hofferberth v. Myers*, 42 App. Div. 183, 59 N. Y. Supp. 88, where a wall on the premises gradually forced out of position a wall on an adjoining lot, it was held that the lessor was liable if this was a result of the original construction of the wall, and this was regarded, under

⁵⁹⁶ *Reg v. Watts*, 1 Salk. 357.

⁵⁹⁷ *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568; *Deford v. State*, 30 Md. 179; *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367; *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490.

⁵⁹⁸ See *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568; *Deford v. State*, 30 Md. 179; *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490.

⁵⁹⁹ *Rector of Church of Ascension v. Buckhart*, 3 Hill (N. Y.) 193; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Railway Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, 12

building or of a part thereof being regarded as *prima facie* evidence of negligence,⁶⁰⁰ in accordance with the so called doctrine of *res ipsa loquitur*.⁶⁰¹ While a wall or building in such a state as to show an evident likelihood of falling upon the highway may well be regarded as a public nuisance, as interfering with the use of that part of the highway, by frightening persons away therefrom, it would seem most questionable whether a wall or building, or a part of a building, can properly be so regarded, so as to impose either criminal liability, or an absolute liability in damages for injuries to a person on the highway, merely because it falls upon the highway. If the likelihood of its fall is not apparent to the ordinary traveler on the highway, it does not interfere with the use of the highway by the public, nor are the public affected by its eventual fall and the consequent injury to a particular individual.

If, in accordance with the views above indicated, a building or a part of a building or other structure is not a nuisance, merely because it is in such condition that it eventually falls upon the highway, the person in control cannot be regarded as absolutely liable for any injuries caused by the fall, but can be subjected to liability only as for lack of due care in regard to the condition of the building; and as before stated, the cases are ordinarily to this effect. And if such a structure is not a nuisance for the purpose of imposing a liability upon the person in control thereof,

L. R. A. 189; *Inhabitants of Mulford v. Holbrook*, 91 Mass. (9 Allen) 17, 85 Am. Dec. 735; *Ryder v. Kinsey*, 62 Minn. 85, 64 N. W. 94, 34 L. R. A. 557, 84 Am. St. Rep. 623.

In New York the cases distinguish, in the case of actions against abutting owners, lessors or others for defects in the street, between those based on negligence and those based on the maintenance of a nuisance, holding that if the complaint is based on one theory there can be no recovery on the other. See *Fisher v. Rankin*, 25 Abb. N. C. 191, 7 N. Y. Supp. 837, and Mr. Abbott's note thereto, where the distinction

between negligence and nuisance is well stated. See, also, *Martin v. Pettit*, 117 N. Y. 118, 22 N. E. 566, 5 L. R. A. 794; *Sturmwoold v. Schreiber*, 69 App. Div. 476, 74 N. Y. Supp. 995; *Matthews v. De Groff*, 13 App. Div. 356, 43 N. Y. Supp. 237; *Dodd v. Rothschild*, 31 Misc. 721, 65 N. Y. Supp. 214.

⁶⁰⁰ *Hadley v. Taylor*, L. R. 1 C. P. 53; *Railway Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530.

⁶⁰¹ See *Shearman & Redfield*, Neg. §§ 59, 60.

it cannot be a nuisance for the purpose of imposing liability upon a person who has divested himself of the control, that is, one who has leased to another the land with the building thereon, and he can be subjected to liability, it seems, only upon the theory of negligence in leasing a building which he knows, or ought to know, to be in a dangerous condition, as before suggested. In one jurisdiction the lessor has been held liable in such case on the theory of negligence,⁶⁰² while in others the liability is stated as being by reason of the leasing of the premises in a condition constituting a nuisance.⁶⁰³

c. **Fall of snow or ice.** The question of the liability of a lessor for injuries caused to one on the highway by the fall of ice or snow from the roof of a building has been the subject of litigation in several cases. There is one decision to the effect that the lessor is liable in such case, on the theory that the injury is due to the faulty construction of the roof.⁶⁰⁴ And elsewhere it has been asserted that liability for such an injury is not by reason of lack of due care in the management of the roof but rather by reason of the erection and maintenance of a roof in that shape.⁶⁰⁵ In other cases it has been decided that the lessor is

⁶⁰² *Waterhouse v. Jos. Schlitz Brew. Co.*, 16 S. D. 592, 94 N. W. 587; *Patterson v. Jos. Schlitz Brew. Co.*, 16 S. D. 33, 91 N. W. 336, 65 L. R. A. 151.

⁶⁰³ *Keeler v. Lederer Realty Corp.*, 26 R. I. 524, 59 Atl. 855; *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568; *Uggla v. Brokaw*, 117 App. Div. 586, 102 N. Y. Supp. 857.

In *Mitchell v. Brady*, 124 Ky. 411, 30 Ky. Law Rep. 258, 99 S. W. 266, 124 Am. St. Rep. 408, it is said that the lessor and lessee are both *prima facie* responsible for the fall of a pipe placed on the building leased. It is not stated that the fall was by reason of defects in the fastenings of the pipe which existed at the time of the lease, and the theory on which the lessor was held liable

does not appear. Nor does it appear whether the statement that the lessor and lessee were *prima facie* responsible means that there was a presumption that they were negligent, under the doctrine of *res ipsa loquitur*. The opinion quotes from text books in which the word "nuisance" is used in connection with the liability for injuries caused by the fall of a building.

⁶⁰⁴ *Walsh v. Mead*, 8 Hun (N. Y.) 387.

⁶⁰⁵ *Hannem v. Pence*, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717; *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318. This latter case seems, however, to be overruled in this regard by later cases cited in the next note.

In *Coman v. Alles*, 198 Mass. 99, 83 N. E. 1097, 15 L. R. A. (N. S.)

not liable for injuries so caused, for the reason that he has a right to rely upon the exercise of due care by the tenant in removing snow and ice.⁶⁰⁶

If the lessor is to be held liable in such case, it seems proper to base his liability upon his negligence in leasing the property with a roof which he knows is likely, by reason of its construction, to be a source of danger to others.⁶⁰⁷ And whether the construction of the roof is such that, in view of the climatic conditions in that particular place, he is negligent in placing the building in the control of another, who may or may not clear off the roof, would seem to be a proper question for a jury to pass upon.⁶⁰⁸ To hold him absolutely free from liability in any and every such case is in contravention of the ordinary rules as to a lessor's liability for a condition on the premises,⁶⁰⁹ and on the other hand to hold him absolutely liable in such a case, without reference to the question of negligence, seems justifiable only upon the theory that a roof from which snow and ice may thus possibly fall on the highway constitutes a public nuisance, and, as was remarked by a distinguished Massachusetts judge, if such a condition of the premises constitutes a nuisance, "half the householders in Boston (or in any other Northern city) are indictable."⁶¹⁰ Since a roof so constructed as to facilitate the fall of snow or ice therefrom on the highway does not interfere with the use of the highway by the public, it does not seem to come within the legal conception of a public nuisance,⁶¹¹ and it

1120, the same theory was applied to relieve the lessor from liability for injury caused by the fall of ice resulting from the accumulation of water in a gutter on the building, since the tenant might have prevented such accumulation.

⁶⁰⁶ *Lee v. McLaughlin*, 86 Me. 410, 30 Atl. 65, 26 L. R. A. 197; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76; *Atwill v. Blatz*, 118 Wis. 226, 95 N. W. 99.

⁶⁰⁷ See ante, § 102.

⁶⁰⁸ Such a view is perhaps indicated in *Neas v. Lowell*, 193 Mass.

441, 79 N. E. 810, it being there said that "because of the failure of the plaintiff to introduce evidence that the house was a nuisance at the time of the letting by the defendant, or that there was an existing condition of construction that the defendant intended to have used in such a way as to make it a nuisance, a verdict was rightfully directed for the defendant."

⁶⁰⁹ See ante, § 101.

⁶¹⁰ *Holmes, J.*, in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279.

⁶¹¹ See ante, § 103 b.

is not a private nuisance, since its existence is not a continuing cause of injury to any particular individual.^{611a}

d. **Escape of water or filth.** For injuries to adjoining premises or property thereon caused by the failure to make repairs in pipes, drains or cesspools, the necessity for which arose after the demise,⁶¹² or for those caused by the tenant's improper use of such appurtenances, the lessor is not liable,⁶¹³ while he is liable if their condition is such at the time of the demise that, though properly used by the tenant in the manner to be anticipated, such injuries result.⁶¹⁴

e. **Interference with water rights.** The lessor is not liable for the act of his tenant in interfering, by the erection of a dam or otherwise, with the natural flow of a stream or of surface water,⁶¹⁵ or in polluting it,⁶¹⁶ unless he advised or aided the tenant therein,⁶¹⁷ or unless the condition of the premises at the time of

^{611a} See ante, § 102.

⁶¹² *Deutsch v. Abeles*, 15 Mo. App. 398; *Harris v. Cohen*, 50 Mich. 324, 15 N. W. 493; *Strauss v. Hamersley*, 37 N. Y. St. Rep. 749, 13 N. Y. Supp. 816; *Ingwersen v. Rankin*, 47 N. J. Law, 18, 54 Am. Rep. 109; *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010; *Mylander v. Beimschla*, 102 Md. 689, 62 Atl. 1038, 5 L. R. A. (N. S.) 316.

⁶¹³ *Vason v. City of Augusta*, 38 Ga. 542; *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582. So in *Lufkin v. Zane*, 157 Mass. 117, 31 N. E. 757, 17 L. R. A. 251, 34 Am. St. Rep. 262, a case of a flow of waste matter from a stable, it was said that "if it was reasonably practicable to use the premises for a stable in the manner in which the landlord intended they should be used, without creating a nuisance, then it cannot be said that by letting them the landlord authorized the creation or continuance of a nuisance." To the same effect, that a livery stable is not necessarily a nuisance so as to render the lessor liable, see *Metropolitan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90.

⁶¹⁴ *Fleischner v. Citizens' Real Estate & Inv. Co.*, 25 Or. 119, 35 Pac. 174; *Knauss v. Brua*, 107 Pa. 85; *Fow v. Roberts*, 108 Pa. 489; *Wunder v. McLean*, 134 Pa. 334, 19 Atl. 749, 19 Am. St. Rep. 702; *Rex v. Pedly*, 1 Adol. & E. 822; *McCullum v. Hutchison*, 7 U. C. C. P. 508. So in *Mylander v. Beimschla*, 102 Md. 689, 62 Atl. 1038, 5 L. R. A. (N. S.) 316, while the landlord was regarded as free from liability, in the case of defects in a spout which arose during the lease, so far as concerned injuries accruing during that tenancy, he was held liable for injuries thereafter accruing, though he subsequently leased to another.

⁶¹⁵ *Jansen v. Varnum*, 89 Ill. 100; *Baker v. Allen*, 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93; *Fiske v. Framingham Mfg. Co.*, 31 Mass. (14 Pick.) 491; *Batteman v. Finn*, 32 How. Pr. (N. Y.) 501; *Sargent v. Stark*, 12 N. H. 332.

⁶¹⁶ *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209.

⁶¹⁷ *Twiss v. Baldwin*, 9 Conn. 291, 23 Am. Dec. 339; *Baker v. Allen*, 66

the demise was such that this was a natural result of the tenant's use of the premises.⁶¹⁸

f. **Injuries to other tenants.** A tenant of other premises, under the same landlord, whether or not a part of the same building, is a third person within the meaning of the rule of liability which we have above considered, and consequently a landlord is not liable to his tenant for injuries caused by conditions existing on premises leased by him to another person, if he had no part in the creation of such conditions.⁶¹⁹ So a landlord is not ordinarily liable for injuries to his tenant, caused by the nonrepair or negligent management of water fixtures or appliances in another part of the same building which is leased to another person.⁶²⁰

§ 104. Liability of transferee of reversion.

The liability, by reason of the demise of premises while in a condition productive of injury to a stranger, is necessarily re-

Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93.

⁶¹⁸ So the lessor was held liable for the pollution of a stream where "houses, drains and wells were constructed and owned by the (lessor) and were adapted to be used, and intended to be used, by the tenants in the manner in which they were used," and this resulted in such pollution. *Jackman v. Arlington Mills*, 137 Mass. 277. But it was held that a lessor was not liable for the taking of an excessive amount of water from a stream at the dry season of the year merely because the flume on the premises by which the water was taken was of a size proper for taking such amount, this amount not being excessive at other seasons of the year. *Gould v. Stafford*, 91 Cal. 146, 27 Pac. 543.

⁶¹⁹ *White v. Montgomery*, 58 Ga. 204; *Peterson v. Bullion-Beck & Champion Min. Co.*, 33 Utah, 20, 91 Pac. 1095. So it was held that the landlord is not liable for injuries to

one of his tenants caused by the use of gasoline by another tenant in the same building, unless he knew, or had reason to know, when leasing to the latter, that he would use gasoline or some other dangerous substance. *Lewis v. Hughes*, 12 Colo. 208, 20 Pac. 621.

⁶²⁰ *Lebensburger v. Scofield* (C. C. A.) 155 Fed. 85; *Haizlip v. Rosenberg*, 63 Ark. 430, 39 S. W. 60, 62 Am. St. Rep. 206; *Becker v. Bullowa*, 36 Misc. 524, 73 N. Y. Supp. 944; *Leonard v. Gunther*, 47 App. Div. 194, 62 N. Y. Supp. 99; *White v. Montgomery*, 58 Ga. 204; *McCarthy v. York County Sav. Bank*, 74 Me. 315, 43 Am. Rep. 591; *Harris v. Cohen*, 50 Mich. 324, 15 N. W. 493; *Sheridan v. Forsee*, 106 Mo. App. 495, 81 S. W. 494. Compare *Freidenburg v. Jones*, 63 Ga. 612; *Jones v. Freidenburg*, 66 Ga. 505, 42 Am. Rep. 86, where the landlord and a tenant both had the right to use the bath room in which the leak occurred.

stricted to the person who makes the demise, and cannot be extended to one to whom the reversion, existing after the making of the demise, is transferred.⁶²¹ It has been in one case decided that the transferee might be liable if he knew of such condition at the time of his acceptance of the transfer,⁶²² but such a view seems most questionable, since the transferee has neither created nor maintained the dangerous condition, and he is in no position to effect its removal. One's mere acquisition of an interest in property in connection with which a dangerous or harmful condition exists, the property still remaining in another's control, cannot involve any liability on his part to a person injured by such condition, on the theory either of negligence or of nuisance, since such transferee of an interest in the property cannot, while the property is in another's exclusive control, be regarded as negligent in failing to remove the condition, or as thereby maintaining a nuisance.⁶²³ A transferee of the reversion is, however, liable, as would be any other person, if he advises, aids or abets an action of the tenant which causes an injury to a stranger.⁶²⁴

§ 105. Effect of renewal of lease.

Although neither the lessor nor his transferee is liable to one injured by reason of a condition, existing in connection with the premises, which arose after the making of the lease, he is so liable if he renews the lease with such condition still existent, and knowing, or having reason to know, of such condition, the same rule applying as if the lease were not a renewal, but an original, lease.⁶²⁵

⁶²¹ *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778; *Woram v. Noble*, 41 Hun (N. Y.) 398; *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429; *Lufkin v. Zane*, 157 Mass. 117, 31 N. E. 757, 17 L. R. A. 251, 34 Am. St. Rep. 262.

⁶²² *Pierce v. German Sav. & Loan Soc.*, 72 Cal. 180, 13 Pac. 478, 1 Am. St. Rep. 45.

⁶²³ The decision cited in the last preceding note is based on a pas-

sage in Addison on Torts, which is in turn based on a dictum of Little-dale, J., in *Rex v. Pedly*, 1 Adol. & E. 827. But this dictum is questioned in the last (eighth) edition of Mr. Addison's work at p. 499, in Clark & Lindsell, Torts (3d Ed.) at p. 39, and in *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778. A contrary view appears also to be indicated in *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429.

⁶²⁴ See ante, at note 546.

⁶²⁵ *Ingwersen v. Rankin*, 47 N. J.

§ 106. Periodic tenancy.

The question has arisen whether, in the case of a periodic lease, that is, one from year to year, from month to month, or the like, the landlord is liable for a defect or injurious condition in the premises existent at the end of any period, as if he had at that time given a renewal lease, merely because he has failed to give the necessary notice and thereby terminate the tenancy at that time. A tenancy from year to year being in effect a tenancy for one year certain with a growing interest during every year thereafter, springing out of the original lease,⁶²⁶ it would seem that the reversioner could not be held liable for injuries caused by a condition not existing at the commencement of the tenancy but arising thereafter, prior, however, to a time at which he might have terminated the tenancy, that, in other words, he is not liable as if he had renewed the lease at the end of the year merely because he failed at that time to terminate the tenancy, and a similar view would seem to apply in the case of any other periodic tenancy. The English decisions, as they now stand, are clearly to the effect that, in the case of a periodic tenancy, the landlord is not liable for conditions arising after the commencement of the tenancy.⁶²⁷ There are occasional decisions in this

Law, 18, 54 Am. Rep. 109; *Baker v. Allen*, 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93; *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845; *Matthews v. DeGroff*, 13 App. Div. 356, 43 N. Y. Supp. 237; *Fleischer v. Citizens' Real Estate & Inv. Co.*, 25 Or. 119, 35 Pac. 174; *Waterhouse v. Jos. Schlitz Brew. Co.*, 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157, 76 Am. St. Rep. 616; *Gandy v. Jubber*, 5 Best & S. 78; *Metzger v. Schultz*, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619, 59 Am. St. Rep. 323.

⁶²⁶ See *Cattley v. Arnold*, 1 Johns. & H. 651, and ante, § 14 a.

⁶²⁷ In *Gandy v. Jubber*, 5 Best & S. 78, it was held that the landlord, failing to terminate a tenancy from year to year, was liable for the injuries if the injurious condition had existed at the end of any year. A contrary conclusion was arrived at on writ of error, but the case was settled and the opinion never delivered. This opinion is reported in *Gandy v. Jubber*, 9 Best & S. 15. In the subsequent case of *Sandford v. Clarke*, 21 Q. B. Div. 398, the decision in error in the previous case is referred to as law in the case of a tenancy from year to year, but it was decided that the same rule did not apply to a weekly tenancy on the theory that a weekly tenancy is in its nature different from one from year to year and comes to an end at

country to the contrary.⁶²⁸

§ 107. Effect of contract as to condition or repairs.

It has been quite frequently asserted that if there is an agreement by the landlord to make repairs, the landlord is liable for injuries arising from a failure to make them, although the necessity for repairs does not arise till after the demise, the theory usually advanced being that thereby circuitry of action is avoided.⁶²⁹ Occasionally the liability of the landlord by reason of such an agreement has been questioned.⁶³⁰

That the landlord is so liable was first suggested somewhat over a century ago, in a case⁶³¹ in which it was decided that, by reason

the end of each week without any notice. But in *Bowen v. Anderson* [1894] 1 Q. B. 164, this latter decision is overruled, and it is decided that a weekly tenancy is not terminated without notice, and that therefore the landlord is not liable for a condition arising after the making of the lease.

⁶²⁸ In *Borman v. Sandgren*, 37 Ill. App. 16 and *Griffith v. Lewis*, 17 Mo. App. 605, the decision in *Gandy v. Jubber*, 5 Best & S. 78, is followed, without any particular discussion and without reference to that on error in *Id.*, 9 Best & S. 15, and a like view appears to be adopted in *East End Imp. Co. v. Sipp*, 14 Ky. Law Rep. 924. But *Hull v. Sherrod*, 97 Ill. App. 298, appears to accord with the later English doctrine. In *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310, it was decided that if the tenancy was to be regarded as coming to an end at the end of each period, the tenant was to be regarded as having, at the end of each period, asserted his right then to remove the improvements which caused the injury, and as having replaced them at the commencement of the succeeding period.

⁶²⁹ *Gridley v. City of Bloomington*, 68 Ill. 47; *Reichenbacher v. Pahmeyer*, 8 Ill. App. (8 Bradw.) 217; *Boyce v. Tallerman*, 183 Ill. 115, 55 N. E. 703; *City of Lowell v. Spaulding*, 58 Mass. (4 Cush.) 277, 50 Am. Dec. 775; *Inhabitants of Milford v. Holbrook*, 91 Mass. (9 Allen) 17, 85 Am. Dec. 735; *Szathmary v. Adams*, 166 Mass. 145, 44 N. E. 124; *Frischburg v. Hurter*, 173 Mass. 22, 52 N. E. 1086; *Mills v. Temple-West*, 1 Times Law R. 503 (semble); *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 311.

⁶³⁰ *Russell v. Shenton*, 3 Q. B. 449; *Brady v. Klein*, 133 Mich. 422, 95 N. W. 557, 62 L. R. A. 909, 103 Am. St. Rep. 455; *Clyne v. Helmes*, 61 N. J. Law, 358, 39 Atl. 767. In *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594, it is said that "the covenant of the landlord to repair does not enure to the benefit of a stranger sustaining injury because of its breach." The case cited in support of the statement, *Odell v. Solomon*, 99 N. Y. 635, 1 N. E. 408, involved a covenant by the *lessee*.

⁶³¹ *Payne v. Rogers*, 2 H. Bl. 350.

of such an agreement on the part of the landlord, the tenant was not liable, and one of the judges said that to hold the tenant liable in such a case would "encourage circuity of action, as the tenant would have his remedy over against the landlord." A recent Illinois case⁶³² appears to be the only actual adjudication that the landlord is liable by reason of such a covenant, and there has been no judicial discussion of the theory of liability or of the soundness of the view that such a liability exists. *Prima facie*, as has been remarked,⁶³³ "it would be difficult to say that a contract between the landlord and tenant could give third persons a right to sue the landlord." The contract by the landlord cannot be regarded as made for the benefit of any person who may happen to be injured by a condition on the premises which would have been obviated had the contract been performed, and consequently the person injured would have no right of action upon the contract, even in jurisdictions where the beneficiary of a contract made with another is allowed to sue thereon,⁶³⁴ and even conceding that damages for such injuries could be recovered in an action on the contract, as distinguished from an action of tort.⁶³⁵ The landlord's liability, consequently, if it exists at all, must be in tort and not in contract. As to the theory of avoidance of circuity of action, this is, as has been remarked in this particular connection,⁶³⁶ "a questionable principle at best, and peculiarly one of last resort and one whose operation thus broadly applied is counter to every just notion of privity of action." Moreover it assumes that, in case of a recovery by the person injured, as against the tenant, of a judgment for damages, the tenant could, in an action against the landlord on the contract, recover the amount of such judgment, which he has been compelled to pay. Whether A's subjection to such a judgment in favor of a third person, for injuries which would not have occurred had B performed his contract to repair, would be a proper ground of recovery in an action by A against B for nonperformance of the contract, is open to most serious ques-

⁶³² Boyce v. Tallerman, 183 Ill. 115, 55 N. E. 703.

⁶³³ Per Coleridge, J., in Russell v. Shenton, 3 Q. B. 449.

⁶³⁴ See article by Professor Willis-ton in 15 Harv. Law Rev. at p. 803; Hammon, Contracts, 714.

⁶³⁵ See ante, § 87 d (10).

⁶³⁶ 6 Am. Law Rev. at p. 629, in the course of an able and suggestive article by Joseph Willard, Esq., of the Boston bar, on "Responsibility for the Condition of Demised Premises."

tion. Neither the injury to a third person nor a recovery by him would seem to have been within the contemplation of the parties at the time of the making of the contract. In other words, a contract to make repairs should not be given the effect of a contract to indemnify against liability for injuries caused third persons by lack of repairs.

It has been suggested that the landlord may be held liable, by reason of his contract to make repairs, for injuries received by a third person, on the theory that the landlord is, by reason of such contract, in control of the premises, so far as concerns the repair or lack of repair thereof.⁶³⁷ But it is doubtful whether one can properly be regarded as in control of premises for the purpose of imposing on him a duty as to third persons, merely because he has agreed to repair such premises.⁶³⁸

That the lessor reserves the right to make repairs, without contracting to make them, has been held to impose no liability upon him for injuries caused by the lack of repair.⁶³⁹

There are in England decisions to the effect that the lessor is exempt from liability for injuries caused by conditions existing at the time of the demise, if the lessee has contracted to make repairs, the theory being that, by thus devolving the duty of re-

⁶³⁷ *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767.

⁶³⁸ In the recent case of *Cavallier v. Pope* [1906] App. Cas. 428, it is said by Lord Atkinson, in an opinion concurring with those of the other judges, "It was insisted upon by the appellant's counsel that the premises were under the control of the landlord because of his agreement to repair. I have been quite unable to follow the reasoning by which that conclusion has been arrived at. In *Miller v. Hancock* [1893] 2 Q. B. 177, and *Hargroves, Aronson & Co. v. Hartopp* [1905] 1 K. B. 472, the landlord was held liable because control was retained by him; but the power of control necessary to raise the duty, for a breach of which damages were recovered in the several cases to

which we have been referred, implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them. But, this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair cannot transfer them to him. The existence of such an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out his contract, but nothing in the shape of control."

⁶³⁹ *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778. And see *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279.

pairs on the lessee, the lessor shows that he does not "authorize the premises to be kept in a dangerous state."⁶⁴⁰ This theory of authorization as a basis of the lessor's liability has been before referred to,⁶⁴¹ and it does not seem that such liability, imposed by a rule of law, should be excluded merely by the lessee's covenant to undertake the duties which the lessor owes in this respect to the public generally. That a lessor cannot thus relieve himself from liability for a dangerous condition existing in connection with the premises at the time of the lease, by exacting a covenant to repair from the lessee, has been decided in several cases in this country.⁶⁴² In Massachusetts, however, there are to be found expressions favoring the English view,⁶⁴³ and the highest court

⁶⁴⁰ *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Gwinnell v. Eamer*, L. R. 10 C. P. 658.

⁶⁴¹ See ante, at notes 563-567.

⁶⁴² "The person injuriously affected by the ruinous state of the premises demised has no right nor privity in the covenant. He is not given thereby a right of action against the lessee greater nor more sure than he had before. He has the right without the covenant. * * * It is not so that a person upon whom there rests a duty to others may, by an agreement solely between himself and a third person, relieve himself from the fulfillment of his duty. Surely an ineffectual attempt to fulfill it would not; as if in this case insufficient repair of the pier had been made by a builder who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessee, to keep in order and repair, is no more effectual than a contract with a builder to the same end. Both may afford an indemnity to the lessor, but neither can shield him from liability. * * * If *Pretty v. Bickmore*, L. R. 8 C. P. 401, is put upon the ground that the cov-

enant of the lessee to keep in repair absolved the lessor from that duty toward the public, why is he not absolved without covenant? For whether or not covenanting so to do, the tenant or occupant of premises is under the duty to the public to keep them in a safe condition, so far as the public have concern therewith." *Folger, J., in Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295. To the same effect, see *Ingwersen v. Rankin*, 47 N. J. Law, 18, 54 Am. Rep. 109; *Nugent v. Boston, C. & M. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; *Odell v. Solomon*, 99 N. Y. 635, 1 N. E. 408; *Keeler v. Lederer Realty Corp.*, 26 R. I. 524, 59 Atl. 855; *Helbig v. Slaughter*, 95 Ill. App. 623.

⁶⁴³ *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76, where the landlord was held not to be liable for injuries to a person passing, caused by the fall of snow from the roof, the decision was presumably based on the theory that the failure to remove the snow, and not the slope of the roof, was what caused the injury (see ante, note 606), but the opinion mentions the fact that the tenant agreed to make all repairs. In *Munroe v. Carlisle*,

of that state has gone so far as to hold that a lessor is relieved from liability, for injuries caused by the condition of a part of the building not leased by him, by a covenant on the part of the lessee of another part to save him, the lessor, harmless from any claim or damage arising in connection with the part not leased.^{643a}

§ 108. Conditions in connection with property not leased.

If a building is leased in part only, the landlord is liable for defects and dangerous conditions in that part of the building not leased, resulting in injury to strangers, since he is in control of that part.⁶⁴⁴ On the same principle, if the owner of a building leases the various apartments therein to different tenants, the exterior parts of the building, or at least some of such parts, cannot be regarded as included in any lease, and remain under his control, and for injuries to strangers caused by defects or particular conditions in such parts he is liable as if no part of the building were under lease.⁶⁴⁵ The same rule applies if he

176 Mass. 199, 57 N. E. 332, an action against a landlord by a person injured by the fall of a stone from the building, the opinion lays stress on the fact that there was a covenant by the lessee to repair, but also lays stress on the fact that the liability of the stone to fall did not appear at the time of the lease, three years before the accident.

^{643a} *Wixon v. Bruce*, 187 Mass. 232, 72 N. E. 978, 68 L. R. A. 248. The decision is based on *Quinn v. Crimmins*, 171 Mass. 255, 50 N. E. 624, where it had been decided that one adjoining owner could, by contracting to maintain a partition fence, relieve the other from any liability for injuries to a third person caused by a defect therein. In the later case it is said that the person injured could not maintain an action against a *stranger* who had agreed to insure the owner against liability for damages, but that tenants of a portion of

the building were not strangers. A lessee of a portion of a building is, it is submitted, as great a stranger as regards another portion of the building as he would be as regards another building which happened to be owned by the same lessor. Compare *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 271.

⁶⁴⁴ *Ingwersen v. Rankin*, 47 N. J. Law. 18, 54 Am. Rep. 109; *Brunswick-Balke Collender Co. v. Rees*, 69 Wis. 442, 34 N. W. 732, 2 Am. St. Rep. 748. So the landlord has been held liable to a tenant of a part of the building for injuries caused by defective plumbing in a part not leased. *Citron v. Bayley*, 36 App. Div. 130, 55 N. Y. Supp. 382.

⁶⁴⁵ *Kirby v. Boylston Market Ass'n*, 80 Mass. (14 Gray) 249, 74 Am. Dec. 682; *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628 (cornice falling from building).

retains control of some particular appurtenance used in connection with several apartments or buildings, each of which is demised by him to a different tenant.⁶⁴⁶ In Massachusetts it seems to be the law that the lessor can shift the liability for injuries caused by defects in a part of a building which remains in his possession, by exacting a covenant from a lessee of another part to keep the entire building in repair,⁶⁴⁷ a view which, it is apprehended, would not ordinarily be indorsed.

III. TENANT'S OBLIGATIONS TOWARDS LANDLORD.

§ 109. To refrain from waste.

a. **What acts constitute waste—(1) General considerations.** A tenant under lease has the right to use and enjoy the premises in the condition in which he receives them, and to take therefrom the profits of the land, whether periodical or continuous, but cannot generally do any acts upon the premises which involve a diminution in their value, to the injury of the reversion. Such acts of injury to the reversion constitute "waste."

Waste is divided into two classes, "voluntary waste," which usually consists of affirmative acts on the part of the tenant causing injury to the premises, and "permissive waste," which in-

⁶⁴⁶ *Inhabitants of Milford v. Holbrook*, 91 Mass. (9 Allen) 17, 85 Am. Dec. 735 (landlord liable for defects in wooden awning in front of several shops leased by him).

So if the landlord of a house, parts of which are leased to different tenants, retains control of the coal hole in front of the building, he is liable for defects therein, or for negligence in leaving it open. *Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575; *Stevenson v. Joy*, 152 Mass. 45, 25 N. E. 78. And this has been decided to be so although the negligence is that of a tenant to whom he lends the key. *Anderson v. Caulfield*, 60 App. Div. 560, 69 N. Y. Supp. 1027. And the fact that the landlord's janitor,

entrusted with the charge of the coal vault, is employed by the tenants to carry the coal to their apartments, does not relieve the landlord from liability for the act of the janitor in leaving the hole open after taking in coal for the use of the tenants. *Jennings v. Van Schaick*, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459. In New York, as before stated, the lessor has been held liable for the leaving open of the coal hole though he has transferred the control thereof to a lessee of a part of the building. *Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575, ante, note 583.

⁶⁴⁷ See *Wixon v. Bruce*, 187 Mass. Div. 560, 69 N. Y. Supp. 1027. And 232, 72 N. E. 978, 68 L. R. A. 248, ante, note 643 a.

volves acts of omission rather than commission on the part of the tenant. Permissive waste will be hereafter considered.⁶⁴⁸

The question of what constitutes waste is determined primarily by the consideration whether the act results in injury to the reversioner or remainderman.⁶⁴⁹ But acts on the part of the tenant, involving unauthorized alterations of the premises, are also quite frequently regarded as waste, even though their effect is to increase, or at least not to diminish, the value of the property.⁶⁵⁰ Acts thus constituting technical waste, though calculated to increase the value of the premises, are known as "meliorating waste."

Many, perhaps the majority, of the decisions upon the question of waste have been made with reference to the rights and obligations, not of a tenant claiming under a lease as against the landlord, but of a life tenant claiming under a will or settlement, or by right of dower or courtesy, as against the remainderman. The same considerations, however, ordinarily determine what constitutes waste, whether the tenant holds under a lease or otherwise, and the authorities hereafter cited, though many of them not involving questions arising under leases, may be regarded, generally speaking, as authorities bearing upon such questions as they may arise between landlord and tenant.

A merely trifling damage has, from early times, been regarded as insufficient to support an action as for waste, the judgment being entered for defendant in case the jury finds for the plaintiff in merely nominal damages.⁶⁵¹

In determining whether particular acts constitute waste, the condition and usages of the particular locality are to be considered, a thing thus constituting waste in one locality which is not waste in another.⁶⁵² It is said, indeed, that no act is waste

⁶⁴⁸ See post, § 113.

⁶⁴⁹ *Doe d. Grubb v. Burlington*, 5 Barn. & Adol. 507; *Pynchon v. Stearns*, 52 Mass. (11 Metc.) 304, 45 Am. Dec. 207; *King v. Miller*, 99 N. C. 583, 6 S. E. 660; *Proffitt v. Henderson*, 29 Mo. 325; *McGregor v. Brown*, 10 N. Y. (6 Seld.) 114. But see *Livingston v. Reynolds*, 26 Wend. (N. Y.) 115.

⁶⁵⁰ See post, at notes 713-723.

⁶⁵¹ *Co. Litt.* 54a; *Harrow School v. Alderton*, 2 Bos. & P. 86; *Doe d. Grubb v. Burlington*, 5 Barn. & Adol. 507; *Doherty v. Allman*, 3 App. Cas. 733; *Sheppard v. Sheppard*, 3 N. C. 382.

⁶⁵² *Pynchon v. Stearns*, 52 Mass. (11 Metc.) 304, 45 Am. Dec. 207; *Drown v. Smith*, 52 Me. 141; *King v. Miller*, 99 N. C. 583, 6 S. E. 660.

which is sanctioned by a prevailing local usage, unless such usage is excluded by the instrument of demise.⁶⁵³ The general tendency of the American courts has been to restrict the application of the English law of waste, in order to adapt it to the conditions of a new and growing country, and to stimulate the development of the land by the tenant in possession.⁶⁵⁴ Even though an act or series of acts on the part of the tenant result in injury to the reversion, he is not guilty of waste if there was merely a reasonable and proper user of the tenement, having regard to the class to which it belongs.⁶⁵⁵

There is a decision to the effect that the act of the tenant in defacing the buildings on the premises by smearing offensive and greasy matter thereon did not constitute waste, the injury not being of a permanent character, and being reparable by mere cleansing.⁶⁵⁶ There has, apparently, been no other decision with reference to whether such action by a particular tenant constitutes waste.

The question whether waste has been committed is, in an action at law, usually regarded as one for the jury under the instructions of the court, depending, as it does to a great extent, on matters of fact, such as the custom of the neighborhood, the character of the premises, the reasonableness of the use made thereof, the actual commission *vel non* of the acts charged, and whether the

⁶⁵³ Per Lindley, L. J., in *Dashwood v. Magniac* [1891] 3 Ch. 306. So in *Tucker v. Linger*, 21 Ch. Div. 18, it was held not to be waste for a tenant for years to collect and sell flints turned up in plowing, this being in accordance with a local custom.

⁶⁵⁴ 4 Kent, Comm. 76; *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. (6 Stew.) 603; *Pyncheon v. Stearns*, 52 Mass. (11 Metc.) 304, 45 Am. Dec. 207; *Clemence v. Steere*, 1 R. I. 273, 53 Am. Dec. 621; *King v. Miller*, 99 N. C. 583, 6 S. E. 660; *Drown v. Smith*, 52 Me. 141; *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733; *Chase v. Hazleton*, 7 N. H. 171; *Proffit v. Henderson*, 29 Mo. 325.

⁶⁵⁵ *Saner v. Bilton*, 7 Ch. Div. 815.

The tenant is not liable as for waste because he turns cattle into a field without fencing young trees therein, the landlord having reason, from the fact that the premises were leased as a dairy farm, to know that cattle would be placed in the field.

Fowler v. Johnstone, 8 Times Law R. 327. But negligently allowing cattle to go into an orchard has been regarded as waste. *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776.

⁶⁵⁶ *Bandlow v. Thieme*, 53 Wis. 57, 9 N. W. 920. The court held that it was an action, not for waste, but for malicious and willful injury to land, and consequently could be brought before a justice of the peace.

premises have been injured by such acts.⁶⁵⁷ Certain acts, however, may be so clearly injurious to the premises and beyond the power of the tenant to commit as to constitute waste as matter of law, and the court would no doubt in any such case control the verdict of the jury in that regard.⁶⁵⁸

(2) **Alteration in character of land.** An alteration in the character of land leased, as by the conversion of meadow into arable land, or of arable land into wood, or *e converso*, has been usually stated to be waste, the reasons given being, firstly, that the course of husbandry is thereby changed, and, secondly, that the identity of the property is affected, with the result of rendering the proof of title more difficult.⁶⁵⁹ The first reason for the rule has been stated to be inapplicable in this country, where the custom has ordinarily been for farmers to change the mode of using land *ad libitum*,⁶⁶⁰ and the second reason is likewise inapplicable, since land is almost invariably, at the present day, described by metes and bounds or courses and distances, or by reference to a plat or survey, and not by its particular character.⁶⁶¹ And it was held in one case that the ploughing of certain meadow land was not waste, it being shown by evidence that such plowing was good husbandry.⁶⁶² Still an entire change in the character of the premises leased, if evidently not contemplated by the lessor at the time of leasing, as, for instance, if land which has previously been used for pasture purposes only is entirely ploughed up and planted with crops, might well be regarded by the courts as an act of waste, without reference to whether it actually lessens the value of the land.⁶⁶³ The conversion of

⁶⁵⁷ *Agate v. Lowenbein*, 57 N. Y. 7 Bing. 640; *Murphy v. Daly*, 13 Ir. 604; *Hasty v. Wheeler*, 12 Me. 434; C. L. 239.

Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; *Jackson v. Tibbits*, (11 Metc.) 304, 45 Am. Dec. 207; 3 Wend. (N. Y.) 341; *Young v. Spencer*, 10 Barn. & C. 145. See post, note 697.

⁶⁵⁸ See *McGregor v. Brown*, 10 N. Y. (6 Seld.) 114, as explained in *Agate v. Lowenbein*, 57 N. Y. 604.

⁶⁵⁹ Co. Litt. 53 b; Bac. Abr. Waste, c. 1; *City of London v. Greyme*, Cro. Jac. 181; *Darcy v. Askwith*, Hob. 234; *Simmons v. Norton*, 26 N. W. 874, it was held that the

⁶⁶⁰ *Pyncheon v. Stearns*, 52 Mass. Am. Dec. 621. See 3 Dane's Abr. 218.

⁶⁶¹ *Pyncheon v. Stearns*, 52 Mass. (11 Metc.) 304, 45 Am. Dec. 207; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621. See 3 Dane's Abr. 218.

⁶⁶² *Hubble v. Cole*, 85 Va. 87, 7 S. E. 242.

⁶⁶³ *In Chapel v. Hull*, 60 Mich. 167,

meadows and pasture land into a cemetery has been enjoined on the theory that it would constitute waste,⁶⁶⁴ and there is one decision to the effect that depositing large quantities of refuse material on the premises, so as to raise the surface thereof several feet, and so alter the nature of the land demised, constitutes waste.⁶⁶⁵

(3) **Diminution in value of land.** Acts by the tenant involving actual diminution in the value of the land ordinarily constitute waste; as where the tenant undertook to plow up strawberry beds in actual bearing,⁶⁶⁶ or to sow a crop of a peculiarly noxious quality which would take several years to eradicate.⁶⁶⁷ In this last case the sowing of the noxious crop was with the intention of injuring the land, and mere injudicious and unhusbandlike farming has been held not to be waste,⁶⁶⁸ though it apparently constitutes a breach of an implied contract on the tenant's part as to cultivation.⁶⁶⁹ As elsewhere stated, in some cases at least, acts of the tenant may constitute waste although they do not actually decrease the value of the premises.⁶⁷⁰

(4) **Removal of earth and minerals.** A particular tenant, such as a tenant for life or years, has, in the absence of a stipulation or license allowing him so to do,^{670a} no right to take clay, gravel, soil, and the like, unless such material was one of the recognized profits of the land before the commencement of his tenancy,⁶⁷¹ nor can he open new quarries, mines, or oil or gas wells, unless

plowing up of all the meadow land on the farm leased was waste and would be restrained. The court speaks of this as involving an unhusbandlike use of the farm.

⁶⁶⁴ *Hunt v. Browne, Sausse & S.* 178. Here the tenant held under a lease for lives, renewable forever.

⁶⁶⁵ *West Ham Central Charity Board v. East London Waterworks Co.* [1900] 1 Ch. 624.

⁶⁶⁶ *Pratt v. Brett*, 2 Madd. 62.

⁶⁶⁷ *Watherell v. Howells*, 1 Camp. 227.

⁶⁶⁸ *Richards v. Torbert*, 3 *Houst.* (Del.) 172; *Harris v. Mantle*, 3 *Term R.* 307; 10 *Bac. Abr.*, Waste, p. 423.

⁶⁶⁹ See post, § 119 a (1).

⁶⁷⁰ See ante, § 109 a (3).

^{670a} See ante, § 7 c.

⁶⁷¹ *Co. Litt.* 53 b; *Whitham v. Ker-shaw*, 16 *Q. B. Div.* 613; *Doe d. Wood v. Morris*, 2 *Taunt.* 52; *United States v. Bostwick*, 94 *U. S.* 53, 24 *Law. Ed.* 65; *Smith v. City of Rome*, 19 *Ga.* 89, 63 *Am. Dec.* 298; *University v. Tucker*, 31 *W. Va.* 621, 8 *S. E.* 410; *Coates v. Cheever*, 1 *Cow. (N. Y.)* 460; *Reed's Ex'rs v. Reed*, 16 *N. J. Eq.* (1 *C. E. Green*) 248. Compare *Gulf C. & S. F. R. Co. v. Settegast*, 79 *Tex.* 256, 15 *S. W.* 228. The tenant may, however, take clay or gravel for the repair of the house on the same principle on which he may take wood for that purpose, under the law of estovers. *Co. Litt.* 53 b.

he is expressly given such right.⁶⁷² Quarries, mines, or wells, however, which were opened before the commencement of the tenancy in question, may be worked by the tenant, it being considered that the previous owner, by such opening, made the minerals a part of the regular profits of the land.⁶⁷³ And an open mine, it is held, may be worked even to exhaustion.⁶⁷⁴ The mine or quarry cannot be worked by the tenant for general purposes, as for sale, if, previous to his tenancy, it was worked merely for some other and restricted purpose, as for the repair of particular buildings.⁶⁷⁵

If the work in a mine was discontinued before the beginning of the tenancy, and the discontinuance was such as apparently to show an intention on the part of the previous owner to devote the land to other uses, the tenant cannot work it, though he may do so if the discontinuance was owing to lack of sale for the minerals, to want of capital, or to a like reason.⁶⁷⁶ And the right to work a mine or quarry which is already opened includes the right to sink new shafts on the same vein, or break new ground on the same rock, but not to work new veins.⁶⁷⁷

⁶⁷² Co. Litt. 53 b; *Astry v. Ballard*, 2 Mod. 193; *Saunders' Case*, 5 Coke, 12 a; *Stoughton v. Leigh*, 1 Taunt. 410; *Owings v. Emery*, 6 Gill (Md.) 260; *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891. See *Ison v. Rex Crude Oil Co.*, 147 Cal. 659, 82 Pac. 317.

⁶⁷³ Co. Litt. 54 b; *Astry v. Ballard*, 2 Mod. 193; *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. (6 Stew.) 603; *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686; *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733; *Lynn's Appeal*, 31 Pa. 44, 72 Am. Dec. 721; *Moore v. Rollins*, 45 Me. 493. This rule has been held to be inapplicable, however, if the premises were, by the express terms of the lease, to be used for agricultural purposes only. *Freer v. Stot-*

enbur, 2 Abb. Dec. (N. Y.) 189, 34 How. Pr. 449.

⁶⁷⁴ *Sayers v. Hoskinson*, 110 Pa. 473, 1 Atl. 308; *Irwin v. Covode*, 24 Pa. 162, 62 Am. Dec. 372; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 56 Am. St. Rep. 884.

⁶⁷⁵ *Elias v. Snowdon Slate Quarries Co.*, 4 App. Cas. 454. But see *Neel v. Neel*, 19 Pa. 323, where a different view was taken as to the rights of a life tenant not holding under a lease.

⁶⁷⁶ *Gaines v. Green Pond Iron Min. Co.*, 32 N. J. Eq. (5 Stew.) 86; *Bagot v. Bagot*, 32 Beav. 509. See *Stoughton v. Leigh*, 1 Taunt. 402.

⁶⁷⁷ *Clavering v. Clavering*, 2 P. Wms. 388; *Elias v. Snowdon Slate Quarries Co.*, 4 App. Cas. 466; *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. (6 Stew.) 603; *Billings v. Taylor*, 27 Mass. (10 Pick.) 460; *Moore v. Rollins*, 45 Me. 493; *Irwin*

It has been decided in Canada, and presumably would be so decided in any jurisdiction, that in the case of a lease of land which is evidently for agricultural purposes, the lessee may remove stones in the land for the purpose of putting it into condition for agriculture.⁶⁷⁸

(5) **Destruction of trees and timber.** Trees are, for the purpose of the law of waste, divided in England into "timber" trees and trees not timber. Some trees, such as oak, ash, and elm, seem to be invariably regarded as timber, but other trees may be, and frequently are, timber by the custom of the particular neighborhood. Trees are not, however, considered timber until twenty years of age, and, by custom, may require even a greater age in order to be so considered.⁶⁷⁹ This distinction between timber trees and trees not timber has, in that country, important results. Timber trees are considered as part of the inheritance, and consequently a tenant has no right to cut them except upon land where it has been the custom to fell seasonable wood at intervals as part of the regular profits.⁶⁸⁰ Trees not timber the tenant for life may cut, generally speaking, provided such cutting does not injure the inheritance. The tenant may accordingly cut underwood, provided he does not destroy the stubs from which it grows, such wood being for this purpose like an ordinary crop on the land,⁶⁸¹ and a tenant may cut "dotards," or dead trees.⁶⁸² Trees of the nature of timber trees, but which are as yet too young to be timber, can be cut only for the purpose of thinning the growth for the benefit of other trees.⁶⁸³ Fruit trees cannot be cut,⁶⁸⁴ nor trees other than timber, if beneficial to the inheritance, such

v. Covode, 24 Pa. 162, 62 Am. Dec. 372; *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

⁶⁷⁸ *Lewis v. Godson*, 15 Ont. 252. See dictum to the same effect in *Dearden v. Evans*, 5 Mees. & W. 11.

⁶⁷⁹ *Co. Litt.* 53 a; *Bewes, Waste*, 98; *Honywood v. Honnywood*, L. R. 18 Eq. 306; *Dashwood v. Magniac* [1891] 3 Ch. 306.

⁶⁸⁰ *Perrot v. Perrot*, 3 Atk. 94; *Ferrand v. Wilson*, 4 Hare, 344; *Dashwood v. Magniac* [1891] 3 Ch. 306. These cases all involved the

rights of a tenant for life under a devise or settlement. Presumably a tenant under a lease would have the same right, but the matter would almost invariably be controlled by the covenants of the lease.

⁶⁸¹ *Co. Litt.* 53 a; *Bewes, Waste*, 58; *Phillips v. Smith*, 14 Mees. & W. 589.

⁶⁸² *Co. Litt.* 53 a; *Herlakenden's Case*, 4 Coke, 62.

⁶⁸³ *Honywood v. Honnywood*, L. R. 18 Eq. 306.

⁶⁸⁴ *Bewes, Waste*, 95; *Co. Litt.* 53 a.

as willows protecting the banks of streams, and ornamental trees.⁶⁸⁵

In this country, what constitutes waste as regards timber is determined generally by considerations both of the purpose of the cutting and its effect upon the value of the inheritance. In view of the quantity of land which is here available for use only by clearing away the timber thereon, it is usually held that a tenant is not guilty of waste if he cuts timber to a reasonable extent in order that he may cultivate the soil, and the fact that he sells the timber so cut is immaterial.⁶⁸⁶ But cutting is waste if it decreases rather than enhances the value of the land,⁶⁸⁷ or if the real purpose of the cutting is the sale of the timber,⁶⁸⁸ or some other purpose not conducive to the benefit of the land.⁶⁸⁹ The question is, it is said, to be determined with reference to what one would do, in the exercise of good husbandry, if he were the owner of the fee,⁶⁹⁰ and also with regard to the custom of the neighbor-

⁶⁸⁵ Co. Litt. 53 a; Honywood v. 29 Am. Dec. 72; Jackson v. Brown-Honywood, L. R. 18 Eq. 309; Phillips v. Smith, 14 Mees. & W. 589.

^{685a} Keeler v. Eastman, 11 Vt. 293; Drake v. Wigle, 24 U. C. C. P. 405; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Jackson v. Browning, 7 Johns. (N. Y.) 227, 5 Am. Dec. 218; Cannon v. Barry, 59 Miss. 289; King v. Miller, 99 N. C. 583, 6 S. E. 660; Dawson v. Coffman, 28 Ind. 220; Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308; Owen v. Hyde, 14 Tenn. (6 Yerg.) 334, 27 Am. Dec. 467; Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 513; Disher v. Disher, 45 Neb. 100, 63 N. W. 368.

⁶⁸⁶ Johnson v. Johnson, 18 N. H. 594; Davis v. Gilliam, 40 N. C. (5 Ired.) 308; Smith v. Smith, 105 Ga. 106, 31 S. E. 135; Warren County v. Gans, 80 Miss. 76, 31 So. 539; Moss Point Lumber Co. v. Board of Supervisors of Harrison County, 89 Miss. 448, 42 So. 290; Davis v. Clark, 40 Mo. App. 515; Modlin v. Kennedy, 53 Ind. 267; Lester v. Young, 14 R. I. 579; Morehouse v. Cotheal, 22 N. J. Law (2 Zab.) 521; Padelford v. Padelford, 24 Mass. (7 Pick.) 151; Noyes v. Stone, 163 Mass. 490, 40 N. E. 856; Chase v. Hazelton, 7 N. H. 171; McLeod v. Dial, 63 Ark. 10, 37 S. W. 306.

⁶⁸⁷ Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 513; Cannon v. Barry, 59 Miss. 289; King v. Miller, 99 N. C. 583, 6 S. E. 660; Davis v. Gilliam, 40 N. C. (5 Ired. Eq.) 308; Keeler v. Eastman, 11 Vt. 293; Proffitt v. Henderson, 29 Mo. 325.

⁶⁸⁸ Davis v. Gilliam, 40 N. C. (5 Ired. Eq.) 308; Mooers v. Wait, 3 Wend. (N. Y.) 104; Johnson's Adm'r v. Johnson, 2 Hill Eq. (S. C.) 277,

⁶⁸⁹ Armstrong v. Wilson, 60 Ill. 226; Cook v. Cook, 77 Mass. (11 Gray) 123.

⁶⁹⁰ Cannon v. Barry, 59 Miss. 289;

hood.⁶⁹¹ The fact that but a small proportion of the property is woodland is a strong consideration against the tenant's right to remove timber.⁶⁹² The cutting or destruction of fruit trees is waste,⁶⁹³ but not of dead trees.⁶⁹⁴ In some of the New England states, however, it seems questionable whether the cutting of wood, otherwise than for estovers, by a tenant in possession, is in any case allowable,⁶⁹⁵ and it seems questionable whether the lessee of a farm, a large proportion of which is timber land, would, if his tenancy is to endure but a few years, be allowed to extend the cultivated portions at the expense of the timber, and so materially to alter the nature of the thing demised, even though the money value of the farm is thereby increased rather than diminished.⁶⁹⁶ The question whether the cutting of timber by a tenant is reasonable, and in accordance with the custom of the country, has been regarded as one for the jury.⁶⁹⁷

The terms of the lease may authorize such a cutting of timber as would otherwise be waste,⁶⁹⁸ and the nature of the property

Davis v. Gilliam, 40 N. C. (5 Ired. Eq.) 308; Chase v. Hazelton, 7 N. H. 171; Drown v. Smith, 52 Me. 141; Keeler v. Eastman, 11 Vt. 293; Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 513; Moss Point Lumber Co. v. Board of Supervisors of Harrison County, 89 Miss. 448, 42 So. 290.

⁶⁹¹ Morehouse v. Cotheal, 22 N. J. Law (2 Zab.) 521; McCullough v. Irvine's Ex'rs, 13 Pa. 438; Proffitt v. Henderson, 29 Mo. 329; Drown v. Smith, 52 Me. 141; Findlay v. Smith, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

⁶⁹² Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572; Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004; Hastings v. Crunckleton, 3 Yeates (Pa.) 261; McLeod v. Dial, 63 Ark. 10, 37 S. W. 306.

⁶⁹³ Bellows v. McGinnis, 17 Ind. 64; Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004; Silva v. Garcia, 65 Cal. 591; Co. Litt. 53 a; Bewes, Waste, 95. Allowing cattle to injure fruit trees is waste. Warder v.

Henry, 117 Mo. 530, 23 S. W. 776. But the tenant is not liable if this was merely the result of keeping stock on the premises, as the lessor had reason to expect. Fowler v. Johnstone, 8 Times Law R. 327.

⁶⁹⁴ Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308; Keeler v. Eastman, 11 Vt. 293; King v. Miller, 99 N. C. 583, 6 S. E. 660.

⁶⁹⁵ See Ford v. Erskine, 50 Me. 227; White v. Cutler, 34 Mass. (17 Pick) 248, 28 Am. Dec. 296; Clark v. Holden, 73 Mass. (7 Gray) 8, 66 Am. Dec. 450; Chase v. Hazelton, 7 N. H. 171.

⁶⁹⁶ See ante, § 109 a (2).

⁶⁹⁷ Jackson v. Brownson, 7 Johns. (N. Y.) 233, 5 Am. Dec. 258; Drown v. Smith, 52 Me. 141; King v. Miller, 99 N. C. 583, 6 S. E. 660; McCullough v. Irvine's Ex'rs, 13 Pa. 438. See ante, note 657.

⁶⁹⁸ See McDaniel v. Callan, 75 Ala. 327.

A lease giving a right to the lessee

leased may be such as to give rise to an implication of a license to that effect. Accordingly it has been decided that where a smelting furnace was leased together with adjoining land, there was an implication of a right in the lessee to use wood for the furnace.⁶⁹⁹ And a tenant has, on the same principle, been allowed to use wood on the premises in connection with salt wells also located thereon.⁷⁰⁰

A covenant by the lessee not to cut down timber except for the lessee's use or to improve the premises, has been regarded as broken by tapping the trees for sap, if this is calculated to injure them for timber purposes.⁷⁰¹

It has in one case been decided that, when the lease gave the lessee the right to cut timber, a subsequent contract by him, relinquishing such right, was valid, though the contract was not in writing.^{701a} The decision is placed upon the ground that such contract involved a change in the mode of performance of the "contract of lease," and, performance having taken place, such modifying contract was not within the statute of frauds.⁷⁰² What is meant by the statement that the contract had been performed does not clearly appear. By the decisions in most of the states the grant of a right to cut timber is regarded as the conveyance of an interest in land which must be in writing,^{703, 704} and a relinquishment of that right might, it seems, be regarded as a reconveyance of such interest, which must also be in writing.

(6) **Estovers.** A tenant for life or years, or from year to year, but not a tenant at will, is entitled to cut and appropriate a reasonable quantity of timber for the purpose of repairing buildings, fences, gates, and the like, which were upon the premises

to cut and use the wood from such part of the land as he desires to clear for cultivation obviously gives him no right to sell trees from another part of the land. *Ladd v. Shattock*, 90 Ala. 134, 7 So. 764. And so where the right to cut wood is expressly restricted to a particular part of the premises. *Jones v. Gammon*, 123 Ga. 47, 50 S. E. 982.

⁶⁹⁹ *Den v. Kinney*, 5 N. J. Law (2 Southard) 552. So where a mine was leased with the right to smelt

ore therefrom. *Wilson v. Smith*, 13 Tenn. (5 Yerg.) 381.

⁷⁰⁰ *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 773. In this case the tenant was one for life under a devise.

⁷⁰¹ *Campbell v. Shields*, 44 U. C. Q. B. 449.

^{701a} *Lee v. Hawks*, 68 Miss. 669, 9 So. 828, 13 L. R. A. 633.

⁷⁰² See *Wald's Pollock, Contracts* (Williston's Ed.) p. 823.

^{703, 704} See 1 *Tiffany, Real Prop.* p. 530.

at the time of the demise, and also for repairing implements of husbandry, and he may, moreover, take sufficient wood to burn in the house, or it seems, in houses occupied by his servants. The timber which he is thus entitled to take is known as "estovers" or "botes."⁷⁰⁵ He is, however, guilty of waste if he cuts down growing wood when there is sufficient dead timber for the purpose, or if he takes superior, rather than inferior trees, and likewise if he takes more than a reasonable amount, or if he sells the timber so cut.⁷⁰⁶ He has no right to take timber for repairs which have been rendered necessary by his own fault.⁷⁰⁷ He can, instead of using the timber from the premises for the purpose of repairs, exchange that timber for other timber to be used for the repairs, if, it seems, this is a clear saving to the reversioner or remainderman, and not otherwise.⁷⁰⁸ The question whether trees

⁷⁰⁵ Co. Litt. 41 b, 53 b; *Smith v. jure the reversion*. The note to this *Jewett*, 40 N. H. 530; *Padelford v. case, in the Lawyers' Reports An-Padelford*, 24 Mass. (7 Pick.) 152; notated, vol. 68, at p. 641, states at *Walters v. Hutchins' Adm'x*, 29 Ind. length the various cases on the sub-136; *Calvert v. Rice*, 91 Ky. 533, 16 ject of estovers.
S. W. 351; *Gardiner v. Derring*, 1 ⁷⁰⁷ Co. Litt. 53 b.
Paige (N. Y.) 573; *London v. War-⁷⁰⁸ *Loomis v. Wilbur*, 5 Mason, 13; field*, 28 Ky. (5 J. J. Marsh.) 196; *Fed. Cas. No. 8,498; Miller v. Shields*, 55 Ind. 71. See *King v. Harris v. Goslin*, 3 Har. (Del.) 340; *Miller*, 99 N. C. 583, 6 S. E. 660. In the case first cited, the statement in *Co. Litt. 53 b*, that it is waste if the tenant sells trees and makes repairs with the proceeds, is regarded by *Story, J.*, as referring to a case in which the original cutting was wrongful as not being made for the purpose of procuring means to make repairs, which wrongful cutting could not be legalized by the subsequent application of the proceeds to repairs.

⁷⁰⁶ Co. Litt. 53 b; *Simmons v. Norton*, 7 Bing. 640; *Doe d. Foley v. Wilson*, 11 East, 56; *Johnson v. Johnson*, 18 N. H. 594; *Padelford v. Padelford*, 24 Mass. (7 Pick.) 152; *Phillips v. Allen*, 89 Mass. (7 Allen) 115.

In *Anderson v. Cowan*, 125 Iowa, 259, 101 N. W. 92, 68 L. R. A. 641, 106 Am. St. Rep. 303, the tenant's right to estovers for firewood is clearly recognized, but it is restricted by the language of the opinion, it seems, to cases in which the trees cut are of such a character as are usually cut for use as firewood and in which such cutting does not in-

In *In re Williams*, 1 Misc. 35, 22 N. Y. Supp. 906, it is held that a tenant given the right to cut timber for fencing could cut and sell timber to pay for fencing.

have been cut down in good faith for the purpose of repairs has been regarded as one for the jury.⁷⁰⁹

(7) **Alteration or removal of buildings or other fixtures.** The tenant is ordinarily guilty of waste if he removes buildings or other structures, or parts thereof, which were annexed to the land at the time of the lease.⁷¹⁰ It is said by Coke that "if glass windows (though glazed by the tenant himself,) be broken down or carried away, it is waste, for the glass is part of his house. And so it is of wainscot, benches, doors, windows, furnaces and the like, annexed or fixed to the house, either by him in the reversion or the tenant."⁷¹¹ This statement must, however, be accepted subject to the rights of the tenant, under the modern law of fixtures, to remove articles annexed by him.⁷¹²

Generally speaking, it seems, a tenant holding under a lease has no right to destroy a building on the premises even for the sake of erecting a more valuable one in its stead, nor to make considerable alterations in a building without the landlord's consent, even though these increase its value. It is stated by an old authority that the substitution of a larger for a smaller house is waste because it increases the charge for repairs,⁷¹³ and such a reason might have weight at the present day. Another reason, upon which the older authorities lay much stress, for regarding a substantial alteration in the character of a building, even though beneficial, as constituting waste, is that thereby the means of

⁷⁰⁹ Doe d. Foley v. Wilson, 11 East, 56; Agate v. Lowenbein, 57 N. Y. 604.

A tenant authorized to take wood and fuel for repairs and fuel cannot, it has been held, take it for other purposes, or justify such action on the ground that he took no more than he was authorized to take for repairs and fuel, and that he procured elsewhere that needed for these purposes. Clarke v. Cummings, 5 Barb. (N. Y.) 339. Here, however, the character of the wood taken seems to be a factor in the decision.

⁷¹⁰ Co. Litt. 53 a; Dooly v. Stringham, 4 Utah. 107, 7 Pac. 405; Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769; McCullough

v. Irvine's Ex'rs, 13 Pa. 438; Cornish v. Strutton, 47 Ky. (8 B. Mon.) 586; Davenport v. Magoon, 13 Or. 3, 4 Pac. 299, 57 Am. Rep. 1; United States v. Bostwick, 94 U. S. 53, 24 Law. Ed. 65; Bass v. Metropolitan West Side El. R. Co., 53 U. S. App. 542, 27 C. C. A. 147, 82 Fed. 857; Palmer v. Young, 108 Ill. App. 252; Champ Spring Co. v. B. Roth Tool Co., 103 Mo. App. 344, 77 S. W. 344, 12 L. R. A. 187; Smith v. Chappell, 25 Pa. Super. Ct. 81.

⁷¹¹ Co. Litt. 53 a.

⁷¹² See post, § 240.

⁷¹³ 2 Rolle, Abr., Waste, p. 815, pl. 18.

identifying the premises are diminished and the evidence of title is consequently affected.⁷¹⁴ This latter reason, however, is of little, if any weight, at the present day, when property is described by metes and bounds, or courses and distances, or with reference to a plat or survey.⁷¹⁵ But there is, it seems, a more fundamental consideration which has moved the courts to regard as waste any considerable alteration by the tenant in the premises leased, and that is, that by a lease the lessee is given merely the right to use and not to alter the building, and that the landlord has a right to receive back, at the end of the term, the very thing which he has leased. So it is said in early cases that the conversion of a brew house into a dwelling house, producing a greater net rental, is waste, "because of the alteration of the nature of the thing,"⁷¹⁶ and that it is waste if the lessee tears down a wall between a parlor and a chamber "because it cannot be intended for the benefit of the lessor, and it is not in the power of the lessee to transpose the house."⁷¹⁷ In a recent case it is said: "The importance of this rule (that the lessee cannot alter the thing leased) to the landlord or owner of the future estate cannot be denied. Especially is it valuable and essential to the protection of a landlord who rents his premises for a short time. He has fitted his premises for certain uses. He leases them for such uses, and he is entitled to receive them back at the end of the term still fitted for those uses; and he may well say that he does not choose to have a different property returned to him from that which he leased, even if, upon the taking of testimony, it may be found of greater value by reason of the change."⁷¹⁸ In accordance with this doctrine, it has been decided in this country that the demolition of a building will be restrained although for

⁷¹⁴ See *Cole v. Green*, 1 Lev. 308; *City of London v. Greyme*, Cro. Jac. 181; *Young v. Spencer*, 10 Barn. & C. 145; *Brooke v. Kavanagh*, L. R. 23 Ir. 97.

⁷¹⁵ See *Pyncheon v. Stearns*, 52 Mass. (11 Metc.) 304, 45 Am. Dec. 207; *Melms v. Pabst Brew. Co.*, 104 Wis. 7, 79 N. W. 738, 46 L. R. A. 478; *Doherty v. Allman*, 3 App. Cas. 709.

⁷¹⁶ *Cole v. Green*, 1 Lev. 308.

⁷¹⁷ 2 Rolle, Abr., 815, pl. 19.

⁷¹⁸ *Melms v. Pabst Brew. Co.*, 104 Wis. 7, 79 N. W. 738, 46 L. R. A. 478, per Winslow, J., where, however, the decision was that a life tenant, not holding under a lease, was not restricted in the same way in this regard as a lessee. The opinion contains an able discussion of the law of waste.

the purpose of substituting a better one,⁷¹⁹ and a like ruling has been made in England.⁷²⁰ Likewise it has been decided in this country that waste may consist in the removal of partitions,⁷²¹ in the opening of a doorway in an outer wall,⁷²² or the erection of a chimney,⁷²³ without reference to the question whether such alterations actually decrease the value of the premises.

The obligation of a tenant to refrain from the substantial alteration of a building may be modified, it seems, by the fact that his lease has a great length of time to run, so that he may be regarded to a considerable extent as the absolute owner, while the value of the reversion is comparatively slight.⁷²⁴ And occasionally, perhaps, the necessity of some alterations in order to make the premises reasonably fit for the business for which they were leased may justify the making of them.⁷²⁵ The removal of a valueless build-

⁷¹⁹ *Davenport v. Magoon*, 13 Or. 3, 4 Pac. 299, 57 Am. Rep. 1. In *Dooly v. Stringham*, 4 Utah, 107, 7 Pac. 405, a widow having a life estate was enjoined from tearing down a building, though she intended to build a better one.

⁷²⁰ *Smyth v. Carter*, 18 Beav. 78. And see *Brooke v. Kavanagh*, L. R. 23 Ir. 97; *West Ham Central Charity Board v. East London Waterwork Co.* [1900] 1 Ch. 624. But compare the remarks on *Smyth v. Carter*, 18 Beav. 78, *supra*, in *Doherty v. Allman*, 3 App. Cas. 709.

⁷²¹ *Agate v. Lowenbein*, 57 N. Y. 605, where the principle that no such alteration, however beneficial, of the building, can ordinarily be made, is clearly asserted, but the case really turned upon the question whether the alterations were harmless and required by the tenant's business so as to be within a permission in the lease to make alterations. See, also, *Wotton v. Wise*, 47 N. Y. Super. Ct. (15 Jones & S.) 515.

⁷²² *Klie v. Von Broock*, 56 N. J. Eq.

18, 37 Atl. 469. And so when windows were changed into doors connected with passage ways to other buildings. *Peer v. Wadsworth*, 67 N. J. Eq. 191, 58 Atl. 379.

⁷²³ *Brock v. Dole*, 66 Wis. 142, 28 N. W. 334.

⁷²⁴ See *Doherty v. Allman*, 3 App. Cas. 709, where the House of Lords refused an injunction to restrain a tenant under a lease for 999 years from converting store buildings into dwelling houses, the neighborhood having changed so as to do away with any demand for store buildings. And so in *Crowe v. Wilson*, 65 Md. 479, 5 Atl. 427, 57 Am. Rep. 343, it was decided that a tenant under a lease renewable forever could make alterations provided the security for rent was not impaired. And see *Klie v. Von Broock*, 56 N. J. Eq. 18, 29, 37 Atl. 469, for dicta to the same effect.

⁷²⁵ See *Klie v. Von Broock*, 56 N. J. Eq. 29, 37 Atl. 469, where Pitney, V. C., says: "If a building be erected and let for a hotel, and through some oversight or miscalculation

ing by a life tenant, not holding under a lease, has been decided not to be an act of waste, where the removal was necessary, owing to changing conditions, for the profitable use of the property,⁷²⁶ but it appears from the same case that a different view would be taken in the case of a tenant holding under a lease, at least if it had but a few years to run.

(8) **Erection of building or other structure.** The construction of a building on the leased land, in a place where there was none before, is not waste, it seems, unless this results in an injury to the reversion,⁷²⁷ or unless, apparently, it involves an alteration of the character of the land, as when the tenant of agricultural land covers it with buildings so as to render it useless for agricultural purposes.⁷²⁸ It has been asserted that a tenant under a lease may erect fences on the land as he may please.⁷²⁹

(9) **Improper user of building.** A tenant is, apart from express stipulations, not liable for injury to buildings resulting from a

some mistake in the interior arrangements occurs which materially interferes with its beneficial use for that purpose, and requires a change, it is probable that the right to make such change could properly be inferred from the circumstances." And see *Doherty v. Allman*, 3 App. Cas. 709, and *Melms v. Pabst Brew. Co.*, 104 Wis. 7, 79 N. W. 738, 46 L. R. A. 478, where the fact that the alteration of the buildings was necessary for the profitable use of the premises is emphasized in justifying the making of it by the tenant.

⁷²⁶ *Melms v. Pabst Brew. Co.*, 104 Wis. 7, 79 N. W. 738, 46 L. R. A. 478. And see *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588.

⁷²⁷ *Jones v. Chappell*, L. R. 20 Eq. 539; *Winship v. Pitts*, 3 Paige (N. Y.) 259, 24 Am. Dec. 218; *Pyncheon v. Stearns*, 52 Mass. (11 Metc.) 304, 45 Am. Dec. 207; *Meux v. Cobley* [1892] 2 Ch. 262. See *Viner's Abr., Waste*, p. 439, pl. 22. The statement in *Co. Litt.* 53 a, that "if the tenant build a new house, it is waste, and

if he suffered it to be wasted, it is a new waste," is, it has been said, "to be understood with the condition that the new house or building affects the inheritance of the land in a manner which the law recognizes to be injurious." *Leake, Uses & Profits of Land*, 95.

The erection of a building for purposes of the tenant's trade, to be removed by him at the end of the lease without injury to the land, is not waste. *Hubble v. Cole*, 85 Va. 87, 7 S. E. 242.

⁷²⁸ In *Brooke v. Mernagh*, L. R. 23 Ir. 86, and *Brooke v. Kavanagh*, L. R., 23 Ir. 97, where the tenant had erected dwellings on the leased premises, an agricultural holding, in order to aid the "plan of campaign" which was, in the eyes of the law, an illegal conspiracy, an injunction issued to restrain any further erections and to compel the removal of the dwellings already erected.

⁷²⁹ *Donason v. Walker*, 87 Ill. 231.

reasonable use of them for the purpose for which they were intended. "No user of a tenement" it has been said, "which is reasonable and proper, having regard to the class to which it belongs, is waste."⁷³⁰ Accordingly the tenant is not liable for the breaking down of a building owing to its insufficiency to support a reasonable weight of goods placed in it by the tenant, he having no reason to suspect its weakness.⁷³¹ But he is liable for injuries caused by placing an unreasonable and extraordinary weight in the building,⁷³² as he is for injuries caused by other improper use thereof,⁷³³ or by any sort of negligence on the part of himself or his servants.⁷³⁴ The burden is on the landlord of showing that any injury to the premises was by the tenant's fault, and unless this is shown the tenant is free from liability.⁷³⁵

⁷³⁰ *Saner v. Bilton*, 7 Ch. Div. 815. And, to the same effect, see *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606.

⁷³¹ *Saner v. Bilton*, 7 Ch. Div. 815; *Machen v. Hooper*, 73 Md. 342, 21 Atl. 67; *Sheer v. Fisher*, 27 Ill. App. 464. And so the lessee has been held not to be liable for injury caused by the use of machinery in the building with the lessor's assent (*Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957) on the ground presumably that this was a reasonable use of the premises. It would seem that, on the maxim *volenti non fit injuria*, the landlord could never complain of a particular use of the premises to which he has assented.

⁷³² *Moses v. Old Dominion Iron & Nail Works Co.*, 75 Va. 95; *Southern Oil Works v. Bickford*, 82 Tenn. (14 Lea) 651; *Chalmers v. Smith*, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769; *Brooks v. Clifton*, 22 Ark. 54; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507.

⁷³³ *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812; *Powell v. Day-*

ton, S. & G. R. Co., 16 Or. 33, 16 Pac. 863, 8 Am. St. Rep. 251.

⁷³⁴ *Mason v. Stiles*, 21 Mo. 374, 64 Am. Dec. 242 (injury to building from explosion caused by negligence of servant); *Duer v. Allen*, 96 Iowa, 36, 64 N. W. 682 (fire); *Zigler v. McClellan*, 15 Or. 499, 16 Pac. 179 (fire); *Wilcox v. Cate*, 65 Vt. 478, 26 Atl. 1105 (explosion).

⁷³⁵ *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N. E. 1099; *Finch v. Shackelford*, 12 Ky. Law Rep. 322; *Lynn's Appeal*, 31 Pa. 44, 72 Am. Dec. 721. See, also, cases cited in reference to injury by fire, post, note 860. But in *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507, it is decided that if the building is destroyed by the acts of the lessee or his undertenants, he must, to exonerate himself, show that the destruction was owing to causes for which he was not responsible; for instance, if the building fell upon the placing of goods therein, he must show that it fell by reason of structural weakness rather than of the excessive weight of the goods.

except, by the authorities generally, when the injury is caused by a direct act of commission on the part of a stranger.⁷³⁶

Occasionally the cases contain a suggestion that the liability of the tenant for injuries to the building caused by his use thereof in an improper manner is by reason of an "implied contract" not to so use the premises.⁷³⁷

A landlord cannot, after encouraging the tenant to use the building for a particular purpose which, as he knew, involved the use of heavy machinery, assert a liability on the tenant's part for injuries caused by the operation of such machinery.⁷³⁸

(10) **Equitable waste.** The doctrine of "equitable waste," by which waste of a character not recognized at law as illegal is relieved against in equity by an injunction to prevent it, and when possible, by compelling the restoration of the thing wasted, has been fully developed in England. In this country there are but few decisions in which waste has been considered as of such a character as to be cognizable in equity and not at law, and the extent to which there is such a thing as equitable waste, as distinct from legal waste, appears doubtful. The doctrine of equitable waste is applied in England in the case of unreasonable or willful destruction by a tenant in fee simple, when there is an executory limitation over to another, and also in the case of such destruction by a tenant for life "without impeachment of waste." It has but little application even in that country, it seems, to the case of a tenant holding under a lease, since a lease seldom contains a clause, "without impeachment of waste."⁷³⁹ In one state in this country, in the case of a lease containing such a clause, recovery of damages for willful and unreasonable waste by the tenant was allowed at law, that is, what in England would be equitable waste was treated as legal waste.⁷⁴⁰ In another state it has been decided

⁷³⁶ See post, § 110.

⁷³⁷ See *Chalmers v. Smith*, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769; *Brooks v. Clifton*, 22 Ark. 54. See post, at notes 775-779.

⁷³⁸ *Murphy v. St. Louis Type Foundry*, 29 Mo. App. 541.

⁷³⁹ See *Woodfall, Landl. & Ten.* (16th Ed.) 647.

⁷⁴⁰ *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205. There a lease to one

"to hold, to use and control as he thinks proper, for his benefit during his natural life," was regarded as a lease "without impeachment of waste." In *Duncombe v. Felt*, 81 Mich. 332, 45 N. W. 1004, where a grantee in a conveyance leased to his grantors, the latter "to have as full and complete control of said premises as if such conveyance had not been made," the lease was re-

that the law of legal waste is not applicable to injuries by a tenant under a lease for ninety nine years, renewable forever, an ordinary form of lease in that state, since the tenant under such a lease has the absolute control of the property, but that equity will intervene to prevent such injuries or destruction as will affect the security for the rent.⁷⁴¹

(11) **Effect of express stipulations.** In a number of cases the courts have been called upon to construe clauses in the lease allowing the tenant to make alterations on the premises. A provision that the lessee shall have the right to make alterations, provided they do not injure the premises, has been construed as allowing the tenant to make alterations which would constitute technical waste, provided they cause no injury,⁷⁴² and the same construction was placed on a covenant by the lessee not to commit waste, coupled with a provision authorizing him to "repair, alter and improve the premises in such a manner as should be for his use and benefit."⁷⁴³ A license to the lessee to make improvements and additions was inferred from a covenant by him to repair "such improvements and additions as should be made by him," and consequently quite extensive changes were regarded as not constituting waste.⁷⁴⁴ A stipulation authorizing the lessee to make "alterations in the building now on said lands so as to adapt it to other business than that" for which it had previously been used, does not, it has been held, confer the right to tear down a building in order to erect another in its place.⁷⁴⁵ A clause in the instrument of lease allowing the use of a steam engine in a building has been held to authorize the tenant to make openings in the walls necessary for the introduction and removal of the engine.⁷⁴⁶

The statute of Marlbridge⁷⁴⁷ provided that "fermors" (lease-

garded as without impeachment of waste. Here, however, willful and unreasonable waste was prevented by injunction.

⁷⁴¹ Crowe v. Wilson, 65 Md. 479, 5 Atl. 427, 57 Am. Rep. 343.

⁷⁴² Agate v. Lowenbein, 57 N. Y. 604.

⁷⁴³ Hasty v. Wheeler, 12 Me. 434.

⁷⁴⁴ Doe d. Dalton v. Jones, 4 Barn. & Adol. 126.

⁷⁴⁵ Davenport v. Magoon, 13 Or. 3, 4 Pac. 299, 57 Am. Rep. 1.

⁷⁴⁶ Kelsey v. Durkee, 33 Barb. (N. Y.) 410.

⁷⁴⁷ 52 Hen. 3, c. 23, § 2 (A. D. 1267).

holders) should not do waste "without special license had by writing of covenant making mention that they may do it" and it is said by Coke⁷⁴⁸ that such special license "ought to be by deed, for all waste tends to the disinheritation of the lessor, and therefore no man can claim to be punishable of waste without deed," and it has been asserted in this country that an oral permission to commit particular acts of waste is invalid on the ground that this would involve a transfer of an interest in land without writing, in violation of the statute of frauds.⁷⁴⁹ In spite of these statements, however, it seems somewhat questionable whether, apart from a statute expressly so providing, an oral permission by the landlord to do acts which would otherwise constitute waste is insufficient to validate such acts, since such a permission does not involve any actual transfer of an interest in land. There is no requirement that a license to do a thing upon another's land shall be in writing, merely because the doing of such thing may affect parts of the land, though the fact that the license is oral may render it revocable, while if in writing it would be irrevocable.⁷⁵⁰ An oral license to cut trees, for instance,⁷⁵¹ or to take minerals from the land,⁷⁵² is ordinarily regarded as perfectly valid if acted on before revocation, and it is not perceived why a different rule should be applied as between landlord and tenant from that applied between strangers. In a few jurisdictions there are statutory provisions to the effect that a license to commit acts which would otherwise constitute waste shall be in writing.^{753, 754}

b. **Remedies for waste**—(1) **Action for damages.** At common law, it is said, an action could be brought on account of waste

⁷⁴⁸ 2 Co. Inst. 146.

⁷⁴⁹ *McGregor v. Brown*, 10 N. Y. (6 Seld.) 114, per Edwards, J. In the same case Denio, J., bases the decision upon the express provision of the statute. The view of Edwards, J., seems to be regarded with approval in *Moore v. Townshend*, 33 N. J. Law, 284, 306.

⁷⁵⁰ See *Tiffany*, Real Prop. § 304.

⁷⁵¹ *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *White v. King*, 87 Mich. 107, 49 N. W. 518; *Cool v. Peters Box & Lumber Co.*, 87 Ind.

531; *Giles v. Simonds*, 81 Mass. (15 Gray) 441, 77 Am. Dec. 373; *Bruley v. Garvin*, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839. See 18 Am. & Eng. Enc. Law (2d Ed.) 1131. ⁷⁵² See 1 *Barringer & Adams*, Mines & Mining, 67.

^{753, 754} See *Delaware Rev. Code* 1893, p. 665, § 1; *Kentucky St.* 1903, § 2328; *Missouri Rev. St.* 1899, § 4140; *New York Code Civ. Proc.* § 1651; *South Carolina Civ. Code*, § 2425; *Wisconsin Rev. St.* 1898, § 3171. The New York statute seems

against tenants in dower or by curtesy, and against guardian in chivalry, but not against lessees for life or years, this distinction being based on the ground that, while the interests of the former were created by act of the law, in the case of the latter the lessor could have provided in the lease against waste.⁷⁵⁵ Owning, however, to the frequent commission of waste by lessees, the Statute of Marlbridge⁷⁵⁶ was passed, by which it was provided that "fermors, during their terms, shall not make waste, sale, nor exile of houses, woods, and men, nor of anything belonging to the tenements that they have to ferm," and that, if they do so, they shall yield full damage.⁷⁵⁷ Subsequently, the Statute of Gloucester⁷⁵⁸ gave a writ of waste "against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower," and provided that the person guilty of waste should "lose the thing that he has wasted" and pay "thrice so much as the waste shall be taxed at."

A tenant at will was never regarded as within the scope of these statutes, and if such a tenant commits acts injurious to the inheritance, which, in the case of other tenants, would constitute waste, he is considered to have committed not waste but a trespass, which terminates the tenancy, and renders him liable to an action for damages as in the case of any wrongdoer.⁷⁵⁹ And the local

to be ignored in *Cohen v. Witteman*, 100 App. Div. 338, 91 N. Y. Supp. 493, where it is held that a landlord, having consented (orally, it appears) to the removal of shutters on the building, could not recover damages on account of such removal.

⁷⁵⁵ Co. Litt. 54 a; 2 Co. Inst. 299, 305; *Moore v. Townshend*, 33 N. J. Law, 284. This is, however, questioned, as regards tenants for life, in 2 Pollock & Maitland, Hist. Eng. Law, p. 9, and also in a learned article on "Liability for waste" by George W. Kirchwey, Esq., in 8 Columbia Law Rev. 425.

⁷⁵⁶ 52 Hen. 3, c. 23, § 2 (A. D. 1267).

⁷⁵⁷ "Fermors (firmarii) do com-

prehend all such as hold by lease for life or lives or for years, by deed or without deed." 2 Inst. 145. But see Mr. Kirchwey's remarks to the effect that the expression referred to tenants under a lease for years. 8 Columbia Law Rev., at p. 432.

⁷⁵⁸ 6 Edw. 1, c. 5 (A. D. 1278).

⁷⁵⁹ Litt. § 71; Co. Litt. 57 a; *Countess of Shrewsbury's Case*, 5 Coke, 13; *Chalmers v. Smith*, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769; *Phillips v. Covert*, 7 Johns. (N. Y.) 1; *Parrott v. Barney*, Deady, 405, Fed. Cas. No. 10,773 a; *Perry v. Carr*, 44 N. H. 118, 82 Am. Dec. 191. But see *Young v. Young*, 36 Me. 133.

The proper form of action against a tenant at will for waste caused by direct acts of commission is tres-

state statutes providing remedies for waste are likewise, by their language, usually limited to tenants for life and for years.⁷⁶⁰

The action of waste, as it existed at common law, and under these English statutes, was gradually superseded by an action on the case to recover damages for the waste,⁷⁶¹ and the old action of waste now no longer exists in England.⁷⁶² To what extent the Statutes of Malbridge and Gloucester are in force in this country is a matter of considerable uncertainty,⁷⁶³ but even where they are not in force, and though there is no local statute on the subject, an action of trespass on the case, or its equivalent code action, would seem to lie for the recovery of damages caused by acts of voluntary waste committed by a tenant for life or years.⁷⁶⁴ In a considerable number of the states there is an express statutory provision for the recovery of damages for waste committed by a tenant for life or years,⁷⁶⁵ and, in two or three states for

pass, and not trespass on the case. *Supervisors of Harrison County, Salop v. Crompton*, Cro. Eliz. 777; 89 Miss. 448, 42 So. 290. That they *Goodright v. Vivian*, 8 East, 190; are in force in part or in whole, see *Perry v. Carr*, 44 N. H. 118, 82 Am. Dozier v. Gregory, 46 N. C. (1 Jones Dec. 191; *Chalmers v. Smith*, 152 Law) 100; *Sackett v. Sackett*, 25 Mass. 561, 26 N. E. 95, 11 L. R. A. Mass. (8 Pick.) 309. See, also, 769. In *Files v. Magoon*, 41 Me. 104, Alexander's British Statutes in trespass on the case against tenant for will was sustained. The court in force in Maryland, pp. 46, 83. ⁷⁶⁴ See 4 Kent, Comm. 81; *Rand-states* that there are numerous all v. Cleaveland, 6 Conn. 328; *Dozier v. Gregory*, 46 N. C. (1 Jones Law) 100; *Yocum v. Zahner*, 162 Pa. 468, 29 Atl. 778; *Thackeray v. Eldigan*, 21 R. I. 481, 44 Atl. 689; *Moss Point Lumber Co. v. Board of Harrison County Supervisors*, 89 Miss. 448, 42 So. 290, 873.

⁷⁶⁰ See post, note 765.

⁷⁶¹ See 2 Wms. Saund. 252, note (7) to *Greene v. Cole*.

⁷⁶² See 3 & 4 Wm. 4, c. 27, § 36 (A. D. 1833).

⁷⁶³ To the effect that these statutes are not in force, see *Moore v. Ellsworth*, 3 Conn. 483; *Smith v. Follansbee*, 13 Me. 273; *Parker v. Chambliss*, 12 Ga. 235; *Woodward v. Gates*, 38 Ga. 205, 95 Am. Dec. 385; *Moss Point Lumber Co. v. Board of*

⁷⁶⁵ *California* Code Civ. Proc. § 732; *Connecticut* Gen. St. 1902, § 1100; *Delaware* Rev. Code 1893, p. 666, § 9; *Idaho* Code Civ. Proc. 1901, § 3374; *Iowa* Code 1897, § 4303; *Kentucky* St. 1903, § 2328; *Maine* Rev. St. 1903, c. 97, § 1; *Massachusetts* Rev. Laws 1902, c. 185, § 1; *Michigan* Comp. Laws 1897, § 11116; *Minnesota* Rev. Laws 1905, § 4447; *Montana* Rev. Codes 1907, § 6866; *Nebraska* Ann. St. 1907, § 1645; *Nevada*

waste committed by any tenant of land.⁷⁶⁶ Presumably a periodic tenant would be regarded as within the equity of a statute in terms applying to a tenant for years.

The right to recover damages for waste is not affected by the fact that the lease contains an express covenant not to commit waste, or to yield up the premises in good condition at the end of the term. The landlord has the option of suing on the covenant, or of bringing an action on the case, or other action, directly for the waste.⁷⁶⁷

A decision has been made to the effect that there is no right of action for waste if the tenant has the option under the lease to purchase the premises, but that the right accrues, and limitations begin to run, only when the option expires.⁷⁶⁸ The reason given for this conclusion is that the tenant could at any time extinguish the right of action by exercising his option. It has, however, elsewhere been decided that it is no defense to an action on the case for waste that the tenant, after the commission of waste, purchased the reversion,⁷⁶⁹ or that the landlord purchased the leasehold interest.⁷⁷⁰ And even if an actual purchase of

Comp. Laws 1900, § 3347; *New York* Va. 95; *Parrott v. Barney*, 2 Abb. Code Civ. Proc., § 1651; *North Da-* 197, Fed. Cas. No. 10,773.

kota Rev. Codes 1905, § 7539; Bell. ⁷⁶⁸ *Powell v. Dayton, S. & G. R. Co.*, & C. Codes *Oregon*, § 347; *Rhode* 16 Or. 33, 16 Pac. 863, 8 Am. St. Rep. *Island* Gen. Laws 1896, c. 268, § 1; 251.

South Dakota Code Civ. Proc. 1903, ⁷⁶⁹ *Dickinson v. City of Baltimore*, § 693; *Utah* Comp. Laws 1907, § 48 Md. 583.

3507; Ball. Ann. Codes & St. 1897, ⁷⁷⁰ *Dupree v. Dupree*, 49 N. C. (4 *Washington*, § 5655; *Wisconsin* St. Jones Law) 387, 69 Am. Dec. 757.

1898, § 3171. But see *Pynchon v. Stearns*, 52 ⁷⁶⁶ *Virginia* Code 1904, § 2775; Mass. (11 Metc.) 304, 45 Am. Dec. *West Virginia* Code 1906, § 3389. 207, where the fact that the re- In Pennsylvania the statute (Pepper maindorman took a lease from the & Lewis' Dig., Waste, § 28) gives a right of action in favor of the land- regarded as a defense to an action lord when premises are let for years by the remainderman for waste com- or at will. mitted before the lease. This, how-

⁷⁶⁷ *Kinlyside v. Thornton*, 2 Wm. ever, was an action of waste and not Bl. 1111; *City of London v. Hedger*, of trespass on the case, and the 18 Ves. Jr. 355; *Marker v. Kenrick*, dictum of Lord Coke that the rever- 13 C. B. 188; *Moore v. Townshend*, sion must continue in the same state 33 N. J. Law, 284; *Moses v. Old* may have been regarded as appli- *Dominion Iron & Nail Works Co.*, 75 cable. See post at note 801.

the reversion by the tenant would constitute a defense, it is difficult to see why the fact that the tenant has an option to purchase should have this effect.

It is said by Coke that "if the lessee doth waste, and after surrendereth to the lessor his estate, and the lessor accept thereof, the lessor shall not have an action of waste,"⁷⁷¹ and the old authorities are generally to this effect, unless perhaps when the right of action for waste previously committed is expressly reserved by the lessor upon accepting the surrender.⁷⁷² There is an American case to the contrary, however.⁷⁷³

That after the commission of waste by the tenant the landlord permitted him to retain possession and accepted rent for the full term does not, it has been decided, necessarily involve a waiver of the landlord's right to recover damages for breach of the implied contract to use the premises in a tenant-like manner, it being said that the question of waiver *vel non* in such case is a question for the jury.⁷⁷⁴

There are numerous *dicta* to the effect that there is an implied contract by the tenant not to commit waste, the effect of which would be that the landlord could, at his option, sue in contract for breach thereof, or in tort directly for the waste. Thus it is stated in a standard English treatise that "in the absence of express covenant there is implied in law, for the convenience of remedy, a contract or obligation on the part of the lessee, to use the demised premises in a tenant-like manner, relatively to the nature of the premises; which is nothing more in substance than the obligation concerning waste arising from the mere relation of landlord and tenant."⁷⁷⁵ That such a contract is to be implied is also asserted by other textbook writers.⁷⁷⁶ There

⁷⁷¹ Co. Litt. 285 a.

⁷⁷² The authorities are collected in Vin. Abr., Waste (Ga.) p. 501.

⁷⁷³ Marshall v. Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679.

⁷⁷⁴ Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769.

⁷⁷⁵ Leake, Uses & Profits of Land, p. 25, citing Powley v. Walker, 5 Term R. 373; Dietrichsen v. Giubilei, 14 Mees. & W. 845, which cases,

however, merely involved the sufficiency of allegations as to a promise by the lessee to use the premises in a tenant-like manner or in a certain way, and the promise, so far as appears, may have been express in each case.

⁷⁷⁶ In Woodfall, Landl. & Ten. (16th Ed.) p. 186, it is said that "In the absence of any express covenant on the subject, a covenant or promise is implied on the part of

are occasional English cases which tend to support this view,^{777,778} but there is apparently no positive decision in that country supporting a recovery as for breach of a contract against a tenant committing waste. In this country, also, the existence of such an implied contract has been asserted.⁷⁷⁹ In view of the num-

the lessee that he will use the buildings in a tenantable and proper manner;" citing *Horsefall v. Mather*, Holt, N. P. 7; *Leach v. Thomas*, 7 Car. & P. 327; *Harnett v. Maitland*, 16 Mees. & W. 257; *Yellowly v. Gower*, 11 Exch. 294. Of these cases the first two, which were actions of assumpsit on account of the commission of waste, may, perhaps, be regarded as implying that such an action would lie in case of waste, they denying recovery on other grounds without any comment on the form of the action; but the two latter cases cited in no way support the statement. That there is such a contract is also stated in 1 Addison, Contracts (10th Ed.) 639. In Pollock, Torts (6th Ed.) 340, it is said that "as between landlord and tenant, the real matter in dispute, in a case of alleged waste, is commonly the extent of the tenant's obligation, under his express or implied covenants, to keep the property demised in safe condition or repair. Yet the wrong of waste is none the less committed (and under the old procedure was no less remediable by the appropriate action on the case) because it is also a breach of the tenant's contract;" citing 2 Wms. Saund. 646.

^{777, 778} In *Holford v. Dunnett*, 7 Mees. & W. 348, the judges clearly assume that such a contract may be implied, and the same may perhaps be said of *Horsefall v. Mather*, Holt, N. P. 7; *Leach v. Thomas*, 7 Car. & P. 327. In *Whitham v. Kershaw*, 16 Q.

B. Div. 613, Lord Esher, M. R. said that "there is an implied covenant on the part of the tenant not to commit waste," and apparently regarded the action as on such covenant, while the other judges ignore any such covenant. In *Westropp v. Elligott*, 9 App. Cas. 815, 823, there is a similar dictum by Lord Blackburn, that there is an implied covenant not to commit waste. At the present day, under the English judiciary acts, the question whether the action is on such an implied contract, or for a tort, is immaterial, and there is, in fact, no way of determining whether it is the one or the other. See Pollock, Torts (6th Ed.) 340.

⁷⁷⁹ In *United States v. Bostwick*, 94 U. S. 53, 24 Law. Ed. 65, it is said, per Waite, C. J., speaking for the court, "In every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it, or, as it is stated by Mr. Comyn, 'to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the willful or negligent conduct of the lessee' (citing Comyn, Landl. & Ten. 188). This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the

ber of statements thus made by authorities of the highest respectability, it is hardly probable that any court would refuse to support an action on such an implied contract against waste, but since the right to bring an action in tort for waste is well established, it would seem the part of safety to choose the latter remedy.

(2) **Injunction against waste.** A court of equity may interpose by injunction to prevent the commission of waste.⁷⁸⁰ Occasionally the grant of an injunction against waste upon application therefor seems to have been regarded as a matter of course,⁷⁸¹ while in other cases it has been refused on the ground

parties which the contract creates (citing *Holford v. Dunnett*, 7 Mees. & W. 352, *supra*). It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible" (citing *Horsefall v. Mather*, Holt, N. P. 9; *Brown v. Crump*, 1 Marsh, C. P. 569). This language is, in part, quoted by other courts. See *Warder v. Henry*, 117 Mo. 530, 545, 23 S. W. 776; *Powell v. Dayton, S. & G. R. R. Co.*, 16 Or. 33, 16 Pac. 863, 8 Am. St. Rep. 251. Presumably by "implied obligation," as the expression is here used, is meant implied contract, since otherwise the word "implied" would be meaningless.

In *Earle v. Arbogast*, 180 Pa. 409, 36 Atl. 923, it is said that "generally, in the absence of express covenant on the subject, the law implies a covenant on the part of the lessee so to treat the demised premises that they may revert to the lessor unimpaired except by usual wear and tear, and uninjured by any willful or negligent act of the lessee." And in *Chalmers v. Smith*, 152 Mass. 561, 26 N. E. 95, 11 L. R.

A. 769, it is clearly asserted that there may be a recovery for waste in an action of contract.

⁷⁸⁰ *O'Brien v. O'Brien*, 1 Amb. 107; *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; *Fortescue v. Fowler*, 55 N. J. Eq. 741, 38 Atl. 445; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Dickinson v. Jones*, 36 Ga. 97; *Robertson v. Meadors*, 73 Ind. 43; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *Parker v. Raymond*, 14 Mo. 535; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Davenport v. Magoon*, 13 Or. 3, 4 Pac. 299, 57 Am. Rep. 1.

In Pennsylvania and Rhode Island and the common-law writ of *estrepement* to prevent waste (see 3 Blackst. Comm. 225) is still in vogue, it seems.

⁷⁸¹ *People v. Alberty*, 11 Wend. (N. Y.) 160; *Markham v. Howell*, 33 Ga. 508; *Smith v. City of Rome*, 19 Ga. 89, 63 Am. Dec. 298. These were not, however, cases of waste as between landlord and tenant, but of "waste," so called, by a stranger.

that the injury was not irreparable,⁷⁸² or that there was an adequate remedy at law.⁷⁸³

Injunction has been granted to restrain the ploughing up of meadow land,⁷⁸⁴ the sowing of a pernicious crop,⁷⁸⁵ and the destruction of timber⁷⁸⁶ and fruit trees.⁷⁸⁷ The removal of a building,⁷⁸⁸ and the alteration or removal of parts thereof,⁷⁸⁹ has also been so restrained. An injunction to prevent the removal of timber already cut has been refused, the parties being relegated to their legal rights after the waste has been actually committed by the cutting of the timber.⁷⁹⁰

An injunction will not ordinarily be granted unless the applicant therefor shows that the tenant in possession has attempted to commit waste, or has taken active measures looking towards its commission, or has at least threatened to commit it.⁷⁹¹ And the courts have generally refused to grant an injunction as against "meliorating" or trivial waste.⁷⁹²

In cases in which an injunction is granted, an accounting by

⁷⁸² *Thompson v. Williams*, 54 N. Jungerman v. Bovee, 19 Cal. 354; C. (1 Jones Eq.) 176; *Atkins v. Chil-* *Davenport v. Magoon*, 13 Or. 3, 4 son, 48 Mass. (7 Metc.) 398, 41 Am. Pac. 299, 57 Am. Rep. 1.

Dec. 448; Chamberlain v. Child's ⁷⁸⁹ *Baughner v. Crane*, 27 Md. 36, 92 Unique Dairy Co., 54 Misc. 56, 105 Am. Dec. 618; *Douglass v. Wiggins*, N. Y. Supp. 370. But that irreparable injury need not be shown, 1 Johns, Ch. (N. Y.) 435; *Fox v. Lynch*, 71 N. J. Eq. 537, 64 Atl. 439; see *George's Creek Coal Co. v. Det-* *Poertner v. Russell*, 33 Wis. 193; *mold*, 1 Md. Ch. 371; *Thruston v. Brock v. Dole*, 66 Wis. 142, 28 N. Minke, 32 Md. 487. *W. 334; Denechaud v. Trisconi*, 26

⁷⁸³ *Cutting v. Carter*, 4 Hen. & M. La. Ann. 402.

(Va.) 424; *Atkins v. Chilson*, 48 ⁷⁹⁰ *Watson v. Hunter*, 5 Johns. Mass. (7 Metc.) 398, 41 Am. Dec. Ch. (N. Y.) 169.

448; *Brown v. Niles*, 165 Mass. 276, ⁷⁹¹ *Bewes, Waste*, 340; *Jackson v. Cator*, 5 Ves. Jr. 688; *Hext v. Gill*, 43 N. E. 90. 7 Ch. App. 699; *St. Clair v. Sedwick*,

⁷⁸⁴ *Chapel v. Hull*, 60 Mich. 167, 39 Neb. 562, 58 N. W. 185; *Crockett v. Drury v. Molins*, 6 v. *Crockett*, 2 Ohio St. 180.

⁷⁸⁵ *Pratt v. Brett*, 2 Madd. 62.

⁷⁸⁶ *Kidd v. Dennison*, 6 Barb. (N. ⁷⁹² *Doherty v. Allman*, 3 App. Cas. Y.) 9; *Herring v. Dean of St. Paul's*, 709; *Grand Canal Co. v. McNamee*, 2 Wills. Ch. 1; *Jones v. Gammon*, 123 29 L. R. Ir. 131; *Meux v. Cobley* [1892] 2 Ch. 253; *Brown v. Niles*, Ga. 47, 50 S. E. 982. 165 Mass. 276, 43 N. E. 90; *Butts v.*

⁷⁸⁷ *Silva v. Garcia*, 65 Cal. 591, 4 *Fox*, 107 Mo. App. 310, 81 S. W. 493. And see *Hubble v. Cole*, 85 Va. 87, 7 Pac. 628. S. E. 242.

⁷⁸⁸ *Smyth v. Carter*, 18 Beav. 78;

the tenant as to the proceeds of waste already committed may be ordered, to prevent multiplicity of suits.⁷⁹³ Ordinarily, if there is no right to an injunction, owing to the fact that the tenant committing waste has transferred his interest, or for other reason, no accounting will be allowed, and the reversioner must seek redress at law.⁷⁹⁴ But an accounting has been ordered, apart from any injunction, as incident to a discovery,⁷⁹⁵ in the case of waste by a deceased person, the proceeds of which have gone to swell the assets of his estate,⁷⁹⁶ and presumably it would be allowed in the case of equitable waste.⁷⁹⁷

There may be a mandatory injunction to compel the person committing waste to restore the things wasted, when such restoration is possible.⁷⁹⁸

(3) **Persons entitled to sue.** The action of waste, as established under the old English statutes, could be brought only by him who had the reversion or remainder in fee or in tail immediately following upon the interest of him who committed the waste, with no estate of freehold intervening.⁷⁹⁹ Nor could any

⁷⁹³ *Jesus College v. Bloom*, 3 Atk. 262; *Winship v. Pitts*, 3 Paige (N. Y.) 259; *Fleming v. Collins*, 2 Del. Ch. 230; *Ackerman v. Hartley*, 8 N. J. Eq. (4 Halst.) 476; *Armstrong v. Wilson*, 60 Ill. 226; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368.

⁷⁹⁴ *Jesus College v. Bloom*, 3 Atk. 263; *Smith v. Cooke*, 3 Atk. 378; *Gent v. Harrison*, Johns. 517; *Parrott v. Palmer*, 3 Mylne & K. 632; *Crockett v. Crockett*, 2 Ohio St. 180; *Winship v. Pitts*, 3 Paige (N. Y.) 259.

⁷⁹⁵ *Whitfield v. Bewit*, 2 P. Wms. 240.

⁷⁹⁶ *Blake v. Peters*, 1 De Gex, J. & S. 345; *Morris v. Morris*, 3 De Gex & J. 323; *Lansdowne v. Lansdowne*, 1 Madd. 116.

⁷⁹⁷ See *Lansdown v. Lansdown*, 1 Madd. 116.

⁷⁹⁸ *Vane v. Barnard*, 2 Vern. 738;

Rolt v. Somerville, 2 Eq. Cas. Abr. 759; *Klie v. Van Broock*, 56 N. J. Eq. 18, 37 Atl. 469. In *Engle v. Thorn*, 10 N. Y. Super. Ct. (3 Duer) 15, it is decided that the court will not take jurisdiction of a proceeding to compel the tenant to restore the premises to their original condition, when it is not alleged that the alterations made by the tenant injured the property, and such restoration would be no benefit to the landlord and would be a burden on the tenant.

⁷⁹⁹ Co. Litt. 53 a. See note (7) to *Greene v. Cole*, 2 Wms. Saund. 252a, where it is said: "And therefore if a lease be made to A. for life or years, remainder to B. for life, and A. commit waste, the action cannot be brought by him in the remainder or reversion in fee or in tail, so long as the estate of B. continues (citing Co. Litt. 54 b; *Udal v. Udal*, Alevn, 81, 2 Rolle, Abr. 829; *Bray v. Tracy*, Cro. Jac. 688); but if B.

person maintain this action, unless he had an estate of inheritance at the time when the waste was committed, and therefore it did not lie by an heir for waste done in the time of his ancestor, nor by the grantee of a reversion for waste committed before the grant to him.⁸⁰⁰

It is said by Lord Coke⁸⁰¹ that "after waste done there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for if after the waste he granteth it over, though he taketh back the whole estate again, yet is the waste punishable." This doctrine seems, however, not to be referred to by later writers, and it has been held that, whatever may be the meaning of the statement, it does not prevent the reversioner, who transfers his reversion after the commission of waste by the tenant, from thereafter suing therefor.⁸⁰²

An action on the case for waste, as distinguished from an action of waste, may be brought by one having a reversion for life or for years as well as by one having a fee.⁸⁰³ And there is at least one decision to the effect that it will lie in favor of the reversioner in spite of an intervening estate of freehold.⁸⁰⁴ Moreover, the right of the reversioner to bring the action is not affected, it has been decided, by the fact that after the doing of the waste the reversion underwent a change, or that it ceased to exist as such owing to the acquisition of the leasehold by the landlord or of the reversion by the tenant.⁸⁰⁵

should afterwards die or surrender his estate, the reversioner or remainderman may bring an action for the waste so done by him, for by the death or surrender the impediment is removed (citing *Paget's Case*, 5 Coke, 76 b; *Bray v. Tracy*, W. Jones, 51). So if a lease for life be made, remainder for years, the reversioner or remainderman may bring the action, notwithstanding the mesne remainder (citing *Co. Litt.* 54 a; 2 *Co. Inst.* 301)." *v. Smith*, 1 Q. B. 345; *Crawford v. Bugg*, 12 Ont. 8.

⁸⁰¹ *Co. Litt.* 53 b.

⁸⁰² *Robinson v. Wheeler*, 25 N. Y. 252. But see the dissenting opinion in this case, and *Pyncheon v. Stearns*, 52 Mass. (11 Metc.) 304, 45 Am. Dec. 207, ante, note 770.

⁸⁰³ Note (7) to *Greene v. Cole*, 2 Wms. Saund. 252 b; *Dozier v. Gregory*, 46 N. C. (1 Jones Law) 100.

⁸⁰⁴ *Short v. Piper*, 4 Har. (Del.) 181.

⁸⁰⁵ *Greene v. Cole*, 2 Wms. Saund., note, at p. 252 a; 2 *Co. Inst.* 305; *48 Md.* 583, 30 Am. Rep. 492; *Dupree Comyn, Landl. & Ten.* 489; *Bacon v. Dupree*, 49 N. C. (4 Jones Law)

There are, in a number of states, statutory provisions expressly giving a right of action to persons other than those above named. Thus it is sometimes provided that an heir may bring an action for waste done in the time of his ancestor as well as for that done in his own time.⁸⁰⁶ In some states a right of action is given in terms to one having a reversion for life or years only,⁸⁰⁷ while, not infrequently, it is declared that the presence of an intervening estate shall not affect the right to sue.⁸⁰⁸ A number of statutes give a right of action to the person "injured"⁸⁰⁹ or to the person "aggrieved."⁸¹⁰

To sustain an application for an injunction to prevent waste it is not necessary that the applicant be the immediate reversioner, but any person substantially interested in the reversion may make the application, though his interest is less than a fee, and though there is an estate intervening between his estate or interest and that of the tenant against whom the injunction is sought.⁸¹¹ Accordingly a reversioner may obtain

387, 69 Am. Dec. 757. Compare *Bacon v. Smith*, 1 Q. B. 345.

⁸⁰⁶ *Delaware* Rev. Code 1893, p. 665, § 5; *Kentucky* St. 1903, § 2334; *Maine* Rev. St. 1903, c. 97, § 1; *Michigan* Comp. Laws 1897, § 11119; *Missouri* Rev. St. 1899, § 4142; 3 *New Jersey* Gen. St. p. 3749, § 6; *New York* Code Civ. Proc. § 1652; *North Carolina* Revisal 1905, § 857; *Wisconsin* St. 1898, c. 3174.

⁸⁰⁷ *Kentucky* St. 1903, § 2329; *Maine* Rev. St. 1903, c. 97, § 3; *Massachusetts* Rev. Laws 1902, c. 185, § 2; *Michigan* Comp. Laws 1897, § 11121; *Missouri* Rev. St. 1899, § 4141; *Rhode Island* Gen. Laws 1896, c. 268, § 1 (semble); *Wisconsin* St. 1898, § 3175.

⁸⁰⁸ *California* Civ. Code, § 826; *Idaho* Civ. Code, § 2383; *Burns' Ann. St. Indiana* 1901, § 288; *Iowa* Code 1897, § 4303; *Kansas* Gen. St. 1905, § 4073; *Maine* Rev. St. 1903, c. 97, § 3; *Massachusetts* Rev. Laws 1902, c. 185, § 2; *Michigan* Comp.

Laws 1897, § 11120; *Missouri* Rev. St. 1899, § 4141; *North Dakota* Rev. Codes 1905, § 4807; *South Dakota* Civ. Code 1903, § 287; *Wisconsin* St. 1898, § 3175.

⁸⁰⁹ *Minnesota* Rev. Laws 1905, § 4447; *Nevada* Comp. Laws 1900, § 3347; *Bell. & C. St. Oregon*, § 347; *Virginia* Code 1904, § 2775; *Ball. Ann. Codes & St. 1897, Washington*, § 5655; *West Virginia* Code 1906, § 3389.

⁸¹⁰ *California* Code Civ. Proc. § 732; *Montana* Rev. Codes 1907, § 6866; *North Dakota* Rev. Codes 1905, § 7539; *South Dakota* Code Civ. Proc. 1903, § 693; *Utah* Comp. Laws 1907, § 3507.

⁸¹¹ *Perrot v. Perrot*, 3 Atk. 94; *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410; *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707; *Brashear v. Macey*, 26 Ky. (3 J. J. Marsh.) 93; *Cannon v. Barry*, 59 Miss. 289; *Dennett v. Dennett*, 43 N. H. 499; *Mayo v. Feaster*, 2 McCord Eq. (S. C.) 137.

an injunction against his tenant's lessee, a subtenant.⁸¹² Such a proceeding may, it has been held, be instituted by an administrator having power to take possession of real estate, make leases, and collect rents.⁸¹³

At common law a right of action for waste would not survive to the executor or administrator of the person injured,⁸¹⁴ and whether it does survive in any particular state must depend upon the question whether that state has a local statute providing for the survivorship of a right of action for injuries to land.⁸¹⁵ For waste done after the death of the reversioner, the heir or devisee is obviously entitled to sue.⁸¹⁶

(4) **Persons liable.** An action does not lie, at common law, against the personal representative of the person who committed waste, since it is a tort which dies with the person.⁸¹⁷ But the person injured by the waste has a right to follow into the hands of the executor the proceeds of such waste,⁸¹⁸ and occasionally the statute gives a right of action against the personal representative of the wrongdoer.⁸¹⁹

(5) **Time of suit.** An action for damages on account of waste, and *a fortiori* an application for an injunction against waste, may be brought immediately on the commission of the waste, and the landlord need not wait till the end of the term, to see whether the tenant will restore the premises to their original condition.⁸²⁰

⁸¹² *Farrant v. Lovel*, 3 Atk. 723.

1605; 2 Co. Inst. 302; *Hamblay v.*

⁸¹³ *Halstead v. Coen*, 31 Ind. App. 302, 67 N. E. 957.

Trott, Comp. 376.

⁸¹⁴ 1 Williams, Executors (9th Ed.) 700 note (i).

⁸¹⁸ Williams, Executors, 1606; *Winchester v. Knight*, 1 P. Wms. 406; *Phillips v. Homfray*, 24 Ch. Div. 439, 455.

⁸¹⁵ See, as to state statutes providing for the survival of actions, 1 Woerner, Administration (2d Ed.) c. 31. Occasionally the statute expressly provides that a right of action for waste shall survive. See *Nevada Comp. Laws* 1900, § 2953; *Rhode Island Gen. Laws* 1896, c. 233; *West Virginia Code* 1906, § 3274.

⁸¹⁹ *Delaware Rev. Code* 1893, p. 665, § 5; *Kentucky St.* 1903, § 2355; *Massachusetts Rev. Laws* 1902, c. 185, § 3; *Missouri Rev. St.* 1899, § 4148; *Nevada Comp. Laws* 1900, § 2953; *Rhode Island Gen. Laws* 1896, c. 233, § 7; *West Virginia Code* 1906, § 3274.

⁸¹⁶ Bro. Abr., Waste, pl. 76; *Howard v. Patrick*, 38 Mich. 795.

⁸²⁰ *Provost & Scholars of Queen's College v. Hallett*, 14 East, 489; *Agate v. Lowenbein*, 57 N. Y. 604;

⁸¹⁷ Williams, Executors (9th Ed.)

(6) **Measure of damages.** The measure of damages for waste has been stated to be the amount which would be required to restore the premises to the condition in which they would have been had no waste been committed.⁸²¹ But in England it has been decided that the proper measure of damages is the diminution in the value of the reversion caused by the waste, which may or may not be as great as the cost of restoring the premises to their former condition,⁸²² and there is at least one decision to that effect in this country.⁸²³

The statute of Gloucester⁸²⁴ provided that the person guilty of waste should pay "thrice so much as the waste shall be taxed at." Similarly, in a number of states, the statute provides that the person committing waste shall be liable in treble damages,⁸²⁵ while in some the statute provides that he "may" be made

Klie v. Van Broock, 56 N. J. Eq. 18, 37 Atl. 469; *Moses v. Old Dominion Iron & Nail Works Co.*, 75 Va. 95.

But in *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191, 100 Am. Dec. 469, where a lessee, under a lease having thirteen years to run, diverted a watercourse away from the leased premises to other land belonging to him, and made large expenditures for improvements; which were dependent for their utility upon such diverted stream, it was held that the reversioner had no present right to object, since such diversion did not injure the reversion, and consequently he was not by his silence precluded from insisting on the restoration of the stream upon the expiration of the lease.

In *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228, it was held that, in view of a provision that at the end of the term the land should be delivered up in as good

condition as when received, a provision prohibiting the removal of dirt from the land was not to be regarded as giving a right of action for such removal until the end of the term, and then only if the dirt was not replaced.

⁸²¹ *Moses v. Old Dominion Iron & Nail Works Co.*, 75 Va. 95; *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812.

⁸²² *Whitham v. Kershaw*, 16 Q. B. Div. 613. See *Harder v. Harder*, 26 Barb. (N. Y.) 409.

⁸²³ *Fagan v. Whitcomb* (Tex. App.) 14 S. W. 1018.

⁸²⁴ 6 Edw. 1, c. 5 (A. D. 1278).

⁸²⁵ *Kentucky* St. 1903, §§ 2328, 2334; *Maine* Rev. St. 1903, c. 97, § 1; *Nebraska* Ann. St. 1907, § 1645; 3 *New Jersey* Gen. St. p. 3749, § 3; *New York* Code Civ. Proc. § 1655; *Bell & C. St. Oregon* § 347; *Virginia* Code 1904, § 2778 (if waste wanton).

liable in such damages.⁸²⁶ Occasionally there is a provision for a judgment for double damages.⁸²⁷

(7) **Forfeiture.** The statute of Gloucester provided that the tenant should lose the thing that he has wasted,⁸²⁸ and there are in several of the states statutory provisions for the forfeiture of his estate by a tenant committing waste,⁸²⁹ in some cases only when the waste was done maliciously or when it equals in amount the value of the residue of the tenant's estate.⁸³⁰ Such provisions for forfeiture are obviously of less importance as regards waste by a tenant for years, who ordinarily in this country pays a rent equal to the rental value of the property, than in the case of one holding for life under a devise or settlement. The courts are usually, it seems, indisposed to enforce a forfeiture for this, as for any other cause.⁸³¹

In one state a statutory provision that, where a thing is let for a particular purpose, if the hirer uses it for any other pur-

⁸²⁶ *California* Code Civ. Proc. § 732; *Idaho* Code Civ. Proc. 1901, § 3374; *Minnesota* Rev. Laws 1905, § 4447; *Montana* Rev. Codes 1907, § 6866; *Nevada* Comp. Laws 1900, § 3347; *North Carolina* Revision 1905, § 7539; *North Dakota* Rev. Codes 1905, § 753; *South Dakota* Code Civ. Proc. § 693; *Utah* Comp. Laws 1907, § 3507.

That, in such a statute, "may" is not equivalent to "must," and that the award of treble damages is within the discretion of the court, and should ordinarily be confined to cases of willful or malicious waste, see *Isom v. Rex Crude Oil Co.*, 140 Cal. 678, 74 Pac. 294; *Isom v. Book*, 142 Cal. 666, 76 Pac. 506.

⁸²⁷ *Delaware* Rev. Code 1893, p. 666, § 9; *Michigan* Comp. Laws 1897, § 11121; *Rhode Island* Gen. Laws 1896, c. 268, § 1; *Wisconsin* St. 1898, § 3176.

⁸²⁸ That the forfeiture extended only to so much of the premises as

was wasted, see Co. Litt. 54 a; *Jackson v. Tibbitts*, 3 Wend. (N. Y.) 341.

⁸²⁹ *Delaware* Rev. Code 1893, p. 666, § 9; 3 *New Jersey* Gen. St., p. 3749, § 3; *Kentucky* St. 1903, § 2328; *Maine* Rev. St. 1903, c. 97, § 1; *Nebraska* Ann. St. 1903, § 1646 (if injury more than two thirds of value of tenant's estate); *North Carolina* Revision 1905, § 853; *Rhode Island* Gen. Laws 1896, c. 268, § 1; *South Carolina* Civ. Code, § 2425.

⁸³⁰ *Burns' Ann. St. 1901, Indiana*, § 287; *Iowa* Code 1897, § 4303 (damage more than two thirds value of the defendant's estate); *Nebraska* Ann. St. 1903, § 1646 (ditto); *New York* Code Civ. Proc., § 1655; *Bell & C. Codes Oregon*, § 347; *Minnesota* Rev. Laws 1905, § 4447; *New York* Code Civ. Proc. § 1655; *South Dakota* Code Civ. Proc. § 693; *Ball Ann. Codes 1897 Washington*, § 5655.

⁸³¹ See *Thacher v. Phinney*, 89 Mass. (7 Allen) 146; *Jackson v. Andrew*, 18 Johns. (N. Y.) 434; *Williard v. Williard*, 56 Pa. 119.

pose, the latter may treat the contract as rescinded, has been regarded as applicable when a lease was made for tenement purposes, and the lessee opened oil wells on the land.⁸³²

c. **Right to the proceeds of waste.** Things wrongfully severed by the tenant in the course of commission of waste by him still belong to the landlord,⁸³³ and he may presumably bring replevin for their recovery,⁸³⁴ or he may sue the tenant in trover for their value⁸³⁵ or, in case the tenant subsequently removes them, he may recover in trespass.⁸³⁶

A tenant is entitled to the proceeds of such wood as may be rightfully severed by him, whether he makes the severance,⁸³⁷ or it is the result of a wind storm or other action of the elements,⁸³⁸ and the same principle applies to the proceeds of other acts which do not involve waste.⁸³⁹ So, in the case of a tenancy without impeachment of waste, the proceeds of trees or minerals severed from the land, either by the elements or by a stranger, belong to the tenant, as if they were severed by him.⁸⁴⁰

⁸³² *Isom v. Rex Crude Oil Co.*, 147 Cal. 659, 82 Pac. 317.

⁸³³ *Bewes, Waste*, 193; *Bowles' Case*, 11 Coke, 79; *Herlakenden's Case*, 4 Coke, 62 a; *Bewick v. Whitfield*, 3 P. Wms. 267; *Bulkey v. Dolbeare*, 7 Conn. 232; *Richardson v. York*, 14 Me. 216; *White v. Cutler*, 34 Mass. (17 Pick.) 248, 28 Am. Dec. 296; *Johnson v. Johnson*, 18 N. H. 594; *Lane v. Thompson*, 43 N. H. 320; *Shult v. Barker*, 12 Serg. & R. (Pa.) 272; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

If the tenant wrongfully cuts timber, a purchaser of the timber under a lien for sawing acquires no title. *Hill v. Burgess*, 37 S. C. 604, 15 S. E. 963.

⁸³⁴ *Warren County Sup'rs v. Gans*, 80 Miss. 76, 31 So. 539. And see *McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320, and cases cited 13 Am. & Eng. Enc. Law (2d Ed.) 680, note 4.

⁸³⁵ *Vin. Abr., Trees (A) pl. 7; Farrant v. Thompson*, 5 Barn. & Ald.

826; *Udal v. Udal*, Aleyn, 81; *Brooks v. Rogers*, 101 Ala. 111, 13 So. 386; *Warren County Sup'rs v. Gans*, 80 Miss. 76, 31 So. 539; *Schermerhorn v. Buell*, 4 Denio (N. Y.) 422.

⁸³⁶ *Vin. Abr., Tress (A) pl. 7; Udal v. Udal*, Aleyn, 81; *Schermerhorn v. Buell*, 4 Denio (N. Y.) 422.

⁸³⁷ *Clement v. Wheeler*, 25 N. H. 361; *Keeler v. Eastman*, 11 Vt. 293; *Proffitt v. Henderson*, 29 Mo. 325; *Crockett v. Crockett*, 2 Ohio St. 180.

⁸³⁸ *Bateman v. Hotchkin*, 31 Beav. 486; *Herlakenden's Case*, 4 Coke 63 a; *Bowles' Case*, 11 Coke, 79 b.

⁸³⁹ *Lewis v. Godson*, 15 Ont. 252.

But a clause in the lease authorizing the tenant to make alterations in a building does not entitle him to the articles severed in making the alterations. *Agate v. Lowenbein*, 57 N. Y. 604.

⁸⁴⁰ *Bowles' Case*, 11 Coke, 79 b; *Bewes, Waste*, 151; *Anonymous. Mos. 237; In re Barrington*, 33 Ch. Div. 523.

§ 110. Injuries by third persons.

A tenant has been decided to be liable for waste which is committed by a stranger, on the ground, it is said, that he, the tenant, being in possession, is bound to prevent the waste, and that furthermore he can recover damages against the stranger in an action of trespass.⁸⁴¹ And so a tenant has been held liable for waste done by his tenant, though not by his assignee.⁸⁴² Whether, in the case of waste by a stranger, the tenant is liable as for voluntary or as for permissive waste does not clearly appear from the authorities.⁸⁴³ The question seems to be of practical importance only as determining whether a tenant at will would be liable for waste by a stranger.⁸⁴⁴

⁸⁴¹ 2 Co. Inst. 146, 303; Co. Litt. 54 a; Vin. Abr., Waste (K); Atter-sol v. Stevens, 1 Taunt. 183, 198; Wood v. Griffin, 46 N. H. 230, 237, 88 Am. Dec. 199; Powell v. Dayton, S. & G. R. Co., 16 Or. 33, 16 Pac. 863, 8 Am. St. Rep. 251; Austin v. Hudson River R. Co., 25 N. Y. 334; Cook v. Champlain Transp. Co., 1 Denio (N. Y.) 91; Fay v. Brewer, 20 Mass. (3 Pick.) 203; Regan v. Luthy, 16 Daly, 413, 11 N. Y. Supp. 709; Myers v. Hussenbuth, 32 Misc. 717, 65 N. Y. Supp. 1026; White v. Wagner, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674; Consolidated Coal Co. v. Savitz, 57 Ill. App. 659; Parrott v. Barney, 2 Abb. 197, Fed. Cas. No. 10,773; Moore v. Townshend, 33 N. J. Law, 284; Dix v. Jaquay, 94 App. Div. 554, 88 N. Y. Supp. 228.

A case often referred to, in which this rule was applied, is that of *White v. Wagner*, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674, where a tenant was held liable for the destruction of the building by a mob. In *Powell v. Dayton, S. & G. R. Co.*, 16 Or. 33, 16 Pac. 863, 8 Am. St. Rep. 251, a railroad company was, on the strength of this rule, held liable for waste committed by its receiver.

In *Spencer v. McManus*, 82 Hun, 318, 31 N. Y. Supp. 185, the rule was apparently ignored.

The rule is obviously inapplicable when a so-called "tenant" is not a tenant but merely a licensee. *Baker v. Hart*, 123 N. Y. 470, 25 N. E. 948, 12 L. R. A. 60.

⁸⁴² Y. B. 49 Edw. 3, 26 b; *Hicks v. Downing*, 1 Ld. Raym. 99; Vin. Abr., Waste (K) 6.

⁸⁴³ Lord Coke appears to regard this as permissive waste, he saying (2 Co. Inst. 303) that the tenant is liable for the act of a stranger, "for he in the reversion cannot have any remedy but against the wrongdoer, and recover all in damages against him, and by this means the loss shall light upon the wrongdoer; for voluntary waste and permissive waste is all one to him that hath the inheritance." And Mr. Minor advances a like opinion. 2 Minor's Inst. 543. But that it is voluntary waste, see *White v. Wagner*, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674; *Regan v. Luthy*, 16 Daly, 413, 11 N. Y. Supp. 709; *Consolidated Coal Co. v. Savitz*, 57 Ill. App. 659.

⁸⁴⁴ In *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227, it is decided that

As a reason for imposing such liability upon the tenant for the acts of strangers, it is said by Lord Coke that otherwise the landlord would be without redress.⁸⁴⁵ But even if this were a valid reason in his day, which appears questionable,⁸⁴⁶ at the present day the landlord no doubt can, in spite of the outstanding leasehold estate, bring suit against a stranger injuring the premises to the damage of the reversion.⁸⁴⁷ It is furthermore stated that the case is analogous to that of a common carrier, who is liable for reasons of public policy for injuries by third persons to goods in his custody.⁸⁴⁸ But the application of such an analogy would carry the liability of the tenant further than has ever been done, since, on the same theory, a tenant would be liable for any injuries to the premises if not caused by *vis major*, although caused neither by his negligence nor by third persons, thus making him, as is a carrier, an insurer of the safety of the property.⁸⁴⁹ In the somewhat analogous case of an ordinary bailment of chattels, for the mutual benefit of the bailor and bailee, as in the ordinary contract of hiring, no such liability for the acts of third persons is imposed on the custodian of the property, he being bound to use merely ordinary diligence to protect it.⁸⁵⁰

This rule making the tenant liable for injuries by third persons, regardless of whether he could, by the exercise of reasonable care, have prevented such injuries, may have had its origin in a liberal construction, in favor of the feudal lord, of the provisions of the statute of Marlebridge imposing liability on the

the tenant could not be held liable for waste by a stranger in the absence of a showing as to the character of the tenancy, since a tenant at will is not liable for permissive waste.

⁸⁴⁵ 2 Co. Inst. 146, 303.

⁸⁴⁶ See the remarks of Chambre, J., in *Attersol v. Stevens*, 1 Taunt. 182, referring to the suggestion made by two judges in *Jefferson v. Jefferson*, 3 Lev. 130, that Coke means merely that there would be no redress by action of waste.

⁸⁴⁷ See post, chapter XXXIII.

⁸⁴⁸ *Attersol v. Stevens*, 1 Taunt. 183, 198; *Cook v. Champlain Transp. Co.*, 1 Denio (N. Y.) 91; *Parrott v. Barney*, 2 Abb. 197, Fed. Cas. No. 10,773. See argument of Mr. Pinkney in *White v. Wagner*, 4 Har. J. (Md.) 373, 7 Am. Dec. 674.

⁸⁴⁹ The modern cases do not hold a carrier liable for injuries to goods by a mob if the carrier has taken reasonable measures to protect the goods. See 5 Am. & Eng. Enc. Law (2d Ed.) 236.

⁸⁵⁰ Story, *Bailments*, §§ 403, 406; Lawson, *Bailments*, § 40.

tenant if he make waste of house or woods, but however this may be, it is evidently not in accord with the principle, ordinarily applied at the present day, that one is liable for injuries to specific property, not directly caused by him, only when they are the result of his failure to exercise reasonable care.^{850a} That this is so, plainly appears from the conflict which, in case a building on the premises is burnt by a third person without any negligence or collusion on the part of the tenant, necessarily arises between this rule and the modern rule exempting the tenant from liability for fire not caused by his negligence.⁸⁵¹ The question of the tenant's liability for such incendiary fire has, singularly enough, but seldom arisen, and has never received any adequate discussion.⁸⁵² There seems no more reason for casting the liability in such case upon the tenant than when the fire results from a hidden defect in a flue or other appliance.

There is a decision to the effect that such liability on the part of the tenant for injuries caused by a third person does not exist in case the tenant sought by legal proceedings to prevent such injuries,⁸⁵³ the court regarding the liability as dependent on whether the tenant knowingly permitted the wrongful acts. Such a limitation of the tenant's liability, however reasonable, is not recognized by the authorities generally.

It has been held that the tenant is liable to the landlord for any injuries to the premises caused by the making of an excavation by the owner of adjoining premises, if this resulted from his refusal to join with the landlord in granting to such adjoining owner a license, as provided by statute, to enter on the premises

^{850a} That the tenant is liable for the acts of third persons only in case of negligence on his part, see *Beekman v. Van Dolsen*, 63 Hun, 487, 18 N. Y. Supp. 376; *Rinoldi v. Hudson Guild*, 110 N. Y. Supp. 881.

⁸⁵¹ See post, § 111.

⁸⁵² In *Cook v. Champlain Transp. Co.*, 1 Denio (N. Y.) 91, the tenant was held liable for the act of a third person, a steamboat company, in setting fire to the building.

But in *Maggort v. Hansbarger*, 8 Leigh (Va.) 532, it appears to be

assumed that the tenant was not liable in case the fire was started by accident or by some unknown person, and this accords with the statement made by Coke in 2 Inst. at p. 303 that it was adjudged in 9 Edw. 2 that if thieves burn the house of tenant for life without evil keeping of lessee for life's fire, the lessee shall not be punished for it in action of waste. See, also, post, note 859.

⁸⁵³ *Beekman v. Van Dolsen*, 63 Hun, 487, 18 N. Y. Supp. 376.

in order to shore up the walls, or if the injury resulted from his interference with the shoring up of the walls.⁸⁵⁴

A joint lessee is liable, it seems, according to the weight of authority, for waste done by his colessee.⁸⁵⁵

A tenant is necessarily liable for waste done by his servant, acting within the scope of his employment, this being in effect the act of the tenant himself.⁸⁵⁶

§ 111. Injury or destruction by fire.

It is said by Lord Coke, without any citation of authority, that "burning of the house by negligence or mischance is waste"⁸⁵⁷ and by other authorities,⁸⁵⁸ that under the statute of Gloucester, an accidental burning was waste, and that the tenant was re-

⁸⁵⁴ *Mackenzie v. Hatton*, 6 Misc. 153, 26 N. Y. Supp. 873.

⁸⁵⁵ Lord Coke says: "Two joint tenants for years, or for life, one of them doth waste, this is the waste of them both, but treble damages shall be recovered against him that did the waste only." 2 Inst. 302. And to this effect, see Cruise's Dig. tit. 18, ch. 1, § 62, and notes to *Greene v. Cole*, 2 Wms. Saund. (Ed. 1871) p. 658, by Sir E. V. Williams. But *Clemson v. Trammell*, 34 Ill. App. 414, is adverse to the liability of one joint lessee for waste committed by the other.

⁸⁵⁶ In *Mason v. Stiles*, 21 Mo. 374, 64 Am. Dec. 242, the tenant was held liable for the injury to the building from an explosion caused by his clerk.

⁸⁵⁷ Co. Litt. 53 b.

⁸⁵⁸ Hargrave's note to Co. Litt. 57 a. The view of Mr. Hargrave is adopted by Chancellor Kent (4 Comm. 82) without, however, any discussion of the question. And see, to the same effect, *Dorr v. Harkness*, 49 N. J. Law, 571, 10 Atl. 400, 60 Am. Rep. 656. The question of the liability of a lessee for accidental

fire seems somewhat similar to that of one in possession of land for the accidental escape of fire to adjoining premises, as to which, before the statute of Anne, the authorities are not clear. In Pollock, Torts (6th Ed.) 482, it is said that "we find it in the fifteenth century stated to be the custom of the realm (which is the same thing as the common law) that every man must safely keep his own fire so that no damage in any wise happen to his neighbor (citing Y. B. 2 Hen. 4, 18, pl. 5). In declaring on this custom, however, the averment was 'ignem suum tam negligenter custodivit,' and it does not appear whether the allegation of negligence was traversable or not." Prof John H. Wigmore, in the course of a learned article in 7 Harv. Law Rev. at p. 448, asserts the view that the negligence vel non of the person from whose premises the fire escaped was immaterial, the allegation that defendant "negligently guarded" his fire meaning merely that he failed to guard it. Compare authorities cited in *Lothrop v. Thayer*, 138 Mass. 466, 52 Am. Rep. 286.

lieved from liability in this regard only by the statutes of 6 Anne, c. 31 and 14 Geo. 3, c. 78, § 86. These statutes, however, purported merely to exempt persons, on whose premises a fire may "accidentally begin," from liability for damage caused thereby, and seem directed at cases of fire spreading from one tenement to another. It has been judicially asserted in one case that, even before these statutes, there was no liability on the part of the tenant for injury or destruction by fire, in the absence of negligence.⁸⁵⁹ At the present day, either by reason of the English statutes referred to, or otherwise, the tenant is regarded as not liable for injuries to the premises caused by fire accidentally started or spreading,⁸⁶⁰ while he is ordinarily liable for injuries from fire if this is the result of his negligence.⁸⁶¹

There are authorities to the effect that a tenant at will is not

⁸⁵⁹ Per Blackburne, C. J., in *White v. McCann*, 1 Ir. C. L. 205, construing the language of Lord Coke as asserting a liability only in case of negligence. In cases by a lessor against a lessee, before the statute, negligence on the part of the tenant was charged. See *Salop v. Crompton*, Cro. Eliz. 777; *Hicks v. Downing*, 1 Ld. Raym. 99; *Shrewsbury's Case*, 5 Coke, 14. But as to the possible meaning of the allegation of negligence, see the reference in the preceding note to Prof. Wigmore's article in 7 Harv. Law Rev. at p. 748. In 8 Columbia Law Rev. at p. 625, Prof. Kirchwey cites several early cases tending to excuse the tenant in the absence of negligence.

⁸⁶⁰ *United States v. Bostwick*, 94 U. S. 53, 24 Law. Ed. 65; *Sampson v. Grogan*, 21 R. I. 174, 181, 42 Atl. 712, 44 L. R. A. 711; *Nave v. Berry*, 22 Ala. 383; *Junction Min. Co. v. Springfield Junction Coal Co.*, 222 Ill. 600, 78 N. E. 902; *Earle v. Arbogast*, 180 Pa. 409, 36 Atl. 923; *Waincott v. Silvers*, 13 Ind. 497; *Levey v. Dyess*, 51 Miss. 501; *Warner v.*

Hitchins, 5 Barb. (N. Y.) 666; *Maggort v. Hansbarger*, 8 Leigh (Va.) 532; *Lothrop v. Thayer*, 138 Mass. 466, 52 Am. Rep. 286; *Armstrong v. Maybee*, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898; *Wolfe v. McGuire*, 28 Ont. 45. In *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 54 Am. Rep. 812, the tenant was held liable because the building would not have been destroyed had he not used it, or rather authorized its use, for the storage of cotton, a highly inflammable material. It is said that the storage of cotton was "unauthorized," and that the lessee rented the premises for the storage of vehicles. The case is perhaps an authority to the effect that, apart from any provision in the lease, the use of the premises for storing inflammable materials may constitute negligence.

⁸⁶¹ *Duer v. Allen*, 96 Iowa, 36, 64 N. W. 682; *Robinson v. Wheeler*, 25 N. Y. 252; *Stevens v. Pantlind*, 95 Mich. 145, 54 N. W. 716; *Moore v. Parker*, 91 N. C. 275.

liable for injury caused by fire to the demised premises, even though it is the result of his negligence, on the theory that the negligent keeping of a fire is permissive waste, for which such a tenant is never liable.⁸⁶² And in recent years⁸⁶³ one court refused to apply to such a case the comparatively modern theory of liability for negligence, saying that "if landlords would protect themselves from the mere negligence of their tenants, they should take a written lease, with proper covenants; and a mere tenant at will is not liable to his landlord for the mere negligence of himself or his servants in kindling or guarding fires in stoves or chimneys for the purpose of heating the premises; but he is liable for willful burning, and also for such gross negligence as amounts to reckless conduct." A tenant at will has, however, been held liable to his lessor for the negligent burning of the building on the premises leased, when the lessor himself was merely holding under a lease, for the reason that such sublessor is answerable over to the original lessor.⁸⁶⁴ And a tenant at will is liable, as any other occupant of the property would be, for injury to adjoining property owned by the landlord, caused by fire resulting from his negligence.⁸⁶⁵

§ 112. Accidental injuries.

In the absence of provisions in the lease to a contrary effect, a tenant is not liable for injuries caused by act of God, as when buildings or trees are thrown down by the wind,⁸⁶⁶ a house is destroyed by lightning,⁸⁶⁷ or the violence of the sea breaks down protective walls, and submerges the land,⁸⁶⁸ nor is he liable for waste done by public enemies, this being *vis major*, against which he is without remedy.⁸⁶⁹ He is not ordinarily

⁸⁶² Shrewsbury's Case, 5 Coke, 14; Salop v. Crompton, Cro. Eliz. 777, 784. See the remarks of Prof. J. B. Ames in this connection in 2 Harv. Law Rev. 7.

⁸⁶³ Lothrop v. Thayer, 138 Mass. 466, 52 Am. Rep. 286.

⁸⁶⁴ Cudlip v. Rundle, Carth. 202; Pantam v. Isham, 1 Salk. 19.

⁸⁶⁵ Lothrop v. Thayer, 188 Mass. 466, 52 Am. Rep. 286.

⁸⁶⁶ Co. Litt. 53 a; 2 Co. Inst. 303; Vin. Abr., Waste (I); Abbot of Sherbourne's Case, Y. B. 12 Hen. 4, 5.

⁸⁶⁷ 2 Co. Inst. 303; Vin. Abr., Waste (I).

⁸⁶⁸ Vin. Abr., Waste (I); Keighley's Case, 10 Coke, 139 b; Y. B. 17 Edw. 3, 65.

⁸⁶⁹ 2 Co. Inst. 303.

liable for an accident which could not have been foreseen by him, or the occurrence of which was not caused by his negligence,⁸⁷⁰ such as an explosion, fire and the like.⁸⁷¹

§ 113. Obligation to repair—Permissive waste.

“Permissive waste is waste by reason of omission or not doing, as for want of reparation,* * * for he that suffereth a house to decay which he ought to repair, doth the waste,”⁸⁷² and it is said that “waste may be done in houses by suffering the same to be uncovered, whereby the spars or rafters or other timbers of the house are rotten, but if the house be uncovered when the tenant cometh in, it is no waste in the tenant to suffer the same to fall down.”⁸⁷³

There are occasional modern decisions in England recognizing a liability upon the part of a tenant for years for permissive waste, that is, an obligation upon him, apart from express contract, to make repairs.⁸⁷⁴ Such decisions are few, however, since a lease for years almost invariably, in that jurisdiction,

⁸⁷⁰ *United States v. Bostwick*, 94 U. S. 53, 24 Law. Ed. 65; *Earle v. Arbogast*, 180 Pa. 409, 36 Atl. 923 (explosion); *Machen v. Hooper*, 73 Md. 342, 21 Atl. 67; *Sheer v. Fisher*, 27 Ill. App. 464; *Clemson v. Trammell*, 34 Ill. App. 414; *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N. E. 1099 (explosion); *Parrott v. Barney*, 1 Sawy. 423, 2 Abb. 197, Fed. Cas. No. 10,773; *Levey v. Dyess*, 51 Miss. 501; *Armstrong v. Maybee*, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898; *Saner v. Bilton*, 7 Ch. Div. 815. It is so expressly provided by North Carolina Revision 1905, § 1991.

Myers v. Hussenbuth, 32 Misc. 717, 65 N. Y. Supp. 1026, is contra. There the court says that there is in every lease an implied covenant that the tenant will return the premises at the end of the term in as good condition as at its commencement, reasonable wear and tear excepted, and that this extends

to accidental injuries. No authorities are cited, except a few to the effect that an express covenant to return the premises in good condition binds the lessee in spite of accidental injuries. The case seems to stand alone among modern authorities, apart from the cases imposing liability on a tenant for the acts of third persons.

⁸⁷¹ As to fire, see ante, § 111.

⁸⁷² 2 Co. Inst. 145.

⁸⁷³ Co. Litt. 53 a.

⁸⁷⁴ *Harnett v. Maitland*, 16 Mees. & W. 257; *Yellowly v. Gower*, 11 Exch. 274; *Davies v. Davies*, 38 Ch. Div. 499. See, also, the exhaustive opinion of Meredith, C. J., in the recent case of *Morris v. Cairncross*, 14 Ont. Law Rep. 544, and an article in 33 *Solicitors' Journal*, 743.

But tenants for life are apparently, by the English decisions, not liable for permissive waste. In *re Cartwright*, 41 Ch. Div. 532; *Patterson v. Central Canada Loan & Sav.*

contains an express provision as to the making of repairs. In this country, likewise, a liability has been asserted as against a tenant for years for permissive waste,⁸⁷⁵ while in some cases he is stated, without the use of the expression "permissive waste," to be bound to make repairs.⁸⁷⁶ Thus it has been said that a tenant for years is bound to make "ordinary repairs,"⁸⁷⁷ and that he is not bound to make substantial lasting or general repairs, but must make "such ordinary repairs as are necessary to prevent waste and decay,"⁸⁷⁸ and that he is bound to make "fair and tenantable repairs, so as to prevent waste and decay," but not "substantial and lasting or general repairs," such as to put on new roofing.⁸⁷⁹ It has been held that a tenant is under no obligation to repair an absolutely valueless building on the land leased,⁸⁸⁰ and there is a *dictum* apparently to the effect that he is under no obligation whatever to repair defects not caused by himself.⁸⁸¹

Co., 29 Ont. 134. Contra in this country. *Miller v. Shields*, 55 Ind. 71; *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205; *Wilson v. Edmonds*, 24 N. H. 517, 545; *Schulting v. Schulting*, 41 N. J. Eq. 130, 3 Atl. 526.

⁸⁷⁵ *Moore v. Townshend*, 33 N. J. Law, 284.

⁸⁷⁶ *Libbey v. Tolford*, 48 Me. 316, 77 Am. Dec. 229.

⁸⁷⁷ *Hatch v. Stamper*, 42 Conn. 28; *Lynch v. Sauer*, 16 Misc. 1, 37 N. Y. Supp. 666; *Hitner v. Ege*, 23 Pa. 305; *Winton v. Stewart*, 43 W. Va. 711, 28 S. E. 776.

⁸⁷⁸ *Suydam v. Jackson*, 54 N. Y. 450.

The tenant must repair the roof (*Lynch v. Sauer*, 16 Misc. 1, 37 N. Y. Supp. 666), or a broken skylight (*Forrester v. O'Rourke Engineering Const. Co.*, 48 Misc. 390, 95 N. Y. Supp. 600), but is not bound to repair defects in the plumbing or heating apparatus existing at the time of the lease (*Thalheimer v. Lempert*, 17 N. Y. St. Rep. 346, 1 N. Y. Supp. 470).

It has been decided in this state that a lessee of a part of a building may enter another part of the building in order to repair pipes. *Coddington v. Dunham*, 35 N. Y. Super. Ct. (3 Jones & S.) 412.

⁸⁷⁹ *Long v. Fitzimmons*, 1 Watts & S. (Pa.) 530. In *Russell v. Rush*, 2 Pittsb. Rep. (Pa.) 134, it is said that the tenant is, in the absence of a contract on the subject, bound to make all repairs, that he is bound to remove temporary or accidental obstructions from drains, spouts or water pipes, and to keep the premises in as good order as when he receives them. In *Scheerer v. Dickson*, 3 Brewst. (Pa.) 276, it is said that the tenant must pay for "ordinary" repairs, but "extraordinary" repairs, such as the cleaning of a cess pool, must be paid for by the landlord.

⁸⁸⁰ *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588. In this case, however, the question was as to the obligations of a tenant in dower, and not of one holding under a lease.

⁸⁸¹ In *United States v. Bostwick*,

In at least one state the liability of a tenant from year to year for permissive waste has been clearly asserted.⁸⁸² It has been said in England, in cases involving tenancies from year to year, that the tenant is under an obligation to keep the premises "wind and water tight"⁸⁸³ and to make "fair and tenantable repairs, so as to prevent waste and decay,"⁸⁸⁴ but that he is under no obligation to make "general"⁸⁸⁵ or "substantial"⁸⁸⁶ repairs, or to make good "mere wear and tear,"⁸⁸⁷ or to "sustain and uphold the premises,"⁸⁸⁸ or to keep them "in good tenantable condition."⁸⁸⁹

In the English cases above cited, in which an obligation to make repairs is asserted as against a tenant from year to year, the failure to make them is not termed permissive waste, and the obligation seems rather to be based upon an implied agreement, it being intimated in one of these cases that such a tenant is not liable for permissive waste.⁸⁹⁰ Historically, there may be reason for so holding, since the tenancy from year to year is to some extent a development from tenancy at will, but in view of the fact that a modern tenant from year to year stands in most respects in the position rather of a tenant for years than of one at will, it appears to be a distinction of somewhat excessive refinement to hold that a tenant for years is bound to make

94 U. S. 53, 24 Law. Ed. 65, it is said, in speaking of the "implied obligation" of the tenant, "It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible." And in *Hughes v. Vanstone*, 24 Mo. App. 637, the opinion implies that there is no duty to make any repairs, though the decision was merely that the tenant was not bound to furnish supports for a weak building.

⁸⁸² *Newbold v. Brown*, 44 N. J. Law, 266.

⁸⁸³ *Auworth v. Johnson*, 5 Car. & P. 239; *Leach v. Thomas*, 7 Car. & P. 327.

⁸⁸⁴ *Ferguson v. —*, 2 Esp. 590.

⁸⁸⁵ *Horsefall v. Mather*, Holt, N. P. 7.

⁸⁸⁶ *Leach v. Thomas*, 7 Car. & P. 327.

⁸⁸⁷ *Torriano v. Young*, 6 Car. & P. 8. In *Davies v. Davies*, 38 Ch. Div. 499, *Kekewich, J.*, seems to assert that the obligation upon a tenant for years not to do permissive waste requires the tenant to repair any injuries from wear and tear to the floors or walls of the building, and even to repair injuries to the chimneys caused by a storm.

⁸⁸⁸ *Auworth v. Johnson*, 5 Car. & P. 239.

⁸⁸⁹ *Horsefall v. Mather*, Holt, N. P. 7.

⁸⁹⁰ *Torriano v. Young*, 6 Car. & P. 8.

repairs because otherwise he would be guilty of permissive waste, while a tenant from year to year is so bound, not for that reason, but because he has impliedly agreed to do so.

As the English statutes were not regarded as imposing liability on a tenant at will for voluntary waste⁸⁹¹ so *a fortiori* they did not make him liable for permissive waste, and he has usually been held to be absolutely free from liability therefor.⁸⁹²

The exact extent of the obligation of a tenant, involved either in the prohibition of permissive waste or in the requirement of "ordinary" repairs, does not clearly appear from the authorities. The character of the repairs most frequently referred to in the cases are such as are necessary to keep the building wind and water tight.⁸⁹³ Such a view of the tenant's obligations in this regard seems to accord with the natural meaning of "permissive waste" as referring to waste from extraneous causes, the operation of which the tenant could have prevented by making repairs but which, nevertheless, he permitted to operate. Occasionally, however, the courts refer to the obligation to make repairs as involving the making of repairs other than those necessary to render the premises wind and water tight, as well as those which are so necessary. There is authority to the effect that merely suffering a house to be uncovered is not itself waste, unless this results in rotting the timber,⁸⁹⁴ the result of

⁸⁹¹ See ante, at note 759.

⁸⁹² Litt. § 71; Co. Litt. 57 a; Shrewsbury's Case, 5 Coke, 13; Harnett v. Maitland, 16 Mees. & W. 257; Moore v. Townshend, 33 N. J. Law, 284; Coale v. Hannibal & St. J. R. Co., 60 Mo. 227; Parrott v. Barney, Deady, 405, Fed. Cas. No. 10,773 a. Overloading the building is voluntary, and not permissive, waste, and a tenant at will is liable therefor in trespass. Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769.

⁸⁹³ Such is the view taken in Morris v. Cairncross, 14 Ont. Law Rep. 544.

"If a window in a dwelling should blow in, the tenant could not per-

mit it to remain out and the storms to beat in and greatly injure the premises without liability for permissive waste; and if a shingle or board on the roof should blow off or become out of repair, the tenant could not permit the water, in time of rain, to flood the premises, and thus injure them, without a similar liability." Per Earl, C., in Suydam v. Jackson, 54 N. Y. 450, 13 Am. Rep. 611.

⁸⁹⁴ Knoll's Case, Hargrave's note to Co. Litt. 53 a. And so Lord Coke says (Co. Litt. 53 a) that waste may be done in houses by suffering them to be uncovered "whereby the spars, rafters or other timbers of the house are rotten."

which would be that the tenant could not be charged with the cost of repairs, if the landlord chose to make them, but the landlord could merely recover for damages to the interior caused by the tenant's failure to make them. Such a view has not, however, been asserted in any modern decision, it seems.⁸⁹⁵

Besides permissive waste in regard to buildings, the tenant is guilty of this form of waste, it is said, if he permits a wall or bank, built to protect the leased premises from submersion by water, to fall into a state of decay, with the result that the land is flooded.^{895a} This, it appears, is but an application of the requirement that the premises be kept by the tenant wind and water tight. If, however, the land is injured by a flood caused by the act of God, the tenant is not liable.^{895b}

The authorities are generally to the effect that a tenant is bound to keep the fences on the land demised in repair.^{895c} This obligation is referred to as part of that to use the premises in a husbandlike manner,^{895d} rather than as one not to commit permissive waste. This duty to keep the fences in repair, and thereby prevent injuries by trespassing cattle, bears, however, some

⁸⁹⁵ It is not in accord with the Pennsylvania cases ante, note 879.

^{895a} Co. Litt. 53 a; Anonymous, Moore, 53 a; Vin. Abr., Waste (D) pl. 33-35.

^{895b} See ante, at note 868.

^{895c} Whitfield v. Weedon, 2 Chitty, 685; Cheetham v. Hampson, 4 Term R. 319; Fenton v. Montgomery, 19 Mo. App. 156; Blood v. Spaulding, 57 Vt. 422; Morgan v. Tims, 44 Tex. Civ. App. 308, 17 Tex. Ct. Rep. 111, 97 S. W. 832; Andrews v. Jones, 36 Tex. 149; Hoyleman v. Kanawha & O. R. Co., 33 W. Va. 489, 10 S. E. 816; Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776. But in Richards v. Torbert, 3 Houst. (Del.) 172, it was decided that a failure to repair by a tenant in dower was not permissive waste, and it was rather implied that it was no breach of any

obligation on the part of the tenant.

^{895d} Whitfield v. Weedon, 2 Chitty, 685; Blood v. Spaulding, 57 Vt. 422.

In Blood v. Spaulding, 57 Vt. 422, it was decided that a landlord was not liable for injuries to the colt of an adjoining owner, caused by the failure to repair a division fence, and the consequent escape of the colt and its injury on a railroad, though the fence was out of repair when the tenant took possession, and the landlord had orally agreed with such adjoining owner, before the demise, to keep the fences in repair. The view of the court seems to be that the "implied duty of the tenant, growing out of his occupancy of the land, to keep the fence in question in repair," relieved the lessor from his express contract so to do.

analogy to the duty to keep the roof and walls in repair, and thereby prevent injuries by wind and water.^{895e}

A tenant is obviously not liable as for permissive waste in failing to make particular repairs, if the lessor expressly assumed the obligation of making such repairs. But he is not relieved from any such obligation by reason of a covenant by the lessor allowing the tenant to make repairs to a limited amount, and to deduct their cost from the rent.^{895f}

Courts of equity will not, it has been decided, take jurisdiction of a proceeding to restrain permissive waste, or give compensation therefor.^{895g} These decisions involved permissive waste by a life tenant, but a like rule, it seems probable, would be applied in the case of such waste by a tenant for years.

§ 114. Stipulations against alterations or erections.

Reference has previously been made to the effect of a stipulation allowing the tenant to make alterations, as relieving him from liability as for waste by reason of such alterations. We will now consider the effect of a stipulation against alterations.^{895h}

It has been decided that a contract by the lessee not to make alterations was violated by the conversion of windows into passageways connected by bridges with an adjoining building, and by the closing up of entrances,⁸⁹⁵ⁱ that a covenant not to make any "alteration or addition in and to the buildings on the premises or to the premises themselves" was broken by the tenant's erection of a wooden building on the rear of the lot, even though he had a right to remove it,^{895j} and that the erection on the sidewalk of a permanent awning, screwed to the house, was within a covenant not to make any alteration "in" the house.^{895k} On the other

^{895e} In *Byrket v. Gardner*, 35 M. & G. 448; In *re Hotchkys*, 32 Ch. Wash. 668, 77 Pac. 1048, it was held that a failure to comply with a clause of the lease requiring the fences to be kept in repair was not waste within the statute authorizing a forfeiture for waste, for the reason that the latter term refers to acts which tend to the destruction of the tenement.

^{895f} *Moore v. Townshend*, 33 N. J. Law, 284.

^{895g} See ante, § 109 a (11).

^{895h} *Peer v. Wadsworth*, 67 N. J. Eq. 191, 58 Atl. 379.

⁸⁹⁵ⁱ *Whitwell v. Harris*, 106 Mass. 532.

^{895j} *Trenor v. Jackson*, 15 Abb. Pr. (N. S.; N. Y.) 115.

^{895k} *Powys v. Blagrove*, 4 De Gex,

hand it has been held that a covenant against the making of any alteration to the premises did not preclude an assignee of the lessee, occupying the premises, with the landlord's assent, for the purpose of a jewelry and watchmaking business, from affixing a large clock on the outside of the front wall, this not being an alteration affecting the form or structure of the building,^{895l} and the placing of a new engine in the stead of the engine which was in the premises at the time of the lease, upon the same foundation, with the intention of removing it, was regarded as not within a covenant against alterations without the landlord's consent, it not being a substantial alteration.^{895m} The erection by the tenant of a building on adjoining premises, in such a way as to close some of the windows upon the leased premises, is not within a covenant against alterations.⁸⁹⁵ⁿ

A requirement of the landlord's consent to alterations applies to those alterations which otherwise the tenant might make without the landlord's consent as well as to others.^{895p}

A covenant against the erection of a "building" on the premises is, it has been decided, broken by the erection of a trellis work upon the top of the boundary fence,^{895q} and a covenant against any "erection" was held to be broken by the construction of wooden "hoardings" for advertising purposes.^{895r} A covenant not to affix any signboard or other notice of business was regarded as broken when the tenant attached to the front of the building, a theatre, a metal frame, containing the name of the theatre, "picked out" at night in electric light.⁸⁹⁶

It has been decided that a covenant, in connection with a demise for ninety-five years of a lot with a building thereon, that no building on the premises shall be removed therefrom, was not broken by the act of the lessee in replacing the building by a much more valuable one.⁸⁹⁷ It was decided in the same case that a covenant that any building erected on the premises should

^{895l} Bickmore v. Dimmer [1903] 1 Ch. 158.

^{895m} Andrews v. Day Button Co., 132 N. Y. 348, 30 N. E. 831.

⁸⁹⁵ⁿ Atkins v. Chilson, 50 Mass. (9 Metc.) 52.

^{895p} Kunemann v. Boisse, 19 La. Ann. 26.

^{895q} Wood v. Cooper [1894] 3 Ch. 671.

^{895r} Pocock v. Gilham, Cab. & E. 104.

⁸⁹⁶ Attorney General v. Playhouse, 19 Times Law R. 580.

⁸⁹⁷ Hawes v. Favor, 161 Ill. 440, 43 N. E. 1076, 52 Am. St. Rep. 377.

front in the same way as the building then existing, and should be set back twenty feet from a certain line, was not broken by the construction of an addition to the building fronting on a side street, so as to give two fronts, or by the construction of a porch attached to the building less than twenty feet from the line.

It has in one jurisdiction been decided that the landlord may, by parol permission to the tenant to make alterations, relieve him from any prohibition in that regard,⁸⁹⁸ and that even the silent acquiescence of the landlord in the expenditure by the tenant of large sums of money in improvements will estop the landlord to assert a forfeiture for breach of condition as to the character of the improvement.⁸⁹⁹

A threatened breach of a covenant not to make any alterations will not, it has been decided, be restrained by injunction, when the injury is not irreparable or incapable of satisfaction in damages, and there is a right of re-entry for breach.⁹⁰⁰

§ 115. Contract to put in repair or for specific repairs.

Occasionally the lessee agrees to put the premises in repair, or to make specific repairs. An agreement to put in repair has been construed as requiring the lessee to rebuild, if otherwise the object of the covenant cannot be attained.⁹⁰¹ As elsewhere stated, an agreement to put the premises in "good" or "tenantable" repair may be inferred from one to keep them in such repair,⁹⁰² and an agreement to do "necessary" repairs has been regarded as requiring the lessee to put the premises in repair.⁹⁰³ A covenant to

⁸⁹⁸ *Moses v. Loomis*, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194. able repair and then to keep them so.

⁸⁹⁹ *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076, 52 Am. St. Rep. 377. Contra, *Perry v. Davis*, 3 C. B. (N. S.) 769. ⁹⁰³ *Truscott v. Diamond Creek Rock Boring Co.*, 20 Ch. Div. 251. So a covenant by the tenant to make necessary repairs was held to

⁹⁰⁰ *Trenor v. Jackson*, 15 Abb. Pr. (N. S.; N. Y.) 115. require the lessee of shore property to erect a breakwater to replace one

⁹⁰¹ *Meyers v. Myrell*, 57 Ga. 516. which had been washed away at the

⁹⁰² See ante, § 87 e (2). In *Keroes v. Richards*, 28 App. D. C. 310, it is stated that a covenant to keep old premises "in repair" imports an obligation to put them in reason- time of the demise, this being necessary to prevent the erosion of the soil. *Waddell v. De Jet*, 76 Miss. 104, 23 So. 437. But a covenant by the lessee to make "necessary" re-

deliver up the premises in "good" or "tenantable" repair would also, it seems, require the tenant to put them in such repair before the end of the term.⁹⁰⁴ Under an agreement to "bear all the expenses of repairing," the tenant has been held liable for the expenses of replacing defective walls under the orders of the municipal authorities.⁹⁰⁵ An agreement to put the premises into habitable repair requires the tenant, it has been said, to put them in a better state of repair than they were in at the time of the demise.⁹⁰⁶ A provision that the lessee shall "put cash in repairs" on the premises to a specified amount does not involve an authority in the lessee to order the making of repairs to that amount on behalf of the lessor.⁹⁰⁷ A covenant to put and keep the premises in good order and repair has been held not to require the lessee to put in a water metre and sinks, if there were none at the time of the making of the lease.⁹⁰⁸

If no time is named for the making of specific repairs, the tenant has, as a general rule, the whole period of the lease in which to make them,⁹⁰⁹ unless they are such that it must evidently have been intended that they should be made immediately,

pairs has been construed, in connection with other language in the lease, as referring to repairs which the tenant might require for his own purposes, and as merely exempting the landlord from the duty of making such repairs. *White v. Albany R. Co.*, 17 Hun. (N. Y.) 98. Compare *Beach v. Crain*, 2 N. Y. (2 Comst.) 87, 49 Am. Dec. 369.

In *Devine v. Radford*, 110 N. Y. Supp. 982, a covenant by the tenant "to make all necessary repairs and alterations necessary to the proper conducting of his business," was held to impose on him the burden of making all repairs necessary for the conduct of his business, though not strictly incidental thereto, such as a leaking or sagging roof.

⁹⁰⁴ See post, at note 1052.

⁹⁰⁵ *Martinez v. Thompson*, 80 Tex. 568, 16 S. W. 334.

⁹⁰⁶ *Belcher v. McIntosh*, 8 Car. & P. 720. And see *Franklin v. Triplett*, 79 Ark. 82, 94 S. W. 929.

⁹⁰⁷ *Schrage v. Miller*, 44 Neb. 818, 62 N. W. 1091. This case involved merely the right of the person making the repairs to a lien upon the landlord's interest.

⁹⁰⁸ *Epstein v. Saviano*, 51 Misc. 28, 99 N. Y. Supp. 910.

A stipulation that the repairs shall be in accordance with certain plans and shall also be in accordance with the regulations of the municipal building department, requires the repairs to accord with the plans, so far as allowed by such regulations. *Davies v. Clark*, 159 N. Y. 392, 54 N. E. 70.

⁹⁰⁹ *Colhoun v. Wilson*, 27 Grat. (Va.) 639; *Dennison v. Read*, 33 Ky. (3 Dana) 586. See post at note 1021.

or within a reasonable time.⁹¹⁰ Even under a covenant to repair 'forthwith' the tenant has a reasonable time for the purpose.⁹¹¹ The lessee may show, as excusing delay, that this was owing to the neglect of a municipal department to approve the plans, as was required by law.⁹¹²

A transferee of the reversion cannot sue on account of a breach of a covenant to put in repair, committed before the transfer,⁹¹³ nor, it seems, is an assignee of the lessee liable under the covenant if it was broken before the assignment to him, it not being in its nature a continuing covenant.⁹¹⁴

For breach of a covenant to make specific repairs the landlord may, it has been decided, recover the decrease in rental value by reason of the lack of such repairs,⁹¹⁵ or, if he himself makes the repairs, the reasonable cost of the repairs,⁹¹⁶ and the rental value of the premises for such time as he may, by reason of his having to make the repairs, be deprived of the use of the premises.⁹¹⁷

§ 116. Contract to keep in repair.

a. **Degree and mode of repair.** In England an instrument of lease almost invariably contains a covenant by the lessee to make repairs on the premises, and the reports of that country frequently contain cases bearing upon such covenants. In this country such a covenant by the lessee is less usual, but is quite occasionally found.

⁹¹⁰ In *Packer v. Cockayne*, 3 G. See *Gerzebeck v. Lord*, 33 N. J. Law, Greene (Iowa) 111, where a lease 240.

for six years provided that no rent ⁹¹⁴ See *Coward v. Gregory*, L. R. 2 should be paid the first year and C. P. 153; *Jacob v. Down* [1900] 2 that after that the tenant should Ch. 156.

pay one-third the produce as rent, ⁹¹⁵ *Saffer v. Levy*, 88 N. Y. Supp. and it was further stipulated that 144.

the tenant should fence the land, it ⁹¹⁶ *Seymour v. Picus*, 9 Misc. 48, 29 N. Y. Supp. 277; *Loughlin v. Carey*, was held that it was intended that 21 Pa. Super. Ct. 477. But the land- he should build the fence the first lord can recover only the reasonable

year. ⁹¹¹ *Doe d. Pittman v. Sutton*, 9 cost of the repairs made by him. Car. & P. 706.

⁹¹² *Davies v. Clark*, 159 N. Y. 392, 54 N. E. 70.

⁹¹³ *Johnson v. Overseers of St. Peter's Church*, 4 Adol. & E. 520.

Y. Supp. 938.

⁹¹⁷ *Loughlin v. Carey*, 21 Pa. Super. Ct. 477.

A general covenant to repair, it is said, is satisfied by keeping the premises in substantial repair, a literal compliance with the covenant not being required.⁹¹⁸ Such a covenant, it is generally agreed, binds the lessee to keep the premises merely in the state of repair in which they were at the time of the demise, that is, when the covenant was made.⁹¹⁹ If it is intended to bind the tenant not only to keep the premises in such repair as they are already in, but to put them in better repair, there must be a covenant to that effect. But an agreement to keep in "good" or "tenantable" repair has been construed as requiring the tenant to put the premises in that condition of repair, since otherwise he could not keep them in that condition.⁹²⁰

A covenant to keep in good or in tenantable repair, as well as a covenant simply to keep in repair, is to be construed with reference to the general condition of repair of the premises at the time of the demise, and also with reference to their age and class. That

⁹¹⁸ *Evelyn v. Raddish*, 7 Taunt. 411; *Harris v. Jones*, 1 Moody & R. 173; *Stanley v. Towgood*, 3 Bing. N. C. 4. *Green v. Eden*, 2 Thomp. & C. (N. Y.) 582; *Appleton v. Marx*, 117 App. Div. 206, 102 N. Y. Supp. 2; *Waddell v. De Jet*, 76 Miss. 104, 23 So.

⁹¹⁹ *Walker v. Hatton*, 10 Mees. & W. 258; *Gutteridge v. Munyard*, 7 Car. & P. 129; *Middlekauff v. Smith*, 1 Md. 329; *Stultz v. Locke*, 47 Md. 562; *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. R. Co.*, 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; *White v. Albany R. Co.*, 17 Hun (N. Y.) 98; *Brashear v. Chandler*, 22 Ky. (6 T. B. Mon.) 150, 17 Am. Dec. 132. *But Lehmaier v. Jones*, 100 App. Div. 495, 91 N. Y. Supp. 687, is to the effect that a covenant to keep in repair requires the tenant to "put" the premises in repair. This case, like the opinion in *Myers v. Burns*, 35 N. Y. 271, and that in *Keroes v. Richards*, 28 App. D. C. 310, ignores any distinction in this regard between a covenant to keep "in repair" and one to keep "in good repair."

⁹²⁰ *Payne v. Haine*, 16 Mees. & W. 541; *Saner v. Bilton*, 7 Ch. Div. 815; *In Proudfoot v. Hart*, 25 Q. B. Div. 42, it is decided that an agreement to keep the premises in tenantable repair and to leave them in that condition requires the tenant to put them in that condition if not in such repair at the time of the demise, and there is a dictum that such is the effect of a covenant to keep and leave in repair.

is, if the premises are old the tenant is not bound under his covenant to make them new, but merely to repair them as old premises.⁹²¹ It has been said: "The age of the house must be taken into account, because nobody could reasonably expect that a house two hundred years old should be put in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields."⁹²²

A covenant to repair does not require the tenant to make improvements, as distinguished from repairs,⁹²³ and accordingly he is, in making repairs, under no obligation to use a class of materials different from that previously used,⁹²⁴ or to change the original method of construction.⁹²⁵ A covenant to "make, uphold, support, cleanse and repair and keep in repair" all drains has been held not to require the making of a new drain,⁹²⁶ and a covenant to keep a drain in good tenantable repair has been held not to require the rectification of a defect in the plan of construction.⁹²⁷ But, on the other hand, a lessee has been regarded as bound, by his covenant to keep the premises in repair, to reconstruct a drain in accordance with a demand of the municipal authorities.⁹²⁸

⁹²¹ *Stanley v. Towgood*, 3 Bing. 401; *Harris v. Jones*, 1 Moody & R. 173; *Soward v. Leggett*, 7 Car. & P. 613; *Lehmaier v. Jones*, 100 App. Div. 495, 91 N. Y. Supp. 687.

⁹²² *Proudfoot v. Hart*, 25 Q. B. Div. 42, per Lord Esher, M. R. To the same effect, see *Payne v. Haine*, 16 Mees. & W. 541.

⁹²³ *Soward v. Leggett*, 7 Car. & P. 613; *Naye v. Noezel*, 50 N. J. Law, 525; *Epstein v. Saviano*, 51 Misc. 28, 99 N. Y. Supp. 910.

A provision that the lessee shall "keep the place in good repair and under good fence" has been held not to require him to erect fences around land not before fenced.

Hazlewood v. Pennybacker (Tex. Civ. App.) 50 S. W. 199.

⁹²⁴ *Ardesco Oil Co. v. Richardson*, 63 Pa. 162, where it was held that the tenant covenanting to repair was not bound to replace with iron parts of a structure made of wood, though this would be more effective and durable.

⁹²⁵ *Soward v. Leggett*, 7 Car. & P. 613.

⁹²⁶ *Lyon v. Greenhow*, 8 Times Law R. 457.

⁹²⁷ *Huggall v. McKean*, Cab. & El. 391.

⁹²⁸ *Keroes v. Richards*, 28 App. D. C. 310.

It has been decided that if, owing to its particular mode of construction, a building is liable, in the course of time, to fall into a particular condition of disrepair, and it does so, the tenant is not, by his covenant to repair, bound to restore it to its former condition, since this would involve the return by him of something different from that which he received.⁹²⁹ The tenant may, for the purpose of relieving himself from liability under his covenant, show the state of repair of the premises at the time of the demise,⁹³⁰ though only generally, it is said, and not in detail,⁹³¹ and only in so far as it goes to show the age, character, and class of the premises, and the extent to which he has performed his contract.⁹³²

A covenant to keep in repair may, it has been held, be limited by the context, as when it was followed by a clause, separated from it only by a semicolon, to the effect that the tenant should replace all glass broken and repair damage from bursting pipes, the tenant being regarded as bound in such case only to make ordinary repairs of the general character specified, and not to rebuild in case of destruction of the building.⁹³³

A covenant to keep or leave the premises in "tenantable" repair has been held to refer to such repair as would make the premises, having regard to their age, character and locality, reasonably fit for their occupation by a reasonably minded tenant of the class who would be likely to take them.⁹³⁴ Under such a

⁹²⁹ *Lister v. Lane* [1893] 2 Q. B. 212, in which case the building was erected on a timber platform resting on a muddy soil, and the timber having rotted the building had to be pulled down, and it was held that the tenant was under no obligation to place "under pinning" to save the building. The same principle is applied in *Wright v. Lawson* [1903] Wkly. Notes 108, 19 Times Law R. 203, 510. But in *Lockrow v. Horgan*, 58 N. Y. 635, it is decided that the lessee is not relieved from his obligation, under his covenant to repair and keep the premises in tenantable condition, by the fact that

the repairs were rendered necessary by the defective construction of the building.

⁹³⁰ *Burdett v. Withers*, 7 Adol. & E. 136.

⁹³¹ *Mantz v. Goring*, 4 Bing. N. C. 451.

⁹³² *Haldane v. Newcomb*, 12 Wkly. Rep. 135.

⁹³³ *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851. To the same effect is *Ducker v. Del Genovese*, 93 App. Div. 575, 87 N. Y. Supp. 889.

⁹³⁴ *Proudfoot v. Hart*, 25 Q. B. Div. 42.

covenant the tenant is not bound to paint any part of the premises unless this is necessary either to make them tenantable within the foregoing definition, or to preserve such part of the structure from decay,⁹³⁵ and he is under no obligation, unless it is necessary in order to make them so tenantable, to replace any portion of the structure.⁹³⁶

A covenant by the lessee to "substantially repair, uphold and maintain" a house has been held to require the tenant to paint inside woodwork so far as necessary to prevent decay.⁹³⁷ But a covenant expressly to repair, repaint, and cleanse the premises does not require repainting, when it is practicable to cleanse the old paint.⁹³⁸ An undertaking to repaint the premises at certain named intervals imposes no liability on the tenant as to the condition of the premises within such intervals.⁹³⁹

A covenant by the lessee of a farm to keep the premises in as good repair as at the time of the lease is obviously not satisfied by the keeping of the premises in such repair as ordinarily prudent farmers would keep them in, if this is not equal to the condition in which they were at the time of the lease.⁹⁴⁰ And it is immaterial, as regards the lessee's obligation under a covenant to keep the premises in repair, that the lessor himself never kept them in repair.⁹⁴¹ It has been decided that the fact that the repairs are rendered necessary by faults in the original construction of the building does not relieve the tenant from the obligation to repair.⁹⁴²

If the lessee agrees to make repairs, he is, it has been held, bound to make all such repairs as the municipal building department shall require to be made for the safety of the building.⁹⁴³ Whether, in case the municipal authorities require that a different and more expensive material be used than was orig-

⁹³⁵ *Crawford v. Newton*, 36 Wkly. Rep. 54.

⁹³⁶ *Proudfoot v. Hart*, 25 Q. B. Div. 42.

⁹³⁷ *Monk v. Noyes*, 1 Car. & P. 265.

⁹³⁸ *Scales v. Lawrence*, 2 Fost & F. 289; *Moxon v. Townshend*, 2 Times Law R. 717, 3 Times Law R. 392.

⁹³⁹ *Perry v. Chotzner*, 9 Times Law R. 488.

⁹⁴⁰ *Vincent v. Crane*, 134 Mich. 700, 97 N. W. 34.

⁹⁴¹ *Hewitt v. Hornbuckle*, 97 Ill. App. 97.

⁹⁴² *Lockrow v. Horgan*, 58 N. Y. 635.

⁹⁴³ *Markham v. David Stevenson Brew. Co.*, 104 App. Div. 420, 93 N. Y. Supp. 684. See post, at notes 1016-1020.

inally used, the extra expense thus involved shall be imposed on the lessee by reason of his covenant, has been regarded as questionable.⁹⁴⁴

b. **Particular causes of injury.** In the absence of an express exception of liability in that regard, it is entirely immaterial that the defects in the premises calling for repair were not the result of the tenant's own act or neglect.⁹⁴⁵ And the fact that the injury results from defects existing in the thing demised at the time of the demise does not, it seems, relieve the tenant.^{945a} Occasionally the lease exempts the lessee from the obligation to repair defects arising from certain enumerated causes. It has been decided, in this connection, that an exception in favor of the lessee, of damage "by the elements or act of Providence" does not cover damage to which human agency in any way contributes,^{945b} while destruction by fire, not resulting from the lessee's fault, is within an exception of "damage by the elements."^{945c}

⁹⁴⁴ Keroes v. Richards, 28 App. D. C. 310, ante, note 313.

⁹⁴⁵ Cohn v. Hill, 9 Misc. 326, 30 N. Y. Supp. 209; Ashby v. Ashby, 59 N. J. Eq. 547, 46 Atl. 522; Lockrow v. Horgan, 58 N. Y. 635; Lovett v. U. S., 9 Ct. Cl. 479. See cases cited post, § 116 d.

So the tenant is, by his agreement, bound to prevent the caving in of the premises by reason of excavations on adjoining premises. Ramsay v. Wilkie, 36 N. Y. St. Rep. 864, 13 N. Y. Supp. 554.

^{945a} See Manchester Bonded Warehouse Co. v. Carr, 5 C. P. Div. 507; Simkins v. Cordele Compress Co., 113 Ga. 1050, 39 S. E. 407; Lockrow v. Horgan, 58 N. Y. 635. The case of a peculiar rather than a defective mode of construction, conducing to the fall of the building, is to be distinguished. See ante, note 929.

Where the lease provided that the lessees should be liable for all damage which should occur to the building "by or by reason of any act or thing done or occurring within said

building, and also for any act or thing done or occurring outside thereof by the said (lessees), their servants, employes or tenants" it was held that the words "by the said," etc., applied to things done within the building as well as to things done outside the building, a construction in harmony with an exception, in a covenant, occurring in the instrument, to yield up in good condition, which exception was broad enough to cover the fall of the building from pre-existing defects, and that consequently the tenant was not bound to restore the building in case of such fall. Machen v. Hooper, 73 Md. 342, 21 Atl. 67.

^{945b} Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115, where the exception was held not to cover injuries caused by a flood from a reservoir, the embankment of which was broken by a stranger. Compare post, at notes 1046-1048.

^{945c} Van Wormer v. Crane, 51 Mich. 363, 16 N. W. 686, 47 Am. Rep.

An exception of injuries caused by "inevitable casualty" has in one case been held to include an injury caused by a fire occurring without the lessee's fault,^{945d} while elsewhere such an exception has been decided not to apply if in any way the injuries could have been prevented.^{945e} Where the expression "other inevitable accident" is used in connection with other named causes of injury, as in the case of an exception of "fire, storm or tempest, or other inevitable accident," it has been held to refer to some cause of injury of the same nature as those specified.^{945f}

An exemption of the tenant from liability for "wear and tear" relieves him, it has been said, from liability for any injuries caused by the operation of natural causes, or by friction incident to the ordinary use of the premises;^{945g} and it has been held in one state to include the fall of a building through its own defects,^{945h} though in England a different view has been taken, it being there said not to cover a "total destruction by a catastrophe never contemplated by either party," even though this results from ordinary use.⁹⁴⁵ⁱ It does not include destruction, total or partial, by fire.^{945j}

In case there is a covenant to deliver up in a certain condition, an exception therein as to injuries caused by particular agencies named has occasionally, on a construction of the whole context, been held to apply likewise to the covenant to repair, found in conjunction therewith.^{945k}

582; *Allen v. Culver*, 3 Denio (N. Y.) 284.

^{945d} *Hodgson v. Dexter*, 1 Cranch, C. C. 109, Fed. Cas. No. 6,565.

^{945e} *Peck v. Scoville Mfg. Co.*, 43 Ill. App. 360, where it was held that the breaking of a window by a stone accidentally kicked up by a passing team was not an "inevitable accident."

^{945f} *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507. See *Saner v. Bilton*, 7 Ch. Div. 815.

^{945g} *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507. See *Waddell v. De Jet*, 76 Miss. 104 23 So. 437, where it is said that "ordinary wear and tear would in-

clude any usual deterioration from the use of the premises in the lapse of time."

^{945h} *Hess v. Newcomer*, 7 Md. 325; *Machen v. Hooper*, 73 Md. 342, 21 Atl. 67.

⁹⁴⁵ⁱ *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507 (breaking down of warehouse from ordinary and proper use).

^{945j} *Armstrong v. Maybee*, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898; *McIntosh v. Lown*, 49 Barb. (N. Y.) 550. Compare post, at notes 1044, 1045.

^{945k} *Ball v. Wyeth*, 90 Mass. (8 Allen) 275; *Allen v. Fisher*, 66 N. J. Law, 261, 49 Atl. 477. Contra,

A covenant to repair is, it has been held, broken by misfeasance on the part of the tenant as well as by nonfeasance. That is, there is a breach of the covenant if he makes unauthorized alterations in the premises.⁹⁴⁵¹

The tenant is not, by his agreement to repair, bound to remove the effects of ordinary wear and tear on the building, caused by the elements during his tenancy, that is, he is not bound to return, at the end of his tenancy, premises in effect no older than they were at the beginning of the tenancy.^{945m} But under a covenant to "preserve the property from deterioration" he must, it has been said, do something to offset the natural wear and damage done by the elements.⁹⁴⁵ⁿ

In New York it has been held that a covenant by the lessee to make all inside and outside repairs imposes on him an obligation to make "ordinary" repairs only, and not to reconstruct a part of a building destroyed by accident,^{945p} or which is in such condition as to be condemned by the municipal authorities.^{945q}

c. **Parts of premises to be repaired.** An agreement by the tenant to repair or keep in repair the premises extends *prima facie* to everything included in the demise, though not specifically named therein.⁹⁴⁶ Such an agreement has been construed as applying to buildings erected on the premises during the term,

Kling v. Dress, 28 N. Y. Super. Ct. (5 Rob.) 521.

⁹⁴⁵¹ Doe d. Vickery v. Jackson, 2 Starkie, 293; Gange v. Lockwood, 2 Fost. & F. 115. So the taking down of a wall was regarded as a breach of a covenant to uphold the wall. Doe d. Wetherell v. Bird, 6 Car. & P. 195, and, apparently, the removal of parts of a fence was regarded as a breach of a covenant to keep the fences in repair. Prettyman v. Hartly, 77 Ill. 265.

^{945m} Gutteridge v. Munyard, 1 Moody & R. 334; Lister v. Lane [1893] 2 Q. B. 212; Roberts v. Freeborn, 14 Daly (N. Y.) 529; Harris v. Goslin, 3 Har. (Del.) 338. But see Davies v. Davies, 38 Ch. Div. 499.

⁹⁴⁵ⁿ Scott v. Haverstraw Clay & Brick Co., 135 N. Y. 141, 31 N. E. 1102; Barnhart v. Boyce, 102 Ill. App. 172.

^{945p} May v. Gillis, 169 N. Y. 330, 62 N. E. 385. See post, § 116 d.

^{945q} Street v. Central Brew. Co., 101 App. Div. 3, 91 N. Y. Supp. 547.

⁹⁴⁶ Pyot v. St. John, Cro. Jac. 329; Openshaw v. Evans, 50 Law T. (N. S.) 156.

A covenant to repair the premises applies to an elevator included in the demise (J. Gray Estey & Co. v. Corn, 46 Misc. 270, 91 N. Y. Supp. 745); but not to an elevator which, as remaining in the landlord's control, cannot be regarded as a part of the premises leased. Wagner v. Welling, 84 N. Y. Supp. 979.

even without any specific reference thereto.^{946a} A covenant to repair "the demised buildings," however, has been held not to include buildings subsequently erected,⁹⁴⁷ unless, it seems, they are attached to and made part of the old buildings.⁹⁴⁸ A covenant to repair may of course be so phrased as to apply only to buildings thereafter to be erected.⁹⁴⁹ The whole question of what is within the operation of the covenant is obviously a matter of the construction of the particular language used.⁹⁵⁰

d. **Obligation to rebuild on destruction.** An express contract by the tenant to repair or keep in repair binds him to repair, although the injuries were accidental, and in no way caused by his negligence.⁹⁵¹ "The express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident or the act of a stranger."^{951a} This principle finds a frequent application in case of the destruction by fire of buildings or other structures on the premises, in which case the tenant is regarded as bound, by his contract to repair or to keep in repair, to rebuild the structure destroyed.⁹⁵² And so the tenant must, under such an agreement, rebuild in case of destruction by other

^{946a} *Douse v. Earle*, 3 Lev. 264, 2 Vent. 126; *Brown v. Blunden*, Skin. 121. This is obviously the case if such new buildings are specifically referred to. *Hudson v. Williams*, 39 Law T. (N. S.) 632.

⁹⁴⁷ *Doe d. Worcester Trustees v. Rowlands*, 9 Car. & P. 740, per Coleridge, J.

⁹⁴⁸ *Cornish v. Cleife*, 3 Hurl. & C. 446, per Bramwell B.

⁹⁴⁹ *Lant v. Norris*, 1 Burrow, 287.

⁹⁵⁰ See *Cornish v. Cleife*, 3 Hurl. & C. 446.

⁹⁵¹ See ante, § 116 b.

^{951a} Per Gray, J., in *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 119, quoted in *David v. Ryan*, 47 Iowa, 642. To the same effect are *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Moses v. Old Dominion Iron & Nail Works Co.*, 75 Va. 95.

⁹⁵² *Bullock v. Dommitt*, 6 Term R. 650; *Nave v. Berry*, 22 Ala. 382; *Warner v. Hitchins*, 5 Barb. (N. Y.) 667; *Ely v. Ely*, 80 Ill. 532; *Reno v. Mendenhall*, 58 Ill. App. 87; *David v. Ryan*, 47 Iowa, 642; *Allen v. Culver*, 3 Denio (N. Y.) 294; *Fowler v. Payne*, 49 Miss. 32, 76; *McIntosh v. Lown*, 49 Barb. (N. Y.) 550; *Hoy v. Holt*, 91 Pa. 88, 36 Am. Rep. 659; *Gettysburg Elec. R. Co. v. Electric Light, Heat & Power Co.*, 200 Pa. 372, 49 Atl. 952; *Phillips v. Stevens*, 16 Mass. 238; *Cline v. Black*, 4 McCord Law (S. C.) 431; *Armstrong v. Maybee*, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898; *Moses v. Old Dominion Iron & Nail Works Co.*, 75 Va. 95; *Dermott v. Jones*, 62 U. S. (2 Wall.) 1.

causes, as by lightning,⁹⁵³ or by a flood or tornado.⁹⁵⁴ There are *dicta*, and perhaps one decision, to the effect that the tenant is not bound to rebuild in case of such destruction by the act of God or of destruction by the public enemy.⁹⁵⁵ Such a view can be supported only on the theory that the covenant to repair, in view of the circumstances under which it was made, is not, in the particular case, to be construed as extending to injuries so caused,⁹⁵⁶ and the authorities show that such a limited con-

⁹⁵³ *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Bohannons v. Lewis*, 19 Ky. (3 T. B. Mon.) 380.

⁹⁵⁴ *Brecknock & Abergavenny Canal Nav. Co. v. Pritchard*, 6 Term R. 750; *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 119; *Proctor v. Keith*, 51 Ky. (12 B. Mon.) 254; *Moses v. Old Dominion Iron & Nail Works Co.*, 75 Va. 95; *Spafford v. Meagley*, 1 Ohio Dec. 364. In *Waite v. O'Neil*, 22 C. C. A. 248, 76 Fed. 408, 34 L. R. A. 550, where the owner of land abutting on a river had "leased" the right to use the river front for loading and unloading boats, with the right to a roadway for purposes of access, it was held that the lessee did not, by covenanting to deliver up the premises in good order and condition and to keep the road in good repair, bind himself to prevent the washing away of the land by an extraordinary change in the current owing to the giving away of certain protective works further up the river, this conclusion being based not only on the intrinsic nature of the case, but also on the fact that the lease stipulated that the lessee should not make repairs without the written consent of the lessor, and that the lessor had expressly reserved the right to make such repairs as should be necessary "to the

security or preservation of the premises."

⁹⁵⁵ See *dicta* in *Hoy v. Holt*, 81 Pa. 88, 36 Am. Rep. 659; *Halbut v. Forrest City*, 34 Ark. 246; *Singleton v. Carroll*, 29 Ky. (6 J. J. Marsh.) 528, 22 Am. Dec. 95.

In *Pollard v. Shaffer*, 1 Dall. (Pa.) 210, where the building on the premises had been destroyed by alien enemies, it was held that the covenant to repair was to be construed as not extending to an injury so caused or to one caused by act of God.

⁹⁵⁶ "The question in all these cases is how far the parties intended the covenant to extend; and where it has been incautiously said that the law will excuse nonperformance, when by the act of God performance has become impossible, the real defense has been that the parties did not by their contract intend to provide against such losses, and hence the agreement was not broken. Courts may be less inclined to hold that providential losses were within the intent of the parties than those arising from other causes; but, when the intent is ascertained, the principle of law applicable in either case is the same." *Sill, J.*, in *Warner v. Hitchins*, 5 Barb. (N. Y.) 666. See, also, *Pollard v. Schaffer*, 1 Dall. (Pa.) 210 (ante, note 955), where the de-

struction is not ordinarily placed upon the covenant.⁹⁵⁷ The tenant is liable, under the covenant to repair, in case the premises are injured or destroyed by third persons,⁹⁵⁸ or even if the premises fall on account of defects existing therein at the time of the lease.⁹⁵⁹

In one state the view has been taken that the word "repair," meaning not to make a new thing, but to refit or make good an existing thing, does not require the tenant to rebuild upon the destruction of the building on the premises.⁹⁶⁰ However reasonable this view may be when there is a total destruction of a building on the premises, it does not seem applicable when a part only of a building is destroyed, since the reconstruction of that part involves the repair of the building considered as a whole. A distinction might perhaps be suggested, in this connection, between a covenant to keep *the premises* in repair, and one to keep a *building* thereon in repair, on the theory that the repair of the premises involves the erection of a building in place of one destroyed, while the repair of a building on the premises at the time of the lease does not involve the erection of a new one upon its destruction.

elision is based on a construction of the covenant.

⁹⁵⁷ See cases cited ante, note 952, and also, to the same effect, *Paradine v. Jane*, Aleyn, 27; *Walton v. Waterhouse*, 2 Wms. Saund. 422 a, note 2; *Superintendent of Schools of City of Trenton v. Bennett*, 27 N. J. Law (3 Dutch) 513, 72 Am. Dec. 373; *Sheppard's Touchstone*, p. 173.

"Where a tenant has covenanted to repair, and the buildings are destroyed by fire, or lightning, or the act of God, as it is termed, the tenant must rebuild upon the demised premises. The reason is obvious. He has contracted expressly to do it, and it is possible for him to restore that which has been destroyed, and if he does not do it he must respond in damages. By rebuilding, it will answer the covenant to repair, and

he cannot avoid his obligation by reason of the destruction of the building, even without fault on his part. It is the contract, and he must perform it." Per Scott, J., in *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60.

⁹⁵⁸ *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 119; *Beach v. Crain*, 2 N. Y. (2 Comst.) 87, 49 Am. Dec. 369.

⁹⁵⁹ *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507.

⁹⁶⁰ *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. Rep. 554. There was in this case also a covenant to return in the same condition of good repair as when the lease was made, but this is barely referred to.

The covenant to repair or keep in repair is quite frequently found in conjunction with another covenant, as to the condition of the demised premises at the end of the term, as when the lessee covenants to repair the premises and deliver them up at the end of the term in the same condition as they are in at the time of the demise. The presence of such additional covenant does not, according to the decisions generally, affect the obligation of the tenant, under the covenant to repair, to rebuild in case of destruction.⁹⁶¹ But it has been suggested that in such a case the lessee's covenant to repair requires him to do so only so far as may be necessary to comply with his covenant to leave in the condition named, and that consequently it does not require him to rebuild in case of destruction.⁹⁶²

The tenant's obligation, under his covenant, to rebuild in case of fire is not affected by the fact that the lessor insured the

A like view is indicated in *May v. Gillis*, 169 N. Y. 330, 62 N. E. 385, where it was decided that a covenant by the lessee to make all "outside and inside repairs" required him to make "ordinary repairs" only, and consequently did not deprive him of the right to vacate the premises upon their becoming untenable owing to the removal by the municipal authorities of a part which had become unsafe.

⁹⁶¹ See *Nave v. Berry*, 22 Ala. 382; *Ely v. Ely*, 80 Ill. 532; *Schmidt v. Pettit*, 8 D. C. (1 Mac Arthur) 179; *Abby v. Billups*, 35 Miss. 630, 72 Am. Dec. 143; *Phillips v. Stevens*, 16 Mass. 238; *Myers v. Myrrell*, 57 Ga. 516; *Gettysburg Elec. R. Co. v. Electric Light, Heat & Power Co.*, 200 Pa. 372, 49 Atl. 952; *Armstrong v. Maybee*, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898.

⁹⁶² See *McIntosh v. Lown*, 49 Barb. (N. Y.) 550, where it is said: "Some authorities hold that where the covenant by the lessee is to repair and leave the premises in the same state

as he found or received them, or language to that effect, he is merely required to use his best endeavors to keep them in the same tenable repair, and is not bound by such a covenant to restore buildings destroyed by fire or otherwise during the term without his fault. This is in consequence of a construction given to the covenant that the lessee is so to repair or keep in repair the buildings, etc., as to leave the demised premises in the same state as he received them; and such I think is the settled law. But where the covenant is to repair or keep in repair generally the buildings, etc., without the qualifying words mentioned, all the authorities hold that it requires the tenant to rebuild, etc., in case of the accidental destruction of the buildings, etc." No authorities are referred to in this case in support of the construction of the covenant, first above referred to, and none have come under the notice of the present writer.

property for his own benefit and has obtained the proceeds of such insurance.⁹⁶³ But it has been held that the effect of a stipulation of the lease that the lessee should take out insurance to a certain amount and assign it to the lessor, for the purpose of restoring the buildings in case of fire, showed that the covenant to repair was not to be construed as imposing any liability on the lessee to rebuild in case of fire.⁹⁶⁴

Where, after the making of the covenant, an ordinance was adopted forbidding the erection of wooden buildings, the lessee was regarded as bound to rebuild, although to do so involved a much greater expenditure than if he could have rebuilt with wood, out of which material the buildings destroyed had been constructed.⁹⁶⁵

In view of the liability to which the tenant may be exposed, under his covenant to repair, in case of the destruction of the premises by fire or other accident, for which he is in no way responsible, an exception as to injuries from such causes is frequently inserted in the covenant. And so a covenant to repair, in general terms, may, by the language of the context, be limited to a particular class of repairs, so as not to be applicable to the restoration of a building destroyed by fire or otherwise.⁹⁶⁶ In some states, moreover, statutes have been adopted with the purpose of relieving the tenant from liability in such case when his covenant contains no express exception.⁹⁶⁷ A statute thus providing that no agreement that he will repair or leave in repair shall bind the tenant to erect similar buildings in case those on the premises are destroyed by fire has been held to apply though

⁹⁶³ *Ely v. Ely*, 80 Ill. 532; *Leeds v. Cheetham*, 1 Sim. 146.

⁹⁶⁴ *Sun Ins. Office v. Varble*, 103 Ky. 758, 46 S. W. 486, 41 L. R. A. 792. The covenant was actually one to deliver up the premises in good repair at the end of the term, but the principle of the decision would apply as well to a covenant to repair.

⁹⁶⁵ *David v. Ryan*, 47 Iowa, 642. But a different view was taken in *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430, as to such a covenant by a lessor to rebuild, it being construed as not intended to bind him to rebuild under such changed conditions.

⁹⁶⁶ *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851; *Ducker v. Del Genovese*, 93 App. Div. 575, 87 N. Y. Supp. 889.

⁹⁶⁷ *Kentucky St.* 1903, § 2297; *North Carolina Revision* 1905, § 1985 (if house destroyed or damaged to more than half its value). See statutes cited post, note 1034.

there is a mere partial destruction or mere injury to the building.⁹⁶⁸

e. **Conditions precedent.** The question sometimes arises whether a provision of the lease as to some thing to be done by the landlord makes a condition precedent to the obligation of the tenant to make the repairs. Covenants, for instance, by the tenant, to keep the premises in repair, "from and after" their repair by the landlord⁹⁶⁹ or "the same being first put into repair by" the landlord,⁹⁷⁰ have been regarded as imposing no liability on the tenant until the landlord has done the things named. Likewise it is held in England that where the tenant agrees to repair, the landlord "finding timber for the purpose," the tenant is under no obligation to repair until the landlord finds the timber,⁹⁷¹ though it is sufficient that he is ready and willing to find the timber, he not being bound to cut it until required.⁹⁷² But in one state it has been held that the landlord's failure to furnish material under such a covenant did not excuse the tenant's non-performance.⁹⁷³ A covenant by the tenant to make repairs and one by the landlord to find materials on notice from the latter, the two covenants being in different parts of the instrument, have been regarded as independent.⁹⁷⁴ The question is obviously one of the construction of the particular instrument.

In case the lessor covenants to repair the outside of the building and the lessee the inside, the latter, it has been held, need not, in case the building falls, repair the inside, until the lessor has completed the rebuilding of the outside.⁹⁷⁵

It does not seem that, ordinarily, a notice by the landlord to the tenant to repair would be necessary in order to put the tenant in default, since the latter is in possession and so in a

⁹⁶⁸ Sun Ins. Office v. Varble, 103 Ky. 758, 46 S. W. 486, 41 L. R. A. 792. 588, 34 Atl. 319, 321. Here the lessee's agreement was, "to keep the fences in proper repair, the material for which to be furnished by the lessor."

⁹⁶⁹ Slater v. Stone. Cro. Jac. 645.

⁹⁷⁰ Neale v. Ratcliff, 15 Q. B. 916; Coward v. Gregory, L. R. 2 C. P. 1530.

⁹⁷¹ Thomas v. Cadwallader, Willes, 496.

⁹⁷² Martyn v. Clue, 18 Q. B. 661.

⁹⁷³ Wood v. Sharpless, 174 Pa.

⁹⁷⁴ Tucker v. Linger, 21 Ch. Div. 18, per Kay, J.; Mucklestone v. Thomas, Willes, 146.

⁹⁷⁵ Leavitt v. Fletcher, 92 Mass. (10 Allen) 119.

position to discover the need of repairs. It has been decided that even when a notice to repair is necessary in order to enforce a forfeiture of the leasehold for nonrepair, the notice need not state the particular repairs necessary.⁹⁷⁶ Occasionally a lease contains both a covenant to repair and also a covenant to repair after a notice from the landlord of a specified length, and it has been held that such covenants are independent, so that the landlord may enforce the tenant's liability under the former although no notice has been given under the latter, or the notice has not expired,⁹⁷⁷ and that if notice is given to repair, without reference to the time named in the latter covenant, it will be referred to the general covenant to repair, and not to that to repair on notice.⁹⁷⁸ But a covenant to repair at all times when occasion may require during the term "and at the furthest within three months after notice" is a single covenant, and the lessee is bound to repair only after the notice named.⁹⁷⁹

f. **Accrual and continuance of liability.** On a covenant to keep in repair, an action may be brought as soon as the premises become out of repair, without waiting for the end of the term,⁹⁸⁰ but if the premises are injured by some accidental cause, the lessee has a reasonable time within which to repair.⁹⁸¹

The covenant is continuous in its nature, and consequently in case of successive breaches a separate action may be brought for each breach,⁹⁸² and the fact that there has been a recovery for a breach thereof is no bar to a subsequent action against the lessee or his assignee, so long as the premises are out of repair,

⁹⁷⁶ *Foss v. Stanton*, 76 Vt. 365, 57 Atl. 942. *Payne v. James*, 42 La. Ann. 230, 7 So. 457, contra, seems to be based on

⁹⁷⁷ *Baylis v. Le Gros*, 4 C. B. (N. S.) 537; *Doe d. Morecraft v. Meux*, 4 Barn. & C. 606. the construction of a particular lease.

⁹⁷⁸ *Few v. Perkins*, L. R. 2 Exch. 92. So, under a covenant to "maintain the buildings," the lessee can be

⁹⁷⁹ *Horsefall v. Testar*, 7 Taunt. 385. sued at any time if he neglects to maintain them. *Buck v. Pike*, 27 Vt. 529.

⁹⁸⁰ *Luxmore v. Robson*, 1 Barn. & Ald. 584; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400; *Perry v. Bank of* ⁹⁸¹ *Sheppard's Touchstone*, 173; *Anonymous*, 1 Dyer, 33 a.

Upper Canada, 16 U. C. C. P. 404. ⁹⁸² *Coffin v. Talman*, 8 N. Y. (4 Seld.) 465.

though such former recovery may be asserted in mitigation of damages.⁹⁸³

That a subsequent lessee has covenanted to make the repairs which the first lessee should have made under his covenant,⁹⁸⁴ and even that such subsequent lessee has actually made them,⁹⁸⁵ does not, it has been held, affect the liability of the first lessee for breach of his covenant.

g. **Specific enforcement of contract.** Specific performance of a contract to repair will not be granted by a court of equity.⁹⁸⁶ In one case, however, performance of a contract to repair, not occurring in connection with a lease, was in effect specifically enforced by an injunction against the continuance of the state of disrepair.⁹⁸⁷ It has been in one state decided that a mandatory injunction would not issue to compel the lessee to comply with his covenant to repair, the building not appearing to be in danger, the lessee having offered to permit the lessor to make repairs, and the lessor having an adequate remedy at law.⁹⁸⁸

h. **Damages for breach.** In case there is a breach of a covenant to keep in repair, and an action on account of such breach is brought during the term, the measure of damages has, in England, been stated to be the amount to which the salable value of the reversion is injured by the nonrepair of the premises, and not the amount which would be necessary to put the premises in repair, since the landlord is not bound to expend the damages awarded him in making repairs, nor has he any right, without permission, to enter on the premises to make repairs.⁹⁸⁹ It has, however, been said by the highest English court that no "hard and fast rule" can be laid down as to the damages in such case,

⁹⁸³ Coward v. Gregory, L. R. 2 C. Westminster Chambers Ass'n [1893] P. 153. 1 Ch. 124.

⁹⁸⁴ Joyner v. Weeks [1891] 2 Q. B. 31.

⁹⁸⁵ Appleton v. Marx, 117 App. Div. 206, 102 N. Y. Supp. 2.

⁹⁸⁶ See Fry, Spec. Perf. (4th Ed.) 41; Hill v. Barclay, 16 Ves. Jr. 402.

⁹⁸⁷ Lane v. Newdigate, 10 Ves. Jr. 192. But see comment on this decision in Ryan v. Mutual Tontine

⁹⁸⁸ Jarvis v. Hernwood, 25 N. J. Eq. (10 C. E. Greene) 460.

⁹⁸⁹ Smith v. Peat, 9 Exch. 161; Doe d. Schools & Almshouses v. Rowlands, 9 Car. & P. 734; Mills v. Guardians of Poor of East London Union, L. R. 8 C. P. 79. See Watriss v. Cambridge Nat. Bank, 130 Mass. 343; Henderson v. Thorn [1893] 2 Q. B. 164.

but that "all the circumstances of the case must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by breach of covenant."⁹⁹⁰ Regarding the injury to the value of the reversion as the proper measure of damages, the fact that the term has a greater or less time still to run may have an important bearing on the question of damages, since, if the expiration of the term is remote, the present state of disrepair may not affect, to any considerable extent, the value of the reversion.⁹⁹¹ In that jurisdiction, moreover, if the action is brought after the end of the term, it is regarded as equivalent to an action on an agreement to leave in repair, and the measure of damages has been asserted to be the reasonable cost of making the repairs,⁹⁹² without reference to whether the landlord has made them or intends to make them,⁹⁹³ or to whether the failure to make them has diminished the value of the reversion.⁹⁹⁴ It has been said that the landlord is in such case entitled also to recover compensation for any loss of the use of the premises as a result of the making by him of the repairs.⁹⁹⁵

In this country, the cost of making the repairs has ordinarily been regarded as the proper measure of damages, without reference to whether the action is brought before or after the expiration of the term.⁹⁹⁶ A recent case in the highest court of

⁹⁹⁰ *Conquest v. Ebbetts* [1896] App. 770; *Joyner v. Weeks* [1891] 2 Q. B. Cas. 490. 31.

⁹⁹¹ *Doe d. Schools & Almshouses v. Rowlands*, 9 Car. & P. 734, per Coleridge, J.; *Turner v. Lamb*, 14 Mees. & W. 412; *Ebbetts v. Conquest* [1895] 2 Ch. 377. Compare *Atkinson v. Beard*, 11 U. C. C. P. 245, to the effect that the fact that the lease has many years to run does not restrict the recovery to nominal damages.

⁹⁹² *Joyner v. Weeks* [1891] 2 Q. B. 31; *Morgan v. Hardy*, 17 Q. B. Div. 770. ⁹⁹⁵ See *Woods v. Pope*, 6 Car. & P. 782; *Birch v. Clifford*, 8 Times Law R. 103. ⁹⁹⁶ *Lehmaier v. Jones*, 100 App. Div. 495, 91 N. Y. Supp. 687; *Markham v. David Stevenson Brew. Co.*, 104 App. Div. 420, 93 N. Y. Supp. 684; *Webster v. Nossor*, 2 Daly (N. Y.) 186, 3 Abb. Pr. (N. S.) 39, 33 How. Pr. 136, in which latter case the court says that the lessée could, in equity, apparently, compel the lessor to apply the money to repairs.

⁹⁹³ *Rawlings v. Morgan*, 18 C. B. (N. S.) 776; *Inderwick v. Leech*, 1 Times Law R. 95, 484. The decision is based on *Vivian v. Campion*, 1 Salk. 140, 2 Ld. Raym. 1, 125, which is not approved by some

⁹⁹⁴ *Morgan v. Hardy*, 17 Q. B. Div. of the later English cases. See, *E. and Ten* 49.

New York explicitly adopts the English rule that such is the case if the action is brought after the term, regardless of whether the value of the reversion has been impaired thereby.^{996a}

It appears to have been decided in England that, in the case of a covenant to repair after notice of a specified period, if after notice and the expiration of such period, and the tenant's failure to make repairs, the landlord himself makes the repairs, he can recover the reasonable cost thereof,⁹⁹⁷ while he can recover only nominal damages in case he himself makes repairs upon the tenant's noncompliance with a general covenant to repair, for the reason, it is said, that the premises are not in that case out of repair at the time of bringing the action.⁹⁹⁸

In case of a covenant by a subtenant to keep in repair, in determining the measure of damages for breach, considerations may enter other than those applicable when the covenant is in a head lease. If there is such a covenant both in the head lease and in the sublease, the fact that the intermediate lessee is liable on his covenant is to be considered in determining the subtenant's liability on *his* covenant, provided the sublease was taken with notice that the person making it was himself a lessee.^{998a} The covenant by the subtenant to repair, though expressed in the same terms as that of the sublessor, does not, however, necessarily entitle the latter to recover, on its breach, the full amount for which he, the sublessor, may be liable to the original lessor on the covenant of the head lease, since the two covenants are entered into at different times and for different periods.^{998b} Nor can the intermediate lessee recover, under the subtenant's cov-

also, apparently to the effect that the cost of repairs is the measure of damages, *Simkins v. Cordele Com-* for the damage and loss sustained by the injury to the property."

press Co., 113 Ga. 1050, 39 S. E. 407; ^{996a} *Appleton v. Marx*, 191 N. Y. 81, 83 N. E. 563, 16 L. R. A. (N. S.) 210.

Martinez v. Thompson, 80 Tex. 568, ⁹⁹⁷ *Colley v. Streeton*, 2 Barn. & C. 273.

16 S. W. 334; *Lockrow v. Horgan*, 58 N. Y. 635. In *Moses v. Old Dominion Iron & Nail Works*, 75 Va. 95, it is said that the measure of damages ⁹⁹⁸ *Doe d. Rutzen v. Lewis*, 5 Adol. & E. 277; *Williams v. Williams*, L. R. 9 C. P. 659.

for breach of such a covenant is the sum "necessarily expended in restoring the property to its former condition, or perhaps such sum as will be ^{998a} *Conquest v. Ebbetts* [1896] App. Cas. 490, affg. *Ebbetts v. Conquest* [1895] 2 Ch. 377.

sufficient to compensate the lessor ^{998b} *Penley v. Watts*, 7 Mees. & W. 601; *Minshull v. Oakes*, 2 Hurl. & N.

enant, the costs incurred by him in an action brought by the original lessor to enforce the covenant in the head lease, as if the covenant in the sublease were one of indemnity.^{998c} But it has been decided that a provision of the sublease, making it in terms "subject in all respects to the terms of an existing lease and the covenants and stipulations contained therein," is in effect a covenant of indemnity, and entitles the lessee to recover from the sublessee the costs of an action which the lessee has reasonably defended.^{998d} It has been decided in England that if the head landlord notifies his tenant to repair, in accordance with the latter's covenant, and the latter then notifies the subtenant to make the repairs and, upon the latter's noncompliance, does them himself to avoid a forfeiture, the tenant, though he may be a trespasser in entering on the subtenant's premises to make the repairs, may recover from the subtenant the cost of the repairs so made.^{998e}

i. **Rights and liabilities on assignment.** A covenant by the lessee to repair runs with the land and consequently binds an assignee of the leasehold interest,⁹⁹⁹ and the benefit thereof passes to a transferee of the reversion.¹⁰⁰⁰ If one who has committed a breach of the covenant afterwards assigns the leasehold, and the repairs are still unmade at the time of the assignment, the assignee is bound to make them, and is liable on the covenant for his failure so to do.¹⁰⁰¹ It has in effect been decided that if the

793; *Walker v. Hatton*, 10 Mees. & W. 249. *Wakefield v. Brown*, 9 Q. B. 209; *Williams v. Earle*, L. R. 3 Q. B. 739;

^{998c} *Penley v. Watts*, 7 Mees. & W. 601; *Walker v. Hatton*, 10 Mees. & W. 249. *Perry v. Bank of Upper Canada*, 16 U. C. C. P. 404. It binds an assignee of the leasehold in part of

^{998d} *Hornby v. Cardwell*, 8 Q. B. Div. 329. the premises. *Congham v. King*, Cro. Car. 221; *Stevenson v. Lambard*, 2 East, 580.

^{998e} *Colley v. Streeton*, 2 Barn. & C. 273. Compare *Williams v. Williams*, L. R. 9 C. P. 659, where the sublessor was not allowed to recover the cost of repairs made by him to avoid a forfeiture for the reason that he did not give the sublessee proper notice to make the repairs. ¹⁰⁰⁰ *Badeley v. Vigurs*, 4 El. & Bl. 71; *Sampson v. Easterby*, 9 Barn. & C. 505; *Martyn v. Williams*, 1 Hurl. & N. 817.

⁹⁹⁹ *Spencer's Case*, 5 Coke, 16; *Badeley v. Vigurs*, 4 El. & Bl. 71; ¹⁰⁰¹ *Coffin v. Talman*, 8 N. Y. (4 Seld.) 465; *Coward v. Gregory*, L. R. 2 C. P. 153; *Plummer v. Johnson*, 18 Times Law R. 316. See post, § 149, at notes 190, 191.

leasehold has passed through several hands, and the premises are out of repair at the time of action brought, and are proven to have been so when held by the defendant, it is for him to show how much of the injury arose subsequently to his occupation.¹⁰⁰²

It has been decided that a transferee of the reversion cannot recover on a covenant to keep in repair, if the premises were out of repair at the time of the transfer, and the tenant merely allowed them, after the transfer, to remain in the same condition, it being said that the tenant's duty to such transferee "is to be measured by the condition of the property at the time of the transfer."¹⁰⁰³ On the other hand it has been decided that a covenant to repair on notice could be enforced by the transferee of the reversion, though the lack of repair existed at the time of the transfer, notice not having been then given.¹⁰⁰⁴

§ 117. Contract to make alterations or improvements.

The tenant is under no obligation, apart from express contract, to make alterations or improvements on the premises, and so he is not bound to pay the cost of improvements voluntarily made by the lessor, after making the lease, in anticipation of the lessee's occupancy.¹⁰⁰⁵ Occasionally, however, the tenant contracts to make alterations or improvements.

A covenant to rebuild the structures on the premises is not satisfied, it has been held, by mere repairs,¹⁰⁰⁶ but a covenant to put and keep in repair, and take down as occasion may require, and build new houses, was held to be satisfied by repairing the houses so as to make them as good as new.¹⁰⁰⁷ A covenant to rebuild does not necessitate an erection precisely similar in form, style and elevation to that previously existing.¹⁰⁰⁸

It has been decided that a covenant to "keep up" the sidewalks "in front of" a corner lot leased obliged the tenant to pay

As to the liability of an executor on his testator's covenant, see ante, §§ 55 a, 158 a 2 (h), notes 373, 374.

¹⁰⁰⁵ First Nat. Bank v. Lucas, 21 Neb. 280, 31 N. W. 805.

¹⁰⁰² Smith v. Peat, 9 Exch. 161.

¹⁰⁰⁶ City of London v. Nash, 3 Atk. 512.

¹⁰⁰³ Foss v. Stanton, 76 Vt. 365, 57

¹⁰⁰⁷ Evelyn v. Raddish, 7 Taunt. 411.

Atl. 942. Johnson v. St. Peter's, Hereford, 4 Adol. & E. 520, is to the same effect.

¹⁰⁰⁸ Low v. Innes, 4 De Gex, J. & S. 286.

¹⁰⁰⁴ Mascal's Case, 1 Leon. 62.

for the construction, under a municipal ordinance, of a sidewalk "along the side of" the lot.¹⁰⁰⁹ A covenant to keep in repair the buildings which the lessee had agreed to erect was held to involve a continuing obligation to erect such buildings, since this was necessary to enable him to keep them in repair.¹⁰¹⁰ A contract to deliver, as part of the rent, refuse from the stove mill to be erected by the lessee has been regarded as imposing on him an obligation to erect the mill.^{1010a} A covenant to make "improvements" to a specified amount is satisfied by the erection of new buildings to that amount as well as by the making of repairs and additions to old ones.¹⁰¹¹

A provision that certain specified work and such other work as "may be needed or desired in and about" said premises shall be done by the lessees "at their expense" was held merely to relieve the lessor from the expense of work done at the desire of the lessees, and not to impose on the lessees the expense of work desired by the lessor.¹⁰¹²

If the lessee agrees to make improvements to the approbation of a person to be named by the landlord, the naming of such person is, it has been held, a condition precedent to the tenant's obligation to perform.¹⁰¹³ And even though the person so named is not satisfied, a forfeiture will not be declared if he should have been satisfied.¹⁰¹⁴ Where the tenant was to retain out of the rent the cost of improvements to be made by him to the satisfaction of the landlord, he was regarded as entitled to exercise the right of retention even though the landlord's approval had not been expressed.¹⁰¹⁵

A covenant by the lessee to comply with all the rules, regulations, and ordinances of the various city departments has been held not to impose upon him the obligation of removing, upon the demand of the city authorities, a stone stoop and steps ex-

¹⁰⁰⁹ *City of Des Moines v. Dorr*, 31 Iowa, 89.

¹⁰¹⁰ *Bennett v. Herring*, 3 C. B. (N. S.) 370; *Jacob v. Down* [1900] 2 Ch. 156.

^{1010a} *Noland v. Cincinnati Co-operative Co.*, 26 Ky. Law Rep. 837, 82 S. W. 627.

¹⁰¹¹ *Peters v. Stone*, 193 Mass. 179, 79 N. E. 336.

¹⁰¹² *Wicker v. Lewis*, 40 Ill. 251.

¹⁰¹³ *Coombe v. Green*, 11 Mees. & W. 480; *Hunt v. Bishop*, 8 Exch. 675.

¹⁰¹⁴ *Doe d. Baker v. Jones*, 2 Car. & K. 743.

¹⁰¹⁵ *Dallman v. King*, 4 Bing. N. C. 105.

tending beyond the building line.¹⁰¹⁶ And a covenant by him to surrender the premises in as good condition as when received, subject to certain specified alterations to be made by the lessee, imposes on him no obligation to pay the cost of rebuilding a wall condemned by the city authorities as unsafe.¹⁰¹⁷ A covenant to bear all the expenses of repairing during the tenancy has been held to require the lessee to bear the expense of repairs required by the city authorities in order to render the structure safe, the lessor having made the repairs after requesting the lessee either to make them or to vacate the premises, and the latter having refused to do either.¹⁰¹⁸ And such a covenant has been regarded as entitling the lessor to reimbursement for the cost of constructing a new drain in accordance with the demand of the city authorities.¹⁰¹⁹

In England there has been considerable litigation upon the question whether a covenant by the lessee of a particular character, such as one to pay "rates," or one to pay "assessments," "impositions," "duties," "charges" or "outgoings," involved an obligation to pay for alterations or improvements required by law.¹⁰²⁰

For the performance of a covenant to make improvements, as for the performance of one for specific repairs, the lessee has, it would seem, the full time of the lease, since during the lease he, and not the landlord, is the one injured by the want of the improvements.¹⁰²¹ A provision, however, that the improvements

¹⁰¹⁶ *City of New York v. U. S. Trust Co.*, 116 App. Div. 349, 101 N. Y. Supp. 574.

A covenant by the lessee to comply with the orders of the municipal building department for the correction, prevention and abatement of nuisances or other grievances has been held not to impose upon him the obligation to construct a fire escape required by that department. *Kalman v. Cox*, 46 Misc. 589, 92 N. Y. Supp. 816.

¹⁰¹⁷ *Clark v. Gerke*, 104 Md. 504, 65 Atl. 326.

¹⁰¹⁸ *Martinez v. Thompson*, 80 Tex. 568, 16 S. W. 334.

¹⁰¹⁹ *Keroes v. Richards*, 28 App. D. C. 310, ante, note 313.

¹⁰²⁰ See *Fawcett, Landl. & Ten.* (3d Ed.) at p. 389. That a covenant to pay all "outgoings" includes such expenses, see *Goldstein v. Hollingsworth* [1904] 2 K. B. 578; *Morris v. Beal* [1904] 2 K. B. 585; *Stockdale v. Ascherberg* [1904] 1 K. B. 447; *Harris v. Hickman* [1904] 1 K. B. 13.

¹⁰²¹ *Chipman v. Emeric*, 5 Cal. 49, 63 Am. Dec. 80; *Palethorp v. Bergner*, 52 Pa. 149; *Givens v. Caudle*, 34 La. Ann. 1025; *Mortimer v. Hanna*, 82 Miss. 645, 35 So. 159.

The fact that the tenant is allowed to hold over does not extend the

shall be made immediately,¹⁰²² or within a certain time,¹⁰²³ is binding, and an action may be brought on the lessee's failure so to make them, without awaiting the expiration of the term.¹⁰²⁴

In case of the lessee's noncompliance with a covenant to make certain improvements, or to leave such improvements on the premises, the landlord can recover the cost or value of such improvements.¹⁰²⁵ The failure to make improvements as agreed is not ground for rescission of the lease.¹⁰²⁶

It is no defense to an action on such a covenant that the tenant refrained from making the improvements because he was told by a third person that the premises belonged to such person and not to the lessor.¹⁰²⁷

A covenant to erect buildings within a certain period named has been regarded as broken once for all, if the buildings are not erected within such period, and as consequently not a continuing covenant.¹⁰²⁸

The rule that a covenant as to a thing not *in esse* runs with the land only when assigns are mentioned,¹⁰²⁹ would seem to apply

time for the making of the improvement. *Pollman v. Morgester*, 99 Pa. 611. *Schoeffel*, 167 Mass. 465, 45 N. E. 933, 57 Am. St. Rep. 472.

In *Bulmer v. Brumwell*, 13 Ont. App. 411, it was held that the language of the lease, construed in connection with the surrounding circumstances, required the improvement to be erected during the first year of the term, though the covenant as expressed was to erect it "during the said term," these words being regarded as indicating that it was not to be erected before the term.

¹⁰²² It was held that a finding that there was no breach of a covenant to make improvements without delay was justified, although two and a half months had elapsed without making them, it appearing that during this time the lessee was making preparations and negotiating contracts for the work. *Lundin v.*

¹⁰²³ *Davies v. Clark*, 10 App. Div. 68, 41 N. Y. Supp. 825.

¹⁰²⁴ *Davies v. Clark*, 10 App. Div. 68, 41 N. Y. Supp. 825.

¹⁰²⁵ *Barnhart v. Boyce*, 102 Ill. App. 172; *Scott v. Haverstraw Clay & Brick Co.*, 135 N. Y. 141, 31 N. E. 1102.

¹⁰²⁶ *Mortimer v. Hannah*, 82 Miss. 645, 35 So. 159. The decision in this case is no doubt correct, but the court fails to recognize that a lease is primarily a conveyance rather than a contract.

¹⁰²⁷ *Long v. Douglass*, 59 Tenn. (12 Heisk.) 147.

¹⁰²⁸ *Jacob v. Down* [1900] 2 Ch. 156. So that acceptance of rent thereafter was a waiver of a right of re-entry for the breach.

¹⁰²⁹ See post, § 149 b (4).

in the case of a covenant to erect entirely new structures upon the land, though perhaps not to a covenant to make improvements on structures already in existence. It has, however, been decided that a covenant to pull down old chimneys and to erect others in their place would bind assignees, though not named.¹⁰³⁰ An assignee is not liable for breach of a covenant to make improvements within a specified time, which time has elapsed before the assignment, since the breach is prior to the assignment.¹⁰³¹

§ 118. Contract as to condition at end of term.

a. **Particular causes of injury.** The stipulation, sometimes found in an instrument of lease, to the effect that the lessee will relinquish or deliver possession to the lessor at the end of the term, involves no obligation on the part of the tenant as to the condition of the premises at the time of such relinquishment.¹⁰³² More generally, however, the lessee agrees to leave the premises in a particular condition named, as for instance, in "as good repair and condition as when demised," or "in good repair," or some equivalent expression is used.

It has been decided in several cases that the covenant to leave in the same condition as at the time of the demise does not require the tenant to repair, or to rebuild, in case of injury by fire, not resulting from his fault, or by other accidental cause, the covenant being thus given a less extensive effect as against the tenant than the covenant to repair or keep in repair.¹⁰³³ A different

¹⁰³⁰ *Harris v. Goslin*, 3 Har. (Del.) 338.

¹⁰³¹ *Grescot v. Green*, 1 Salk. 199; *Townsend v. Scholey*, 42 N. Y. 18; *St. Saviour's Church v. Smith*, 3 Burrow, 1271. See *Gerzebek v. Lord*, 33 N. J. Law, 240; *Morris v. Kennedy* [1896] 2 Ir. 247. See post, § 149 b (9), at notes 192-194; § 158 a (2) (c).

¹⁰³² *Nave v. Berry*, 22 Ala. 382. So in case of a covenant to return "with appurtenances," the latter phrase being regarded as merely formal. *Maggort v. Hansbarger*, 8 Leigh (Va.) 532.

¹⁰³³ *Warner v. Hitchins*, 5 Barb. (N. Y.) 666; *Warren v. Wagner*, 75 Ala. 138, 51 Am. Rep. 446; *Junction Min. Co. v. Springfield Junction Coal Co.*, 222 Ill. 600, 78 N. E. 902; *Wainscott v. Silvers*, 13 Ind. 500; *Levey v. Dyess*, 51 Miss. 501; *Howeth v. Anderson*, 25 Tex. 557, 78 Am. Dec. 538; *Miller v. Morris*, 55 Tex. 412, 40 Am. Rep. 814. In *Halbut v. Forrest City*, 34 Ark. 246, it is said, per Eakin, J., in speaking of a covenant of this character, "It is a question of the real intention and meaning of the parties whether or not the tenant meant to assume the position of an

view has, however, been asserted,¹⁰³⁴ and it is perhaps difficult to see why the covenant should be construed as not applying to accidental injuries while that for repairs is so applied.^{1034a}

Accepting the doctrine of the cases first above referred to, that such a covenant does not impose liability on the tenant when the injuries are the result of accident, it seems that there is but little room for the application of the covenant; and indeed it has been said to be but the expression of the "implied obligation or duty resting on the tenant."¹⁰³⁵ So, while denying the tenant's liability by reason of such a covenant, in case of destruction of the buildings by accident, it has been stated that he is liable thereunder if the fire is the result of his own negligence.¹⁰³⁶ In another case the covenant to deliver up the premises in as good state and condition as reasonable use and wear thereof will permit was regarded as making the tenant liable for the act of a stranger only in so far as allowing the stranger to commit such acts could be regarded as waste.¹⁰³⁷

insurer against fire. In arriving at this meaning, the circumstances and probable intention of the parties will be considered, and the tendency of the more recent decisions is averse to extending the responsibility of the tenant when the covenant is not special and express and so clear as to leave little doubt that he really meant to take the risk of an insurer."

¹⁰³⁴ Sheppard's Touchstone, 173; *Pym v. Blackburn*, 3 Ves. Jr. 34; *Armstrong v. Maybee*, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898; *Priest v. Foster*, 69 Vt. 417, 38 Atl. 78; *Schmidt v. Pettit*, 8 D. C. (1 Mac Arthur) 179; *Pasteur v. Jones*, 1 N. C. 393 (Conf. R. 194); *Phillips v. Stevens*, 16 Mass. 238; *Stevens v. Pantlind*, 95 Mich. 145, 54 N. W. 716 (semble). And see *Jaques v. Gould*, 58 Mass. (4 Cush.) 384.

But a covenant to leave a wood in the same state as at the time of the demise is construed as not imposing

liability on the lessee if trees are blown down. *Sheppard's Touchstone*, 173.

There are, in some jurisdictions, statutes in effect providing that such a covenant to leave or return the premises in good condition or the like shall not involve an obligation to rebuild structures destroyed without the tenant's fault. *Kentucky* St. 1903, § 2297; *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 28; *Mississippi* Code 1906, § 2834; *Virginia* Code 1904, § 2455; *West Virginia* Code 1906, § 3071.

^{1034a} See ante, at notes 945, 951 a. ¹⁰³⁵ *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Davenport v. U. S.*, 26 Ct. Cl. 338; *Junction Min. Co. v. Springfield Junction Coal Co.*, 222 Ill. 600, 78 N. E. 902.

¹⁰³⁶ *Gibson v. Eller*, 13 Ind. 124; *Miller v. Morris*, 55 Tex. 412, 40 Am. Rep. 814.

¹⁰³⁷ *Beekman v. Van Dolsen*, 63 Hun, 487, 18 N. Y. Supp. 376. In this

The covenant to redeliver the premises in the same condition as at the time of the demise does not make the lessee liable for the natural decay of the premises arising from the gradual action of the elements,¹⁰³⁸ nor, it has been decided, for such wear and tear as is incident to the use to which the premises were put by the lessee, such use being approved by the lessor.¹⁰³⁹ A covenant to deliver in good order and repair has been regarded as imposing no obligation to rebuild a structure destroyed by a hostile army.¹⁰⁴⁰

It has been held that a covenant to return the premises in as good condition or repair as they were in at the time of the lease does not require the tenant to restore a building which falls down in consequence of defects in its original construction.¹⁰⁴¹

The tenant is liable, under a covenant to yield up in repair, by reason of his failure to repair defects or injuries caused by his own voluntary act, as by removing parts of the building.¹⁰⁴²

case it was considered that in case of injuries by a stranger the tenant was guilty of permissive, and not of voluntary or commissive, waste (see ante, § 110) and there was held to be no waste because the tenant took all possible measures by legal proceedings to prevent the acts of injury by the stranger, the city dock department. Compare *Cohn v. Hill*, 9 Misc. 326, 30 N. Y. Supp. 209.

Davenport v. U. S., 26 Ct. Cl. 338; *Harris v. Goslin*, 3 Har. (Del.) 338. But in *Sturges v. Knapp*, 31 Vt. 1, a case of a railroad property, a contrary view is asserted.

¹⁰³⁹ *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957. See *Watriss v. Cambridge Nat. Bank*, 130 Mass. 343; *Haas v. Brown*, 20 Misc. 672, 46 N. Y. Supp. 540.

¹⁰⁴⁰ *Pollard v. Shaffer*, 1 Dall. (Pa.) 210, 1 Am. Dec. 239. Compare ante, § 116 d.

¹⁰⁴¹ *Lister v. Lane* [1893] 2 Q. B. 212. So where there was an exception of ordinary wear and tear. *Hess v. Newcomer*, 7 Md. 325. And see *Drouin v. Wilson*, 80 Vt. 335, 67 Atl. 825.

¹⁰⁴² *Pyot v. St. John*, Cro. Jac. 329; *Murray v. Moross*, 27 Mich. 203; *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694; *Id.*, 130 Mass. 343; *McGregor v. Board of Education*, 107 N. Y. 511, 14 N. E. 420; *Browning v. Garvin*, 48 App. Div. 140, 62 N. Y. Supp. 564.

¹⁰³⁸ *Sheppard's Touchstone*, 169;

In the case of a covenant to deliver up the premises in as good condition as when received, an exception of "ordinary wear and tear" has been held to cover the fall of a building owing to its defective construction,¹⁰⁴³ and an exception of "ordinary wear" has been held to cover the breakage of glass caused by defects in construction.¹⁰⁴⁴ But an exception of "ordinary wear and tear" has been decided, most properly, it would seem, not to cover "barking and ploughing up" young trees in an orchard on the farm leased, as a result of cultivating a crop in the orchard.¹⁰⁴⁵

An exception in such a covenant of injury by the elements has been regarded as including injury caused by a flood of water from a reservoir, though the escape of the water was owing to the lessee's negligence.¹⁰⁴⁶ But elsewhere it has been decided that such an exception does not relieve the tenant from liability under his covenant for fire caused by his negligence.¹⁰⁴⁷ It does, however, it has been decided, relieve him from liability for accidental fire.¹⁰⁴⁸

b. Character of condition required. A covenant to yield up in repair, or in good or tenantable repair, like a covenant to repair,¹⁰⁴⁹ is to be construed with reference to the age of the buildings, and it involves no obligation to put on old premises repairs sufficient to make them equal to new,¹⁰⁵⁰ and likewise the char-

But in *Marks v. Chapman*, 135 Iowa, 320, 112 N. W. 817, it is held

that a covenant to surrender in as good condition as reasonable use would permit did not require the lessee to obliterate alterations made by him in the building for the purposes of the business for the conduct of which the premises were leased.

¹⁰⁴³ *Hess v. Newcomer*, 7 Md. 325; *Machen v. Hooper*, 73 Md. 342, 21 Atl. 67. Compare ante, at note 945 i.

¹⁰⁴⁴ *Drouin v. Wilson*, 80 Vt. 335, 67 Atl. 825.

¹⁰⁴⁵ *Thompson v. Cummings*, 39 Mo. App. 537. See also, ante, at notes 945g-945i.

¹⁰⁴⁶ *Wright v. Tileston*, 60 Minn.

34, 61 N. W. 823, 30 L. R. A. 737, 51 Am. St. Rep. 493.

¹⁰⁴⁷ *Porter v. Allen*, 8 Idaho, 487, 69 Pac. 105, 236. In the so-called "Nitro-Glycerine Case," 82 U. S. (15 Wall.) 524, it was apparently assumed that such an exception did not relieve the tenant from liability for injuries caused by an explosion for which he was not responsible.

¹⁰⁴⁸ *Van Wormer v. Crane*, 51 Mich. 363, 16 N. W. 686, 47 Am. Rep. 582; *Allen v. Culver*, 3 Denio (N. Y.) 284.

¹⁰⁴⁹ See ante, at notes 921, 922.

¹⁰⁵⁰ *Payne v. Haine*, 16 Mees. & W. 541; *Harris v. Jones*, 1 Moody & R. 173; *Stanley v. Towgood*, 3 Bing. N. C. 4; *Mantz v. Goring*, 4 Bing N. C. 451.

acter and location of the premises are to be considered in determining the character and degree of the repairs to be made.¹⁰⁵¹

A covenant to "deliver the premises at the end of the lease, in good tenantable repair in every respect" has been regarded as imposing an obligation to put the premises in repair, whatever may be their condition at the time of the lease,¹⁰⁵² while, in the same jurisdiction, the covenant to "keep the premises in good repair and leave them in the same good order at the end of the term" was held to impose no such obligation.¹⁰⁵³ And elsewhere a covenant to deliver the premises in as good condition as when received has been held to impose no obligation to pay for the reconstruction of a part of a building in accordance with an order of the inspector of buildings.¹⁰⁵⁴

A covenant to leave the premises "sufficiently repaired" has been held to be violated by leaving cracked glass in the windows,¹⁰⁵⁵ and covenants to leave in "good repair" or in "good condition" were held to render the tenant liable if he left the window glass broken.¹⁰⁵⁶

A covenant by the lessee to leave the premises in the same condition as at the time of the lease has been held to require the tenant to clear away chattels belonging to him which had been rendered worthless by fire.¹⁰⁵⁷ It has, however, been decided that a covenant to yield up "in good tenantable repair" did not involve any obligation to remove ashes and rubbish on the premises.¹⁰⁵⁸ There is sometimes a specific provision requiring the removal of a particular class of articles.¹⁰⁵⁹

¹⁰⁵¹ Proudfoot v. Hart, 25 Q. B. Div. 42. every crack in the glass or every scratch on the paint."

¹⁰⁵² Brashear v. Chandler, 22 Ky. (6 T. B. Mon.) 150, 17 Am. Dec. 132. ¹⁰⁵⁶ Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Cohn v.

¹⁰⁵³ West v. Hart, 30 Ky. (7 J. J. Marsh.) 258, 23 Am. Dec. 404. But ¹⁰⁵⁷ Boardman v. Howard, 90 Minn. 273, 96 N. W. 84, 64 L. R. A. see Grayson v. Buie, 26 La. Ann. 637, contra, as to a covenant to restore 648, 101 Am. St. Rep. 409.

¹⁰⁵⁴ Clark v. Gerke, 104 Md. 504, 65 Atl. 326. ¹⁰⁵⁸ Thorndike v. Burrage, 111 Mass. 531.

¹⁰⁵⁵ Pyot v. St. John, Cro. Jac. 329. ¹⁰⁵⁹ In Scott v. Haverstraw Clay & Brick Co., 135 N. Y. 141, 31 N. E. But in Scales v. Lawrence, 2 Fost. & 1102, effect was given to a covenant F. 289, it is said by Willes, J., that by the lessee of a brick yard not to "the landlord is not to claim for allow "bats" to be thrown into a

There is in England a decision to the effect that, in view of other language in the instrument of lease, a covenant by the lessee to leave the premises in the same condition in which they "now" are, referred to their condition at the commencement of the term and not at the date of the lease,¹⁰⁶⁰ and the same construction was, in a recent case in this country, placed upon such a clause, in view of the circumstances surrounding the making of the lease.¹⁰⁶¹

c. **Parts of premises within contract.** A covenant to leave in repair has been held to apply to buildings erected by the tenant during the term;¹⁰⁶² but a different construction has, in this country, been placed upon a covenant to leave the premises in as good repair as when received, there being no buildings upon the premises at the time of the lease.¹⁰⁶³

d. **Accrual of liability.** A covenant to deliver up in repair, or in a particular condition, at the end of the term, is ordinarily regarded as incapable of breach until the end of the term.¹⁰⁶⁴ By some authorities, however, a distinction is asserted accordingly as the action is by reason of an injury to the premises which

neighboring stream, he being held bound to remove at the end of the term any bats so thrown. See, also, *Coppinger v. Armstrong*, 8 Ill. App. (8 Bradw.) 210.

In *Fleischman v. Toplitz*, 134 N. Y. 349, 31 N. E. 1089, it was decided that the tenant, upon relinquishing possession, under the local statute, on the destruction of the building (post, § 182 p [8] [f]), was, apart from express stipulation, not bound to remove carcasses of horses destroyed with the building.

¹⁰⁶⁰ *White v. Nicholson*, 4 Man. & G. 95.

¹⁰⁶¹ *Chesapeake Brew. Co. v. Goldberg*, 107 Md. 485, 69 Atl. 37.

¹⁰⁶² *Brown v. Blunden*, Skin. 121; *Douse v. Earle*, 3 Lev. 264.

¹⁰⁶³ *Cosgrave v. Hammill*, 173 Pa. 207, 33 Atl. 1045.

¹⁰⁶⁴ *Schieffelin v. Carpenter*, 15

Wend. (N. Y.) 400; *Payne v. James*, 42 La. Ann. 230, 7 So. 457; *Agate v. Lowenbein*, 4 Daly (N. Y.) 262; *Rosenbloom v. Finch*, 37 Misc. 818, 76 N. Y. Supp. 902; *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606; *Snowhill v. Reed*, 49 N. J. Law, 292, 10 Atl. 737, 60 Am. Rep. 615; *Reed v. Snowhill*, 51 N. J. Law, 162, 16 Atl. 679, 32 L. R. A. 625; *Wright v. Tileston*, 60 Minn. 34, 61 N. W. 823, 30 L. R. A. 737, 51 Am. St. Rep. 493. Consequently there is no right of action in the executor of the lessor if the latter dies before the end of the term. *Palmer v. Brooklyn*, 28 N. Y. St. Rep. 139, 8 N. Y. Supp. 6.

Such a covenant does not preclude the lessee from removing fixtures provided he replaces them before the end of the term. *Fox v. Lynch*, 71 N. J. Eq. 537, 64 Atl. 439.

can be repaired or of one which cannot be repaired, it being considered that an injury of the latter class necessarily involves a breach of the covenant and consequently gives an immediate right of action, while, in the case of an injury of the former class, the tenant might repair before the end of the term.¹⁰⁶⁵

e. **Extinction of liability.** The right of action for breach of a covenant of this character is not extinguished by the lessee's dispossession by summary proceedings after the end of the term,¹⁰⁶⁶ nor, it seems, by the lessor's acceptance of the possession from him at that time.¹⁰⁶⁷

A covenant by the lessee, in connection with an express permission to him to make alterations in the premises, to restore the premises to their former condition at the expiration of the term, "if required by the lessor," requires him so to restore the premises although he is not notified by the lessor to do so till after the expiration of the term, provided such notice is given him within a reasonable time.¹⁰⁶⁸

The right of action for breach of a covenant of this character, it has been held, is not waived by the making of another lease to the same lessee, at the expiration of the original term, the same covenant being contained in both leases, and the question of the breach of the covenant is to be determined by the condition of the premises at the end of the second term.¹⁰⁶⁹

An action on a covenant of this character has been regarded as so distinct in its nature from one in tort for the landlord's negligence in injuring the premises that it is not barred by a judgment for the defendant in the latter class of action.¹⁰⁷⁰

In one jurisdiction it has been decided that a covenant in the instrument of lease to return the premises in good condition at the end of the term has no application in case there was a surren-

¹⁰⁶⁵ Sheppard's Touchstone, 173; Fratt v. Hunt, 108 Cal. 288, 41 Pac. 12; Gulf, C. & S. F. R. Co. v. Settegast, 79 Tex. 256, 15 S. W. 228 (semble); Knutsen v. Cinque, 113 App. Div. 677, 99 N. Y. Supp. 911.

¹⁰⁶⁶ Vernon v. Brown, 40 App. Div. 204, 58 N. Y. Supp. 11.

¹⁰⁶⁷ McGregor v. Board of Education, 107 N. Y. 511, 14 N. E. 420.

¹⁰⁶⁸ Reed v. Harrison, 196 Pa. 337, 46 Atl. 415 (notice three weeks after end of term is in reasonable time). See, also, Lazarus v. Ludwig, 45 App. Div. 486, 61 N. Y. Supp. 365.

¹⁰⁶⁹ McGregor v. Board of Education, 107 N. Y. 51, 14 N. E. 420.

¹⁰⁷⁰ Priest v. Foster, 69 Vt. 417, 38 Atl. 78.

der before the end of the term,¹⁰⁷¹ while in another jurisdiction a different view has been taken.¹⁰⁷²

f. **Effect of assignment.** A covenant to deliver up in repair, or in a certain condition, like one to keep in repair, runs with the land, and the benefit or obligation thereof passes upon a transfer of the reversion or of the leasehold.¹⁰⁷³

g. **Measure of damages.** The measure of damages for breach of a covenant by the lessee to leave in repair or in the same condition as at the time of the demise is, at least as a general rule, the reasonable cost of putting the premises in the required condition.¹⁰⁷⁴ It is immaterial in this regard that, owing to a contract made with a third person as to the subsequent disposition of the premises, or for some other reason, the actual value of the property to the landlord is not diminished by the lack of repair.¹⁰⁷⁵ It has been decided that the tenant is not, in ascertaining the damages, to be allowed for the increased value

¹⁰⁷¹ Reed v. Snowhill, 51 N. J. Law, 162, 16 Atl. 679, rvg. Snowhill v. Reed, 49 N. J. Law, 292, 10 Atl. 737, 60 Am. Rep. 615.

¹⁰⁷² Marshall v. Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679.

A covenant to leave the premises "fallowed and plowed" was held to apply when possession was relinquished to the lessee under a provision authorizing a "surrender" on notice by him. Austin v. Moyle, Noy, 118.

¹⁰⁷³ Martyn v. Clue, 18 Q. B. 661; Martyn v. Williams, 1 Hurl. & N. 817; Pollard v. Shaffer, 1 Dall. (Pa.) 210, 1 Am. Dec. 239; Scheidt v. Belz, 4 Ill. App. (4 Bradw.) 431; Peck v. Christman, 94 Ill. App. 435; Shelby v. Hearne, 14 Tenn. (6 Yerg.) 512; Lehmaier v. Jones, 100 App. Div. 495, 91 N. Y. Supp. 687. But the covenant does not run after breach. Shelby v. Hearne, 14 Tenn. (6 Yerg.) 512.

If the covenantee dies during the

term, the right of action for a breach of the covenant is not in the executor but in the person succeeding to the reversion. Palmer v. Brooklyn, 28 N. Y. St. Rep. 139, 8 N. Y. Supp. 6.

A covenant to remove all rubbish at the end of the term runs with the land. Coppinger v. Armstrong, 5 Ill. App. (5 Bradw.) 637.

¹⁰⁷⁴ Joyner v. Weeks [1891] 2 Q. B. 31; Watriss v. Cambridge First Nat. Bank, 130 Mass. 343; Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612; Darlington v. De-
wald, 194 Pa. 305, 45 Atl. 57; Burke v. Pierce, 27 C. C. A. 462, 83 Fed. 95.

¹⁰⁷⁵ Joyner v. Weeks [1891] 2 Q. B. 31; Henderson v. Thorn [1893] 2 Q. B. 164; Morgan v. Hardy, 17 Q. B. Div. 770; Rawlings v. Morgan, 18 C. B. (N. S.) 776. But that the measure of damages is the decrease in the value of the premises by reason of the failure to comply with the covenant, see Daggett v. Webb, 30 Tex. Civ. App. 415, 70 S. W. 457.

of the premises by reason of the substitution of old for new materials.¹⁰⁷⁶

§ 119. Agricultural land.

a. **Mode of cultivation**—(1) **Implied obligation.** A tenant of agricultural land is under an obligation to cultivate it in a husbandlike manner according to "the custom of the country."¹⁰⁷⁷ This obligation seems to be in legal effect an implied agreement, annexed to the lease,¹⁰⁷⁸ on which, under the common-law procedure, *assumpsit* will lie.¹⁰⁷⁹

The custom of the country in this connection, like other customs, must be reasonable in character.¹⁰⁸⁰ It need not have existed from "time immemorial," but it is sufficient that it has existed a reasonable time,¹⁰⁸¹ and that it is generally applicable to farms of a similar description.¹⁰⁸² The custom must be certain, but need not be absolutely uniform, and so it was held that there was a breach of such a custom when the tenant tilled

¹⁰⁷⁶ *Burke v. Pierce*, 27 C. C. A. 462, 83 Fed. 95. See *Watriss v. Cambridge First Nat. Bank*, 130 Mass. 343.

¹⁰⁷⁷ *Powley v. Walker*, 5 Term R. 373; *Legh v. Hewitt*, 4 East, 154; *Hutton v. Warren*, 1 Mees. & W. 466; *Clarke v. Roystone*, 13 Mees. & W. 752; *Walker v. Tucker*, 70 Ill. 527; *Chapel v. Hull*, 60 Mich. 167, 26 N. W. 874; *Lewis v. Jones*, 17 Pa. 267, 55 Am. Dec. 550; *Jones v. Whitehead*, 4 Clark (Pa.) 330; *Tuttle v. Langley*, 68 N. H. 464, 39 Atl. 488.

In *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776, it is said that a tenant must "remove and keep down filth, such as elders, briars and like growths, growing on farming and grazing lands."

¹⁰⁷⁸ *Westropp v. Elligott*, L. R. 9 App. Cas. 815, 823; *Smith, Landl. & Ten.* (3d Ed.) 308.

In *Richards v. Torbert*, 3 Houst. (Del.) 172, it is decided that ill husbandry by a tenant in dower, as

by planting Indian corn for two or three successive years, is not waste, and it is implied that it is not a violation of any obligation on the part of the tenant. In the earlier case of *Wilds v. Layton*, 1 Del. Ch. 226, 12 Am. Dec. 91, it is decided that such planting, contrary to the established rotation of crops on the land and to local usage, by a tenant under a writ of *elegit*, was waste. In *Byrkett v. Gardner*, 35 Wash. 668, 77 Pac. 1048, it was held that a failure to farm the land in a good and husbandlike manner was not waste within the statute authorizing forfeiture for waste.

¹⁰⁷⁹ See cases cited in note 1077, *supra*.

¹⁰⁸⁰ *Tyson v. Smith*, 9 Adol. & E. 406, per *Tindal*, C. J.

¹⁰⁸¹ *Tucker v. Linger*, 21 Ch. Div. 18, per *Jessel*, M. R., *afid.* 8 App. Cas. 508.

¹⁰⁸² *Dalby v. Hirst*, 1 Brod. & B. 224.

half of the farm, no other farmers in this neighborhood tilling more than a third, though some tilled less than a third.¹⁰⁸³ A custom peculiar to the particular premises demised, or to a particular estate of which such premises are a part, is not a custom of the country within the rule.¹⁰⁸⁴

The failure of a tenant to properly care for an orchard constituting the premises leased has been held to be ground for cancellation of the lease by a court of equity, to prevent further waste and destruction.¹⁰⁸⁵ In another case it is asserted that for bad husbandry the remedy is by suit and not by confiscation of the tenant's rights under the lease, such as that to away going crops.¹⁰⁸⁶ It is not clear upon what principle the tenant's property rights under the lease can be divested for improper cultivation, unless it be regarded as waste within a statute providing for forfeiture for waste.¹⁰⁸⁷

(2) **Express obligation.** An express covenant by the tenant as to the mode of cultivation overrides the implied covenant, if clearly inconsistent therewith.¹⁰⁸⁸ Such express covenants may, it is obvious, assume a variety of forms.¹⁰⁸⁹ Occasionally an express covenant merely requires the tenant to do what he would, it seems, be bound to do apart from such covenant, that

¹⁰⁸³ Legh v. Hewitt, 4 East, 154.

¹⁰⁸⁴ Womersly v. Dally, 26 Law J. Exch. 219.

¹⁰⁸⁵ Anderson v. Hammon, 19 Or. 446, 24 Pac. 228, 20 Am. St. Rep. 832.

¹⁰⁸⁶ Clark v. Harvey, 54 Pa. 142.

¹⁰⁸⁷ But see Byrket v. Gardner, 35 Wash. 668, 77 Pac. 1048, ante, note 1078.

¹⁰⁸⁸ Senior v. Armytage, Holt, N. P. 197; Tucker v. Linger, 8 App. Cas. 508. See Auginbaugh v. Coppenheffer, 55 Pa. 347.

¹⁰⁸⁹ See Fleming v. Snook, 5 Beav. 250; Newson v. Smythies, 1 Fost. & F. 477; Hunter v. Miller, 9 Law T. (N. S.) 159; Manly v. Pearson, 1 N. J. Law (Coxe) 377.

A covenant to "seed" certain land
L. and Ten. 50.

"to clover each year" involves no obligation on the tenant to insure a crop in spite of adverse weather.

¹⁰⁸⁵ Walters v. Hutchins, 29 Ind. 136. A covenant in a lease of a fruit orchard to keep the premises free from undergrowth, except squash and pumpkins, was held not to be broken by the planting of other vegetables on a small part of the land without objection from the lessor. ¹⁰⁸⁸ Randol v. Scott, 110 Cal. 590, 42 Pac. 976.

As to the measure of damages for breach of the lessee's covenant to keep the premises free from brush and burrs, see Brown Land Co. v. Lehman, 134 Iowa, 712, 112 N. W. 185.

is, to cultivate the land in a husbandlike manner.¹⁰⁹⁰ A covenant as to the mode of cultivation runs with the land.¹⁰⁹¹

b. **Removal of hay and straw.** Whether, apart from express covenant, the tenant has a right to remove hay or straw from the premises, involves merely the question whether, as a matter of fact, such removal is, by the custom of the country, bad husbandry.¹⁰⁹² Occasionally there is an express stipulation in this regard.¹⁰⁹³ It has been decided that the removal of the hay or straw under a levy made by the tenant's creditors, without the tenant's consent, does not involve a violation of such a stipulation.¹⁰⁹⁴⁻¹⁰⁹⁶

c. **Removal of manure.** The courts of this country have ordinarily regarded it as a matter of public policy, in order to prevent the deterioration of land, that manure made upon land

¹⁰⁹⁰ Auginbaugh v. Coppeneheffer, 55 Pa. 347; Reynolds v. Chynoweth, 68 Vt. 104, 34 Atl. 36; Buck v. Pike, 27 Vt. 529; Hubble v. Cole, 85 Va. 87, 7 S. E. 242.

A covenant to "cultivate and manage the farm leased in a good, proper and husbandlike manner, according to the best rules of husbandry practiced in the neighborhood," is not broken by use of the arable land for a market garden and the erection of hothouses, other farms in the neighborhood having been converted to such use. *Meux v. Cobley* [1892] 2 Ch. 253.

A covenant to take such care of the premises "as a careful and prudent farmer should of his own property" is broken by pasturing meadow with sheep to such an extent as to injure it, and the question whether this was done and whether allowing Canada thistles to grow and go to seed was a breach of such covenant was one for the jury. *McBride v. Daniels*, 92 Pa. 332.

¹⁰⁹¹ *Cockson v. Cock*, Cro. Jac. 125; *Gordon v. George*, 12 Ind. 408.

¹⁰⁹² *Tuttle v. Langley*, 68 N. H. 464, 39 Atl. 488; *Wing v. Gray*, 36 Vt. 261. The Delaware statute (Rev. Code 1893, p. 876) provides that if any person shall carry from the demised premises, of the quantity of five acres or more, any hay (other than salt hay), straw, cornhusks or manure, without the consent of the owner of the premises, he shall forfeit double the value of such hay, etc. In *Fobes v. Shattuck*, 22 Barb. (N. Y.) 568, it was said that wheat straw belongs to those who own the crop, and not to the landlord, in the absence of stipulation or custom to the contrary.

¹⁰⁹³ See *Gale v. Bates*, 3 Hurl. & C. 84; *Massey v. Goodall*, 17 Q. B. 310; *Smith v. Chance*, 2 Barn. & Ald. 753; *Richards v. Bluck*, 6 C. B. 437; *Lowndes v. Fountain*, 11 Exch. 487; *Clarke v. Westrope*, 18 C. B. 765; *Fielden v. Tattersall*, 7 Law T. 713; *Lekh v. Lillie*, 6 Hurl. & N. (N. S.) 165.

¹⁰⁹⁴⁻¹⁰⁹⁶ *Smith v. Putman*, 20 Mass. (3 Pick.) 221, 4 Am. Dec. 122.

as a result of feeding to stock part of the crops raised on the land should not be removed therefrom,¹⁰⁹⁷ and it is in accordance with this view that it has been decided that a tenant holding under a demise cannot remove manure so made, though made during his tenancy and from his own crops.¹⁰⁹⁸ In only two states, apparently, has a different view been taken.¹⁰⁹⁹ Sometimes it has been decided that such a removal is waste and remediable as such,¹¹⁰⁰ while sometimes the removal of the manure seems to be regarded rather as a breach of the tenant's implied contract, discussed above, to cultivate the land in a husbandlike manner.¹¹⁰¹ The question of the tenant's right to remove the manure is independent of whether it has been collected in heaps or is scattered over the land.¹¹⁰² It may, however, be controlled by custom or agreement.¹¹⁰³ In England it is, it seems, usually,

¹⁰⁹⁷ See 1 Tiffany, *Real Prop.* § 243.

¹⁰⁹⁸ *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Daniels v. Pond*, 38 Mass. (21 Pick.) 371, 32 Am. Dec. 269; *Sawyer v. Twiss*, 26 N. H. 345; *Perry v. Carr*, 44 N. H. 118, 82 Am. Dec. 191; *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611; *Lewis v. Jones*, 17 Pa. 262, 55 Am. Dec. 550; *Wetherbee v. Ellison*, 19 Vt. 379; *Elting v. Palen*, 60 Hun, 306, 14 N. Y. Supp. 607; *Brigham v. Overstreet*, 128 Ga. 447, 57 S. E. 484, 10 L. R. A. (N. S.) 452.

Virginia Code 1904, § 2779, provides that if tenant at will or for years, without a special license, remove, by sale or otherwise, from the leased premises, manure made thereon in the ordinary course of husbandry, consisting of ashes leached or unleached, collections from the stables, barnyard, cattle pens or other places on the leased premises, or composts formed by an admixture of these or any of them with the soil or other substances, such removal shall be deemed waste. And see Delaware Rev. Code 1893, p. 876, ante, note 1092.

¹⁰⁹⁹ In North Carolina it has been decided that there is no such obligation on the tenant to leave manure on the premises (*Smithwick v. Ellison*, 24 N. C. [2 Ired. Law] 326, 38 Am. Dec. 697); and in Maine, that the tenant is bound to leave only the manure made by him the last year of his tenancy, on the theory that he himself is the person who suffers by reason of the removal of that previously made (*Staples v. Emery*, 7 Me. [7 Greenl.] 201).

¹¹⁰⁰ *Daniels v. Pond*, 38 Mass. (21 Pick.) 367, 32 Am. Dec. 269; *Perry v. Carr*, 44 N. H. 118, 82 Am. Dec. 191.

¹¹⁰¹ *Sawyer v. Twiss*, 26 N. H. 345; *Hill v. De Rochemont*, 48 N. H. 87.

¹¹⁰² See *Strong v. Doyle*, 110 Mass. 92; *Lassell v. Reed*, 6 Me. (6 Greenl.) 222, 19 Am. Dec. 211; *Sawyer v. Twiss*, 26 N. H. 345; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Wetherbee v. Ellison*, 19 Vt. 379.

¹¹⁰³ *Fletcher v. Herring*, 112 Mass. 382; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Hill v. De Rochemont*, 48 N. H. 87.

if not always, so controlled, it coming, in the absence of express agreement, within the scope of the implied agreement to cultivate according to the custom of the country.¹¹⁰⁴

The principle of public policy on which is based the rule forbidding the removal of manure produced by the crops raised on the land has no application to manure otherwise produced, as when the stock is fed with materials raised elsewhere.¹¹⁰⁵ In case the manure thus made from produce raised off the premises is mingled with that made from crops raised on the premises, the tenant will, according to occasional decisions, lose the right to remove any portion,¹¹⁰⁶ while by others he may remove such portion of the common mass as may represent that made from produce raised off the premises.¹¹⁰⁷

The rule does not apply, it is furthermore stated, in the case of land not leased for agricultural purposes,¹¹⁰⁸ or except in case of a "farming lease,"¹¹⁰⁹ or to manure made in any manner not connected with agriculture or in a course of husbandry;¹¹¹⁰ but it has been decided that a milk farm is a farm used for agricultural purposes within the rule.¹¹¹¹

A tenant removing manure made from crops grown on the premises has been held liable as for conversion,¹¹¹² and also in

¹¹⁰⁴ See *Webb v. Plummer*, 2 Barn. Pickering v. Moore, 67 N. H. 533, 32 & Ald. 746; *Roberts v. Barker*, 1 Atl. 828, 31 L. R. A. 698, 68 Am. St. Cromp. & M. 808; *Hindle v. Pollitt*, Rep. 695.
6 Mees. & W. 529; *Gough v. Howard*,
Peake, Add. Cas. 197.

¹¹⁰⁵ *Needham v. Allison*, 24 N. H. 355; *Daniels v. Pond*, 38 Mass. (21 Pick.) 367, 32 Am. Dec. 269; *Corey v. Bishop*, 48 N. H. 146; *Pickering v. Jones*, 71 S. C. 404, 51 S. E. 240, 2 Moore, 67 N. H. 533, 32 Atl. 828, 31 L. R. A. 698, 68 Am. St. Rep. 695; *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611; *Lewis v. Jones*, 17 Pa. 267, 55 Am. Dec. 550; *Plumer v. Plumer*, 30 N. H. 558; *Carroll v. Newton*, 17 How. Pr. (N. Y.) 189.

¹¹⁰⁶ *Lewis v. Jones*, 17 Pa. 267, 55 Am. Dec. 550; *Bonnell v. Allen*, 53 Ind. 130.

¹¹⁰⁷ *Nason v. Tobey*, 182 Mass. 314, 65 N. E. 389, 94 Am. St. Rep. 659;

Pickering v. Moore, 67 N. H. 533, 32 Atl. 828, 31 L. R. A. 698, 68 Am. St. Rep. 695.

¹¹⁰⁸ *Lewis v. Jones*, 17 Pa. 267, 55 Am. Dec. 550; *Needham v. Allison*, 24 N. H. 355. And see *Corey v. Bishop*, 48 N. H. 146; *Roberts v. Jones*, 71 S. C. 404, 51 S. E. 240, 2 L. R. A. (N. S.) 640.

¹¹⁰⁹ *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611.

¹¹¹⁰ *Daniels v. Pond*, 38 Mass. (21 Pick.) 367, 32 Am. Dec. 269.

¹¹¹¹ *Bonnell v. Allen*, 53 Ind. 130; *Waln v. O'Conner*, 5 Clark (Pa.) 164, 9 Leg. Int. 67. See *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169.

¹¹¹² *Plumer v. Plumer*, 30 N. H. 558; *Corey v. Bishop*, 48 N. H. 146. And see *Brown v. Magorty*, 156 Mass. 209, 30 N. E. 1021.

an action of trespass on the case.¹¹¹³ An action of trespass *quare clausum fregit* may, it has been decided, be maintained against a tenant at will wrongfully removing the manure, on the theory that such removal constitutes waste.¹¹¹⁴ And trespass *de bonis asportatis* has been sustained against a purchaser of the manure from the tenant who removed it.¹¹¹⁵ Occasionally the liability in damages of the tenant in such case has been recognized, without any specification of the particular form of action.¹¹¹⁶ An injunction will issue, in a proper case, to restrain the removal of the manure.¹¹¹⁷

IV. TENANT'S OBLIGATIONS TOWARDS THIRD PERSONS.

§ 120. To persons on the premises.

The liability of the tenant for injuries to third persons caused by defects or dangerous conditions existing in connection with the premises is that of any occupant of land. He is, as regards persons who may come on the premises by his express or implied invitation, bound to exercise reasonable diligence to prevent injury to such persons,¹¹¹⁸ while as to "mere licensees" or trespassers, he is, apparently, bound only to refrain from such acts as indicate a reckless indifference to their safety.¹¹¹⁹

As regards parts of a building not included in a lease, such as

¹¹¹³ *Middlebrook v. Corwin*, 15 65 Ill. 160; *Newall v. Bartlett*, 114 Wend. (N. Y.) 169. N. Y. 399, 21 N. E. 105; *Mellen v.*

¹¹¹⁴ *Daniels v. Pond*, 38 Mass. (21 Merrill, 126 Mass. 545, 30 Am. Rep. Pick.) 367, 32 Am. Dec. 269; *Perry* 695; *Harris v. Perry*, 89 N. Y. 308; *v. Carr*, 44 N. H. 118, 82 Am. Dec. 191. Welch v. McAllister, 15 Mo. App. 492; *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Ward v.*

¹¹¹⁵ *Daniels v. Pond*, 38 Mass. (21 Hinkleman, 37 Wash. 375, 79 Pac. Pick.) 367, 32 Am. Dec. 269. 956.

¹¹¹⁶ *Brown v. Magorty*, 156 Mass. 209, 30 N. E. 1021; *Lewis v. Jones*, 17 Pa. 262, 55 Am. Dec. 550; *Hunt v. Scott*, 3 Pa. Co. Ct. R. 411. In *Hill v. De Rochemont*, 48 N. H. 87, the action was one of "trespass." The tenant is not liable in the absence of negligence. *Dyer v. Robinson*, 110 Fed. 99, 54 L. R. A. 708; *Reilly v. Shannon*, 180 Pa. 513, 37 Atl. 95; *Harris v. Perry*, 89 N. Y. 308; *Speckman v. Boehm*, 36 App. Div. 262, 56 N. Y. Supp. 758.

¹¹¹⁷ *Bonnell v. Allen*, 53 Ind. 130; *Elting v. Palen*, 60 Hun, 306, 14 N. Y. Supp. 607; *Barrington v. Justice*, 2 Clark, 501, 4 Pa. Law J. 289. ¹¹¹⁸ 2 *Shearman & Redfield*, Neg. §§ 704-706; *Pollock, Torts* (6th Ed.) 503; *Burdick, Torts*, 456.

¹¹¹⁸ *City of Chicago v. O'Brennan*, 503; *Burdick, Torts*, 456.

approaches used in common by the various tenants of a building, the landlord is the person on whom rests the duty of keeping them in a reasonably safe condition, and not the tenant, and consequently the latter is not liable for injuries caused by defects therein.¹¹²⁰

§ 121. To persons not on the premises.

As regards persons not on the premises, but "strangers," such as the owners or occupants of neighboring property, or persons in the highway, the tenant is liable for any injury resulting from negligence on his part,¹¹²¹ or from the creation of a nuisance by him.^{1121a} In several cases the tenant has been held liable for injuries to a person on the highway by reason of defects in the sidewalk,¹¹²² and he is liable for failure to exercise diligence in removing snow from the roof of a building on the leased premises, if a person on the highway is injured by a fall of the snow,¹¹²³ irrespective of whether the lessor is also liable.¹¹²⁴

The question of the tenant's liability for a dangerous or injurious condition, not created by him, but created by his lessor, and allowed by him, the lessee, to remain, has been the subject of but few decisions, and in those it has usually been regarded as determinable by the same considerations as govern the liability

¹¹²⁰ *Andrus v. Bradley-Alderson Co.*, 117 Mo. App. 322, 93 S. W. 872.

¹¹²¹ *Tarry v. Ashton*, 1 Q. B. Div. 314; *De Tarr v. Ferd. Heim Brew. Co.*, 62 Kan. 188, 61 Pac. 689; *Odell v. Solomon*, 99 N. Y. 635, 1 N. E. 408; *Hirschfield v. Alsberg*, 47 Misc. 141, 93 N. Y. Supp. 617; *Lee v. McLaughlin*, 86 Me. 410, 30 Atl. 65, 26 L. R. A. 197; *Harris v. Cohen*, 50 Mich. 324, 15 N. W. 493; *Marshall v. Heard*, 59 Tex. 266. But see *Organ v. City of Toronto*, 24 Ont. 318.

The tenant is not liable apart from negligence (*Fehlaur v. St. Louis*, 178 Mo. 635, 77 S. W. 843; *McCord Rubber Co. v. St. Joseph Water Co.*, 181 Mo. 678, 81 S. W. 189; *Odell v. Solomon*, 99 N. Y. 635, 1 N. E. 408, and see cases cited post, note 1135)

except in the case of the creation or maintenance of a nuisance by him.

^{1121a} See post, § 124.

¹¹²² *City of Lowell v. Spaulding*, 58 Mass. (4 Cush.) 277, 50 Am. Dec. 775; *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Jennings v. Van Schaick*, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459; *Stewart v. Putnam*, 127 Mass. 403; *Bears v. Ambler*, 9 Pa. 193, 49 Am. Dec. 503; *City of Chicago v. O'Brennan*, 65 Ill. 160; *Lindstrom v. Pennsylvania Co. for Ins.*, 212 Pa. 391, 61 Atl. 940.

¹¹²³ *Atwill v. Blatz*, 118 Wis. 226, 95 N. W. 99.

¹¹²⁴ See ante, § 103 c.

of a grantee in fee of premises on which there exists a nuisance at the time of the grant. Accordingly it has been held that the lessee is not liable for the existence of the particular condition until he has been either notified by the person injured thereby to remove it,¹¹²⁵ or, at least, following the rule adopted in some states as to the liability of a grantee in fee, until he has in some other manner acquired knowledge of such condition.¹¹²⁶ In some jurisdictions, it seems, the lessee is liable if the condition causing the injury can be regarded as constituting a public nuisance, without regard to whether he has notice thereof.¹¹²⁷

While the liability of a tenant for years in this regard is usually assimilated to that of a grantee in fee, it has been asserted that the lessee is not liable if he merely maintains and uses a structure on the premises which constitutes a nuisance, without himself doing anything which changes the condition or which makes it more injurious, for the reason that by removing such a structure the lessee would render himself liable for waste to his landlord.¹¹²⁸ Such a view seems open to question. Even conceding that an alteration in the structure, necessary to avoid injury to third persons, would be regarded as waste, making the lessee liable in damages, that seems no reason for exempting the

¹¹²⁵ *McDonough v. Gilman*, 85 Mass. (3 Allen) 264, 80 Am. Dec. 72; *Western & A. R. Co. v. Cox*, 93 Ga. 561, 20 S. E. 68; *Slight v. Gutzlaff*, 35 Wis. 675, 17 Am. Rep. 476. In *McParthand v. Thomas*, 24 N. Y. St. Rep. 110, 4 N. Y. Supp. 100, a lessee of the first floor of a building was held liable for the fall of an awning erected by the lessor without permission from the city authorities, this constituting a nuisance, the benefit of which was shared by the lessee.

As to the liability of a grantee in fee for the continuance of a nuisance on the premises, see 86 Am. St. Rep. 508, note to *Leahan v. Cochran*; 21 Eng. & Am. Enc. Law (2d Ed.) 720. ¹¹²⁸ *Meyer v. Harris*, 61 N. J. Law, 83, 38 Atl. 690. *Kearney v. Central R. Co.*, 167 Pa. 362, 31 Atl. 637, is apparently to the same effect. And see dictum in *Knauss v. Brua*, 107 Pa. 88. In *Meyer v. Harris*, 61 N. J. Law, 83, 38 Atl. 690 *supra*, however, it was held that a lessee for 999 years was a grantee in fee for the purposes of the imposition of liability on him.

¹¹²⁶ *Dickson v. Chicago, R. I. & P. R. Co.*, 71 Mo. 575; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845.

¹¹²⁷ *Leahan v. Cochran*, 178 Mass. 566, 60 N. E. 382, 53 L. R. A. 891, 86 Am. St. Rep. 506; *Vaughn v. Buffalo, R. & P. R. Co.*, 72 Hun, 471, 25 N. Y. Supp. 246; *Keeler v. Lederer Realty Corp.*, 26 R. I. 524, 59 Atl. 855.

lessee from liability for injuries to a third person. The case might be different if a court of equity were actually to enjoin the making of such an alteration, but this the court would not be apt to do. And that one should be relieved of a duty of diligence towards one person by the fact that he would, by exercising such diligence, subject himself to a liability in damages to another person, seems most doubtful.¹¹²⁹ If the lessee's use of the premises in the condition in which they were at the time of the lease contributes in any degree to the injury, it seems clear that he should not be allowed to assert that a change of that condition would involve him in liability for waste, since he could avoid the causing of the injury by refraining from the use of the premises. There are to be found occasional statements to the effect that the lessee's possible liability for waste does not justify him in continuing the condition which causes the injury.¹¹³⁰

So far as the condition of the premises which causes injury to a third person is a nuisance, in the strict sense of the term, it seems proper to assimilate the liability of one who accepts a lease with such condition in existence to that of one who accepts a conveyance in fee. So far, however, as this condition of the premises is not one which itself causes injury to neighboring property or to the public, but merely results eventually in some casualty which injures the person or property of another, the ten-

¹¹²⁹ In *Meyer v. Harris*, 61 N. J. Law, 83, 38 Atl. 690, *supra*, it is said that "the law does not impose upon any one the duty of performing an act for the benefit of one person which will necessarily subject him to liability at the hands of another." No authorities are cited for this proposition. Can one contract not to put repairs on his property and so relieve himself from possible liability to persons injured by defects therein?

¹¹³⁰ It is so decided in *Brent v. Haddon*, Cro. Jac. 555. And in *Roswell v. Prior*, 12 Mod. 640, Holt, C. J., comments adversely on the suggestions in *Ryppon v. Bowles*, Cro. Jac. 373, that it would be waste in the

lessee to abate the nuisance, and that in case it were that therefore an action would not lie against him for the continuance of it. In *City of Boston v. Worthington*, 76 Mass. (10 Gray) 496, 71 Am. Dec. 678, where a pedestrian sought to recover injuries caused by his fall into an open cellar way, it was decided that a covenant by the lessee that "no alteration or addition shall be made in or on the premises without the consent of the lessor" did not relieve the lessee from liability, since in the first place it did not apply to repairs, and, in the second place, such a covenant could not relieve the lessee from liability for a nuisance.

ant can be held liable, it is conceived, as would be any person in possession and control, on the ground of negligence only.¹¹³¹

Another tenant of the same landlord, occupying another part of the same building or an adjoining building, is entitled, as any other person, to assert a liability on the tenant's part¹¹³² for dangerous or injurious conditions. Accordingly one tenant may recover against another tenant for injuries caused by the latter's negligence in using or in keeping in repair water appliances under the latter's control.¹¹³³ There is no liability on the part of a tenant for conditions on the premises leased to him, resulting in injury to the tenant of another part of the building, in the absence of negligence.¹¹³⁴

The fact that the lessor is liable for the injuries caused by a

¹¹³¹ See ante, § 102.

¹¹³² Brunswick-Balke Collender Co. v. Rees, 69 Wis. 442, 34 N. W. 732, 2 Am. St. Rep. 748 (storage of excessive weight by upper tenant); Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193 (offensive odors); Stapenhorst v. American Mfg. Co., 36 N. Y. Super. Ct. (4 Jones & S.) 392 (leakage of oil from upper floors); Quigley v. H. W. Johns Mfg. Co., 26 App. Div. 434, 50 N. Y. Supp. 98 (weakening building by altering supports); Kent v. Todd, 144 Mass. 478, 11 N. E. 734 (leaving open trap door); Cohn v. May, 210 Pa. 615, 60 Atl. 301, 69 L. R. A. 800, 105 Am. St. Rep. 840.

¹¹³³ Rosenfield v. Arrol, 44 Minn. 395, 46 N. W. 768, 20 Am. St. Rep. 584; Cleveland Co-Operative Stove Co. v. Wheeler, 14 Ill. App. (14 Bradw.) 112; Simonton v. Loring, 68 Me. 164, 28 Am. Rep. 29; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164, 96 Am. St. Rep. 146; Moore v. Goedel, 34 N. Y. 527; Miller v. Benoit, 164 N. Y. 590, 58 N. E. 1090, afg. 29 App. Div. 252, 51

N. Y. Supp. 368; Slater v. Adler, 8 Misc. 310, 28 N. Y. Supp. 729; Simon-Riegel Cigar Co. v. Gordon-Burnham Battery Co., 20 Misc. 598, 46 N. Y. Supp. 416; Killion v. Power, 51 Pa. 429, 91 Am. Dec. 127.

¹¹³⁴ Moore v. Goedel, 34 N. Y. 527; Eakin v. Brown, 1 E. D. Smith (N. Y.) 36; Simonton v. Loring, 68 Me. 164, 28 Am. Rep. 29; Sane v. Scagle, 67 Vt. 281, 31 Atl. 289; Denton v. Kernochan, 37 N. Y. St. Rep. 510, 13 N. Y. Supp. 889. See Sheehan & Co. v. Maison Barberis, 41 Wash. 671, 84 Pac. 607.

It is held that negligence on the part of a tenant is prima facie shown by the fact that water ran from his apartments into those of another tenant. Simon-Riegel Cigar Co. v. Gordon Burnham Battery Co., 20 Misc. 598, 46 N. Y. Supp. 416; Warren v. Kauffman, 2 Phila. (Pa.) 259, 14 Leg. Int. 108; Greco v. Bernheimer, 17 Misc. 592, 40 N. Y. Supp. 677; Rosenfield v. Arrol, 44 Minn. 395, 46 N. W. 768, 20 Am. St. Rep. 584 (semble). See Moore v. Goedel, 34 N. Y. 527.

condition existing in connection with the premises does not relieve the tenant from liability therefor.¹¹³⁵

The obligation of a tenant to exercise reasonable care to prevent injuries to third persons by reason of dangerous conditions in connection with the property would ordinarily extend only so far as his control extends, and would not render a tenant of part of a building liable for defects in other parts of the buildings or in the sidewalk in front of the building.¹¹³⁶ It has been decided in one case that a lessee of part only of a building may, by covenant with the lessor to keep the sidewalk in proper condition, render himself liable to a pedestrian injured by the unsafe condition of the sidewalk, this constituting a nuisance.¹¹³⁷ The

¹¹³⁵ *Leonard v. Decker*, 22 Fed. falling into an elevator shaft in a 741; *Gordon v. Peltzer*, 56 Mo. App. common approach under the control 599; *Wunder v. McLean*, 134 Pa. of the landlord if the person injured 334, 19 Atl. 749, 19 Am. St. Rep. was on his way to that part so leased 702; *Joyce v. Martin*, 15 R. I. 558, by invitation of the lessee, but that 10 Atl. 620, 2 Am. St. Rep. 925; a lessee of another part, with whom *Irvine v. Wood*, 51 N. Y. 224; the person injured had no such relation was not liable. If the approach was under the control of the *Brunswick-Balke Collender Co. v. Rees*, 69 Wis. 442, 34 N. W. 732, 2 Am. St. Rep. 748; *Keeler v. Lederer Realty Corp.*, 26 R. I. 524, 59 Atl. 855.

So the tenant is liable for dangerous openings in the highway which existed at the time of the lease, though the landlord is also liable therefor. *Mancuso v. Kansas City*, 74 Mo. App. 138; *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603.

¹¹³⁶ *Burt v. City of Boston*, 122 Mass. 223; *Weinberger v. Kratzenstein*, 71 App. Div. 155, 75 N. Y. Supp. 537. In *Burner v. Higman & Skinner Co.*, 127 Iowa, 580, 103 N. W. 802, it was apparently decided that a lessee of part of a building is liable to one injured by

¹¹³⁷ *Wixon v. Bruce*, 187 Mass. 232, 72 N. E. 978, 68 L. R. A. 248. The decision is in great part based on *Quinn v. Crimmings*, 171 Mass. 255, 50 N. E. 624, 42 L. R. A. 101, 68 Am. St. Rep. 420, in which it was decided that one on whose land a partition fence stood could free himself from liability for injuries to a person caused by the fall of the fence by contracting with his adjoining owner for the keeping of the fence in repair, a decision which might, it is

correctness of this view is, it is submitted, open to serious question. It was conceded by the court that a "stranger" could not subject himself to such liability by contract with the owner of the building, but it was said that a lessee of a part of the building was not a "stranger." Why a lessee of a part of the building is not a stranger as regards a sidewalk confessedly not within the operation of the lease is not clear. A tenant of another building in the same block, owned by the same landlord, would presumably have been regarded as a stranger for the purpose of this distinction, and wherein the position of one is different from that of the other is by no means clear. That the tenant is in one case separated vertically from the sidewalk, and in the other horizontally, would seem to be immaterial.

That the lessee agreed with the lessor to repair, and that, if he had performed his contract, injuries to a third person would not have occurred, should not, it is conceived, of itself impose on him any liability for such injuries, the lessee's liability being a matter to be determined solely by the consideration whether he was negligent in failing to repair,¹¹³⁸ or whether there was a nuisance on the premises. Nor, on the other hand, it seems, should the fact that the lessor agreed to repair, relieve the lessee or his assignee in possession from liability, as the person in control of the premises, for injuries to a third person caused by a lack of repair.¹¹³⁹

conceived, be subjected to considerable scrutiny before it would be accepted in all jurisdictions. 635, 1 N. E. 408; *Reynolds v. Van Buren*, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129; *Martin v. Washburn*,

In *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399, it was decided that the lessee of upper rooms in a building did not have the sole occupancy of the sidewalk, and was not bound to keep in repair a part of the sidewalk on the lessor's land merely because he covenanted to save the lessor harmless "from any claim or damage arising from neglect in not removing snow and ice from the roof of the building or from the sidewalk."

23 La. Ann. 427. But in *San Filippo v. American Bill Posting Co.*, 188 N. Y. 514, 81 N. E. 463, where one had a "formal lease" of a part of the roof of a building for the maintenance of a signboard thereon, the fact that he agreed with the tenant of the building to maintain the signboard was apparently regarded as a consideration in imposing liability on him to one injured by the fall of the signboard.

¹¹³⁹ *Leonard v. Decker*, 22 Fed.

¹¹³⁸ See *Odell v. Solomon*, 99 N. Y. 741. This is apparently assumed in

A tenant who subleases is not thereafter liable for injuries to a third person as being the person in control of the premises, but his liability is determined with reference to the rules before stated as to the liability of a lessor. And he is not liable for such injuries by reason of his agreement with his lessor to make repairs.¹¹⁴⁰

It has been decided in one case that the tenant is liable for injuries caused by the fall of a structure erected by him on the premises, resulting in injuries to a person on the street, though this did not occur until after he had relinquished possession to the landlord.¹¹⁴¹ Though the opinion refers to the rule that the creator of a nuisance is liable therefor, the question of the tenant's liability is discussed as dependent on the question of negligence. The liability of the tenant in such a case may, it is conceived, properly be based on the ground that one is negligent in putting out of his control property which he knows, or has reason to know, to be in such a condition as to constitute a menace to persons on the adjacent highway.¹¹⁴²

the cases asserting that the lessor who covenants to repair is liable to third persons injured as a result of a lack of repair, by reason of the lessee's right to recover over against the lessor the amount of the damages for which he has been subjected to liability. See ante, at note 629. There are occasional suggestions, however, to the contrary, that a covenant by the lessor to repair would relieve the lessee from any liability to third persons. See *Burner v. Higman & Skinner Co.*, 127 Iowa, 580, 103 N. W. 802; *Hirschfield v.* Alsberg, 47 Misc. 141, 93 N. Y. Supp. 617. And see the Massachusetts cases cited ante, note 1137.¹¹⁴⁰ *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391.¹¹⁴¹ *Hussey v. Ryan*, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772. It does not appear whether there was a technical surrender or a mere relinquishment of possession upon the expiration of the term. The opinion refers to the fact that the tenant had the right to remove the structure.¹¹⁴² See ante, § 102.

CHAPTER XI.

MODE OF UTILIZATION OF PREMISES BY TENANT.

- § 122. In absence of express covenant.
123. Express covenants.
- a. General considerations.
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 - d. Covenant against offensive trade.
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124. User resulting in nuisance.

§ 122. In absence of express covenant.

It would seem that, on principle, apart from statute or express stipulation, the tenant is in no way restricted as regards his use of the premises, so long as this does not involve the commission of waste or the maintenance of a nuisance. There are cases asserting that he is so unrestricted,¹ and the numerous decisions involving the effect of a restrictive covenant in this regard contain no suggestion that he is so restricted apart from express stipulation.² On the other hand it has been said in one case that the tenant can use the premises for that purpose only in

Supp. 885; *Heise v. Pennsylvania R.*

¹ *Taylor v. Finnigan*, 189 Mass. Co., 62 Pa. 67.
568, 76 N. E. 203, 2 L. R. A. (N. S.) As to the landlord's mode of using
973; *City of New York v. Interborough Rapid Transit Co.*, 109 N. Y. 2 See post, § 123.

which they are usually employed, to which they are adapted, and for which they were constructed,³ a criterion, it may be remarked, which appears somewhat lacking in definiteness. In another case it was decided that the lessee cannot use, or allow others to use, the roof of the building on the leased premises, for the construction of extensive advertising boards, which might become a "serious nuisance" and subject the landlord to expensive litigation.⁴ There is also to be found a *dictum* that a landlord might enjoin the use of premises as a bawdy house, as not being within the contemplation of the parties,⁵ and in one case it was held that where a lessee of premises, using them as a drugstore, agreed to sublet them for use as a liquor store, and, knowing that the landlord would not consent to such use, obtained a renewal without disclosing the intended use, equity would restrain such use of the premises on the ground of fraud.⁶ Likewise there is a decision apparently to the effect that the lessor is liable in damages if, by reason of his use of the premises for the storage of inflammable materials, when the lease was made for the purpose of storing other materials, it was impossible to prevent the destruction of the building by the spread of fire from adjoining property.⁷

Occasionally the purpose for which the premises are used by the tenant might materially detract from their value, though not effecting such an alteration in the premises as to be visible to ordinary observation, and consequently not to fall within the ordinary conception of waste. Such, for instance, would be the case were the tenant to use a house on the premises as a hospital for infectious diseases, and there is one decision apparently adverse to his right to make such use.⁸ But if the premises are

³ Nave v. Berry, 22 Ala. 382. In on the premises merely because she this case it was decided that the had formerly been of disreputable lessee could use for a seminary a character.

building erected for use as a hotel. ⁶ Parkman's Adm'r v. Aicardi, 34

⁴ O. J. Gude Co. v. Farley, 28 Misc. Ala. 393, 73 Am. Dec. 457.

184, 58 N. Y. Supp. 1036. As to the ⁷ Anderson v. Miller, 96 Tenn. 35, right to erect signs, see post, § 138. 33 S. W. 615, 31 L. R. A. 604, 54 Am.

⁵ Miles v. Lauraine, 99 Ga. 402, 27 St. Rep. 812.

S. E. 739. In this case it was de- ⁸ Hersey v. Chapin, 162 Mass. 176, cided that the landlord could not 38 N. E. 442, where it was decided obtain an injunction to prevent the that a tenant at will could not tenant from bringing his wife to live authorize such use by a board of

expressly leased for that purpose, the tenant has, it is evident, a right, as against his immediate landlord, to so use them.⁹ Perhaps such a use might properly be regarded as involving the commission of waste in so far as it effects, or is calculated to effect, a physical alteration in the premises by the introduction of germs of disease, while not waste, nor a ground for the imposition of any liability, in so far as it merely creates a prejudice against the premises among possible future occupants, unless, of course, there is an express stipulation against a use of that character. Under such a view, the user referred to might be enjoined, but would presumably subject the tenant to liability in damages only to the extent of the cost of a thorough disinfection of the premises, while for permanent diminution in rental value by reason of the odium which attaches to premises once so used, the landlord would be without remedy, as he would be for any other use of the premises, not physically injuring them, against which he neglected to guard by express stipulation. In no case, however, has any such distinction in this regard been suggested.

In the absence of an express stipulation to the contrary, there is no obligation upon a lessee to personally hold possession, and he may assign or sublet to another,¹⁰ and he may license others to come on the premises for particular purposes.¹¹ So, it would seem clear, the lessee has a right, if he so chooses, to leave the premises vacant, provided there is no stipulation to the contrary,¹² and provided, further, this does not result in injury to the premises. In two or three cases, however, expressions are used suggesting the existence of an obligation upon the tenant to enter on the premises, his failure so to do being referred to as a "breach" of his contract.¹³ In these cases, however, the de-

health, and that consequently the board was liable for the consequent loss in value of the premises.

⁹ In *Lovett v. United States*, 9 Ct. Cl. 479, it was decided that if premises are leased for a hospital, they may be used as a smallpox hospital.

¹⁰ See post, chapter XV.

¹¹ See *Perry v. Bailey*, 94 Me. 50, 46 Atl. 789.

¹² See *Moore v. Guardian Trust Co.*, 173 Mo. 218, 73 S. W. 143.

¹³ See *Tully v. Dunn*, 42 Ala. 262; *Silva v. Bair*, 141 Cal. 599, 75 Pac. 162; *Segal v. Ensler*, 16 Misc. 43, 37 N. Y. Supp. 694; *James v. Kibler's Adm'r*, 94 Va. 165, 26 S. E. 417. In *Clark v. Clark*, 49 Cal. 586, it is said that occupation by an agent is sufficient, the court apparently thinking that some occupation is necessary.

fault by the tenant which involved a liability upon his part was, it is conceived, not in his failure to enter, but in his failure to pay rent, and the failure to enter was important only as showing, with other circumstances, an intention not to pay any of the installments of rent which might subsequently accrue.

In a number of states the use of the premises by the tenant for an illegal purpose is by statute a cause of forfeiture.¹⁴ It does not appear that, apart from such a statute, the landlord has a right to object to the tenant's use of the premises because it is for an illegal purpose, though he could ordinarily prevent a continuance of such use by instigating a criminal prosecution of the tenant.

§ 123. Express covenants.

a. **General considerations.** Quite frequently the instrument of lease contains a covenant by the lessee to use the premises for certain purposes only, or not to use them for certain purposes. If the lease is for a year or more, a stipulation as to the use should, it would seem, be evidenced by writing as a contract not to be performed within a year, and it has been in effect so decided,¹⁵ though in another state a different view was adopted.¹⁶ A covenant of this character has been given effect when it was not in terms made by the lessee, but he merely agreed to abide by the regulations of the lessor corporation, among which was one restricting the mode of using the premises.¹⁷

Such a covenant will, it has been said, be construed in favor of the lessee.^{18, 19} That a particular use was made of the premises at the time of the lease will not except such use, it seems evident, from the operation of the covenant, but in case of doubt as to the meaning of the covenant such use might be considered, along with other circumstances.

¹⁴ See post, § 193 b.

entire," a questionable conclusion.

¹⁵ *Higgins v. Gager*, 65 Ark. 604, 47 S. W. 848. This case involved the validity of an oral provision against the use of adjoining premises by the lessor, but the principle would be the same. The court decided that the invalidity of this oral provision invalidated the lease on the theory that "the contract was
¹⁶ See ante, § 53 a, note 56.
¹⁶ *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218.
¹⁷ *Round Lake Ass'n v. Kellogg*, 47 N. Y. St. Rep. 668, 20 N. Y. Supp. 261; *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576.
^{18, 19} *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076.

b. **Covenant against any trade.** Occasionally the instrument of lease contains a covenant by the lessee not to exercise any trade or any business upon the leased premises. It has been held that the word "trade" in this connection refers to a business involving buying and selling, and that it does not cover the maintenance of a private lunatic asylum.²⁰ The keeping of a school, however, has been regarded as within a covenant against using the premises for "business."²¹ That what is, so far as concerns the use of the premises, a business, is conducted with no purpose of profit, has been held not to take it out of the operation of a covenant against using the premises for a business,²² and it has been considered that the maintenance of a "home for working girls," at which board and lodging were furnished free, was within the meaning of such a covenant.²³ But a covenant against using the premises for a business is not broken because, incidentally to its use for other purposes, business happens to be transacted thereon.²⁴

A covenant not to use the premises for any art, trade, or business, has been held to apply to the teaching of music.²⁵ And one not to affix, or permit any outward mark or show of business to be affixed, on the demised premises, was regarded as broken when the lessee placed on an inside blind, visible from the outside, and on a brass plate outside, the name of a firm carrying on business on the premises.²⁶

A covenant not to "convert" the premises into a shop is broken, it seems, by their use as an office for taking orders for coal, although no structural alteration is made.^{27, 28}

c. **Covenant against particular trade.** A covenant not to use the premises for a "coffee house" has been held to prevent persons who are dealers in tea, coffee and other groceries from selling refreshments, such as tea, coffee and sandwiches, for the convenience of customers,²⁹ and a covenant not to exercise the trade

²⁰ Doe d. Wetherell v. Bird, 2 Adol. & E. 161.

²¹ Doe d. Bish v. Keeling, 1 Maule & S. 95; Kemp v. Sober, 1 Sim. (N. S.) 517.

²² Bramwell v. Lacy, 10 Ch. Div. 691; Portman v. Home Hospital Ass'n, 27 Ch. Div. 81, note.

²³ Rolls v. Miller, 27 Ch. Div. 71.

²⁴ Portman v. Home Hospital Ass'n, 27 Ch. Div. 81, note; Rolls v. Miller, 27 Ch. Div. 71.

²⁵ Tritton v. Bankhart, 56 Law T. (N. S.) 306.

²⁶ Evans v. Davis, 10 Ch. Div. 747.

^{27, 28} See Wilkinson v. Rogers, 2 De Gex, J. & S. 62.

²⁹ Fitz v. Iles [1893] 1 Ch. 77.

of butcher was held to be broken by the sale of raw meat on the premises, though the slaughtering was done elsewhere.³⁰ And a covenant not to sell tobacco or cigars precludes, it seems, their sale in connection with a grocery business.³¹ On the other hand it has been decided that a covenant not to carry on a particular trade does not preclude the sale, by a different class of trader, of certain articles which form a part, but by no means the whole, of the prohibited trade.³²

Whether a particular business is one "similar" to the specified business of another tenant of the same lessor, within a covenant against such similar business, is said to be a question of whether they are so much alike as to compete.³³

d. **Covenant against offensive trade.** The carrying on of a fried fish business may, it has been decided, violate a covenant against the carrying on of an offensive trade,³⁴ and lime burning has been regarded as a "noisome" business within a covenant of this character.³⁵ Carrying on a dangerous trade, however, is not a breach of a covenant not to carry on any noisome or offensive trade.³⁶ There is a dictum that such a covenant would be construed with reference to the business carried on upon the premises at the time of the lease, and would not ordinarily be regarded as extending to such a business.³⁷

When certain trades are specified which the tenant is not to carry on and the words "or any other noisome or offensive trade," or similar words, are added, such general words will be construed as referring to trades *ejusdem generis* with those specified.³⁸

³⁰ Doe d. Gaskell v. Spry, 1 Barn. & Ald. 617. tioners. Lumley v. Metropolitan R. Co., 34 Law T. (N. S.) 774.

³¹ Waldorf-Astoria Segar Co. v. Salomon, 109 App. Div. 65, 95 N. Y. Supp. 1053, *affd.* 184 N. Y. 584, 77 N. E. 1197. ³³ Drew v. Guy [1894] 3 Ch. 25.

³² Stuart v. Diplock, 43 Ch. Div. 343. ³⁴ Devonshire v. Brookshaw, 43 Sol. J. 675.

A covenant not to carry on the business of a wholesale or retail confectioner is not broken by the sale, by a grocer, of a particular sweetmeat usually sold by confec- ³⁵ Wiltshire v. Cosslett, 5 Times Law R. 410.

³⁶ Hickman v. Isaacs, 4 Law T. (N. S.) 285. ³⁷ Gutteridge v. Munyard, 7 Car. & P. 129.

³⁸ Doe d. Wetherell v. Bird, 2 Adol. & E. 161; Jones v. Thorne, 1 Barn. & C. 715.

A stipulation that the lessee shall keep the premises clean has been held to be broken by their use as a morgue, and the deposit therein of dead bodies, occasionally in an advanced state of decomposition.³⁹

If there is a covenant not to carry on an offensive trade, it has been decided, the fact that an additional rent is reserved to be paid in case such a trade is carried on does not entitle the tenant, on paying such rent, to carry on such a trade.⁴⁰

A covenant that the lessees will not make nor allow to be made any unlawful, improper or offensive use of the premises will not, it has been held, entitle the lessor to stop by injunction the use of the building for the very business for which both the parties expected it to be used, although, incidentally to the business, a nuisance arises.⁴¹

e. **Covenant to use premises for specified purpose only.** Occasionally there is a covenant to use the premises only for some specified purpose,⁴² as for instance for a private residence.

A covenant to use the premises for a private residence only is broken by their use for a boarding house,⁴³ for a school,⁴⁴ or for the education and lodging of a large number of girls in connection with a charitable institution,⁴⁵ but not by the holding of an auction sale of the furniture previously used thereon.^{45a}

³⁹ Clementson v. Gleason, 36 Minn. 102, 30 N. W. 400.

⁴⁰ Weston v. Metropolitan Asylum Dist., 9 Q. B. Div. 404.

⁴¹ Browne v. Niles, 165 Mass. 276, 43 N. E. 90.

⁴² In Heywood v. Berkeley Land & Town Imp. Ass'n, 71 Cal. 349, 12 Pac. 232, it was held that a finding that there was no breach of a stipulation that the leased premises be used in good faith continuously for the usual and ordinary purpose of a ferry was justified, the ferry boat having failed to run for a month only, owing to the levy of an execution thereon, and a schooner having been substituted during such month which ran at irregular intervals and carried all the freight offered.

⁴³ Hobson v. Tulloch [1898] 1 Ch. 424; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576. So when it was provided that the premises should be used "strictly as a private dwelling, and not for any public or objectionable purpose." Gannett v. Albree, 103 Mass. 372. But a statement that the premises were to be held by the lessees for a private residence has been held not to prevent an "additional use" by taking boarders. Chautauqua Assembly v. Alling, 46 Hun (N. Y.) 582.

⁴⁴ Wickenden v. Webster, 6 El. & Bl. 387; Johnstone v. Hall, 2 Kay & J. 414.

⁴⁵ German v. Chapman, 7 Ch. Div. 271.

^{45a} Reeves v. Cattell, 24 Wkly. Rep. 485.

A covenant that any building to be erected shall be used as a private residence only is broken, it has been held, by the erection of a large block of buildings, to be occupied as residential flats, with a public entrance and staircase.⁴⁶ A clause in a lease to the lessor's mother "only for herself to occupy as a residence" was held not to be violated by her marriage to a man who, with his four children, then came to live with her.⁴⁷

A covenant to use the premises for mercantile purposes and not otherwise is broken by their use for a barber shop,⁴⁸ and a covenant to use them only for an oilcloth and dry goods store is broken by the holding of auction sales of oilcloth and dry goods.⁴⁹

A saloon is not a "salesroom" within a covenant allowing the premises to be used only as a "studio, salesroom and dwelling house."⁵⁰

Where premises were leased to trustees of a society, to be used only for the purposes of the society and for a land office, their use for a justice's court by one of such lessees was regarded as forbidden.⁵¹ But when the lease was of rooms to be used as a real estate and conveyancing office, it was considered, in the same jurisdiction, that no substantial breach of covenant was caused by their use as a justice's office, no loss of rents as to the rest of the building having resulted from such use.⁵²

A statement in the instrument of lease, that the premises are demised for a particular purpose, or are to be used for a particular purpose, has occasionally been regarded as constituting a covenant to use them for such purpose only.⁵³ In one case

⁴⁶ *Rogers v. Hosegood* [1900] 2 Ch. 388.

⁴⁷ *Schroeder v. King*, 38 Conn. 78.

⁴⁸ *Cleve v. Mazzoni*, 19 Ky. Law Rep. 2001, 45 S. W. 88.

⁴⁹ *Weil v. Abrahams*, 53 App. Div. 313, 66 N. Y. Supp. 244. See *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587.

So a covenant to use only for a gentlemen's furnishing store has been held to be broken by the holding of frequent auction sales of the lessee's stock. *Cockburn v. Quinn*, 20 Ont. 519.

⁵⁰ *Bryden v. Northrup*, 58 Ill. App. 233.

⁵¹ *Farwell v. Easton*, 63 Mo. 446.

⁵² *White v. Kane*, 53 Mo. App. 300. This was merely a dictum. The provision as to use was not only not in the form of a covenant, but it was not in terms exclusive of other uses.

⁵³ *McDonald v. Starkey*, 42 Ill. 444; *Sullivan v. Monahan*, 123 Ill. App. 467; *Spalding Hotel Co. v. Emerson*, 69 Minn. 292, 72 N. W. 119; *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812 (ante, note 7); *De For-*

to an interference with the ordinary comfort of existence, as distinguished from a mere fanciful feeling of distaste, irrespective of whether actual damage has been sustained.⁶¹ And so it was held that the reasonable apprehension of danger from infection, resulting from the proximity of a throat hospital, was sufficient to render such hospital an annoyance, even though there was no actual risk of infection.⁶² And the erection of a large wooden screen above the fence between the leased premises and those adjoining, which tended substantially to interfere with the access of light to the latter premises, was regarded as an annoyance.⁶³ But a prominent advertisement, even though ugly and obtrusive, placed across the front of the building leased, in a neighborhood exclusively devoted to business, was held not to be within a covenant against the doing of anything which might grow to the injury, annoyance, disturbance or inconvenience of the lessors.⁶⁴

To involve a breach of a covenant by the lessee not to maintain a "nuisance," it is not, it seems, necessary that the nuisance be one in the technical sense.⁶⁵ But a different view has been asserted, with the result of holding that the establishment of a national (public) school does not involve a breach of such a covenant.⁶⁶ A boys' school has been regarded as within a covenant against any trade, business, or occupation whereby any injurious, offensive or disagreeable noise or nuisance shall be occasioned.⁶⁷

g. **Covenant as to liquor business.** A covenant on the part of the lessee not to use the premises for a liquor business, or for a liquor business of a particular character, has occasionally been the subject of judicial construction. It has been decided that a covenant not to use a building on the premises as "a public house, tavern, or beershop" is broken by selling beer not to be drunk on the premises,⁶⁸ while a covenant not to use a building

⁶¹ *Todd-Heatly v. Benham*, 40 Ch. Div. 80.

⁶² *Tod-Heatly v. Benham*, 40 Ch. Div. 80.

⁶³ *Wood v. Cooper* [1894] 3 Ch. 671.

⁶⁴ *Our Boys' Clothing Co. v. Holborn Viaduct Land Co.*, 12 Times Law R. 344.

⁶⁵ *Tod-Heatly v. Benham*, 40 Ch. Div. 80.

⁶⁶ *Harrison v. Good*, L. R. 11 Eq. 338.

⁶⁷ *Wanton v. Coppard* [1899] 1 Ch. 92.

⁶⁸ *London & Suburban Land & Bldg. Co. v. Field*, 16 Ch. Div. 645; *Nicoll v. Fenning*, 19 Ch. Div. 258.

as a beerhouse or as a public house for the sale of beer is not broken by such sales of beer to be drunk elsewhere.⁶⁹ A covenant by the lessee that he will not sell liquor on the premises is not violated, it has been decided, by his subletting of the premises for use as a retail liquor saloon.⁷⁰

When property is leased for the carrying on of the liquor trade, there is sometimes, particularly in England, a covenant on the part of the lessee not to do any acts which will forfeit the license. A covenant by the lessee not to do any act which may "affect, lessen or make void" the license,⁷¹ or cause it to be "in any danger of being suspended, discontinued or forfeited,"⁷² has been held not to be broken by the lessee's conviction of selling in violation of law, this not necessitating, under the law, a refusal to extend the license. But a covenant not to do or suffer to be done on the premises any act by which the license "may be forfeited" has been regarded as covering a case in which the license is brought in jeopardy by the act of the tenant, though not actually forfeited.⁷³

A covenant not to do or suffer any act whereby the license might be forfeited is not broken because a sublessee does such act,⁷⁴ and it is immaterial that the covenant by the lessee is that neither he nor his "assigns" shall do such act, the word "assigns" not ordinarily including "sublessees."⁷⁵ But a covenant at all times during said term to keep and conduct the saloon in a regular and proper manner in all respects has been regarded as broken by the closing of the saloon owing to a breach of the licensing law on the part of a sublessee.⁷⁶

In England, when premises leased for a "public house" or, as we would ordinarily say, a "saloon," are owned by the pro-

⁶⁹ *London & N. W. R. Co. v. Garnett*, L. R. 9 Eq. 26; *Holt & Co. v. Collyer*, 16 Ch. Div. 718. In *re Cullen & Rial's Contract* [1904] 1 Ir. 206, a covenant not to follow the trade of a publican on the premises was held not to be broken by trading as a licensed "spirit grocer."

⁷⁰ *Granite Bldg. Corp. v. Greene*, 25 R. I. 586, 57 Atl. 649.

⁷¹ *Wooler v. Knott*, 1 Exch. Div. 124.

⁷² *Fleetwood v. Hull*, 23 Q. B. Div. 35.

⁷³ *Harmann v. Powell*, 60 Law J. Q. B. 628. And see *Mumford v. Walker*, 71 Law J. K. B. 19.

⁷⁴ *Wilson v. Twamley* [1904] 2 K. B. 99.

⁷⁵ *Bryant v. Hancock & Co.* [1898] 1 Q. B. 716 [1899] App. Cas. 442.

⁷⁶ *Palethorpe v. Home Brewery Co.*

prietor of a brewery, a covenant is frequently entered into by the lessee to buy from the lessor all beer sold on the premises. Such a covenant has been held to bind the lessee only so long as the lessor supplies him with beer of good marketable quality, and only if it is of the kind required by him in his business.⁷⁷

h. Covenant to occupy personally. Though, apart from an express stipulation to the contrary, the lessee is not, it seems, under any obligation to take possession,⁷⁸ he may expressly agree to occupy. It has been held that a covenant to "use" the house "as a dwelling" was broken by the removal of the tenant's family, though he left his goods there and occasionally slept there.⁷⁹ And a covenant by the lessee to reside on the premises and conduct a hotel thereon has been held to preclude an assignment to a corporation.^{79a}

i. Covenant as to taking supplies from lessor. Where a lessor agreed to supply to the lessee the whole of the chlorine still-waste as it came from his still, at a given rate, and not to use, injure or part with any of the still-waste except to the lessee, it was held that the lessee was bound to take the whole of the waste which, during his tenancy, came from the still, although such waste ceased to be useful to him.⁸⁰ And where it was agreed, upon the leasing of lime works, that the lessor should furnish, and that the lessee should take, from a certain colliery all the coal that might be required for the lessee's business, and that colliery did not yield the quantity required, the lessee, it was held, could resort elsewhere only for the deficiency.⁸¹ A covenant by the lessee, upon a lease of a lot in the grounds of a camp meeting association, to conform to such regulations as the association should from time to time impose, has been held not to entitle the association lessor to make a regulation requiring the lessee, and all other lot owners, to purchase all their supplies at stores operated by the association.⁸²

Occasionally the lessee of premises intended to be used for the liquor business agrees to purchase all his supplies, or a specified

⁷⁷ See post, at notes 83-87.

⁸⁰ *Bealey v. Stuart*, 7 Hurl. & N.

⁷⁸ See ante, § 122.

753.

⁷⁹ *Marsh v. Bristol*, 65 Mich. 378,
32 N. W. 645.

⁸¹ *Wight v. Dicksons*, 1 Dow, 141.

^{79a} *Jenkins v. Price* [1908] 1 Ch. Tucker, 173 N. Y. 203, 65 N. E. 975,
10. 60 L. R. A. 786.

⁸² *Thousand Island Park Ass'n v.*

portion thereof, from the lessor. Such an agreement can, it has been held, be enforced only so long as the lessor supplies a good marketable quality of the specified article,⁸³ and the kind required in his business.⁸⁴ But a contract to the effect that no beer other than that manufactured by the lessor shall be sold on the premises has been held to be operative, so far as precluding the sale of other beer, even though the lessor's beer could not be legally obtained, as was known to the parties at the time of the lease, and though the lessor was a member of a combination formed for the purpose of controlling the local trade in beer.⁸⁵ Whether such a covenant will bind the lessee or his assigns in case the lessor, or the transferee of the reversion, removes the brewery plant to another place, has been regarded as a question of construction.⁸⁶ The benefit of a covenant binding the lessee to take beer from the lessor or his successors in business only was held not to pass to a transferee of the reversion, the lessor continuing the business himself.⁸⁷

j. **Persons affected by covenant.** A covenant as to the mode of use of the premises is one which runs with the land, so as to bind one to whom the leasehold interest is assigned.⁸⁸ And so the assignee is bound by a covenant to conduct the liquor business on the premises strictly according to law,⁸⁹ to purchase all his stock from the lessor,⁹⁰ and not to use the premises for a certain purpose.⁹¹

Though a covenant by the lessee to use premises, or not to use them, in a particular way, is binding on the assignee, and renders him liable in damages in case it is violated by him, neither

⁸³ *Holcombe v. Hewson*, 2 Camp. 56, 47 N. W. 47; *Granite Bldg. Corp.* 391; *Luker v. Dennis*, 7 Ch. Div. 227. *v. Greene*, 25 R. I. 586, 57 Atl. 649;

⁸⁴ *Edwick v. Hawkes*, 18 Ch. Div. 193. *Brolaskey v. Hood*, 6 Phila. (Pa.) 193.

⁸⁵ *Joseph Schlitz Brew. Co. v. Nielsen*, 77 Neb. 868, 110 N. W. 746, 8 N. E. 956.

⁸⁶ *L. R. A. (N. S.)* 494. ⁸⁹ *White v. Southend Hotel Co.*

⁸⁷ See *Doe d. Calvert v. Reid*, 10 [1897] 1 Ch. 767. ⁹¹ *American Strawboard Co. v. Barn. & C.* 849; *Clegg v. Hands*, 44 Ch. Div. 503; *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608.

⁸⁸ *Birmingham Breweries v. Jameson*, 67 Law J. Ch. 403. ⁹⁰ *Haldeman Paper Co.*, 27 C. C. A. 634, 83 Fed. 619, applying the principle of *Tulk v. Moxhay*, 2 Phil. Ch. 774, post, § 131.

⁸⁹ *Wertheimer v. Hosmer*, 83 Mich.

the lessee nor his assignee is liable, as for a breach of such covenant, because a subtenant uses the premises in a way not in accord with such covenant, and this has been decided to be the case even though the covenant is expressly made binding on "assigns," subtenants not being assigns.⁹²

It has in one state been decided that if the lessee covenants not to "suffer" a particular use of the premises, he is liable as for a breach of the covenant if a subtenant makes such use.⁹³ In England, however, a different view is adopted, it being considered that a tenant does not "suffer" premises to be so used merely because he leases to one who so uses them.⁹⁴ Presumably, however, in any jurisdiction, a covenant in general terms that a particular use of the premises shall not be made would be regarded as imposing liability on the covenantor, and also upon his assigns, in case a subtenant makes such use.⁹⁵

A subtenant, not being in privity with the head landlord,^{95a} is obviously not subject to any liability in damages by reason of his failure to comply with a covenant of the original lease with reference to the use of the premises.⁹⁶ He may, however, under the equitable doctrine that one taking possession of property is bound by any existing restrictions upon its use of which he has notice,⁹⁷ be restrained by injunction from using the property in violation of restrictions contained in the head lease⁹⁸ or in any

⁹² *Bryant v. Hancock & Co.* [1898] 1 Q. B. 716; *Granite Bldg. Corp. v. Greene*, 25 R. I. 586, 57 Atl. 649. But see *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812, post, note 98.

⁹³ *Wheeler v. Earle*, 59 Mass. (5 Cush.) 31, 51 Am. Dec. 41; *Miller v. Prescott*, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434. Approval of this view is expressed in *Granite Bldg. Corp. v. Greene*, 25 R. I. 586, 57 Atl. 649.

⁹⁴ *Bryant v. Hancock & Co.* [1898] 1 Q. B. 716; *Wilson v. Twamley* [1904] 2 K. B. 99.

⁹⁵ It is so decided in *Crowe v. Riley*, 63 Ohio St. 1, 57 N. E. 956.

^{95a} See post, §§ 161-164.

⁹⁶ *Crowe v. Riley*, 63 Ohio St. 1, 57 N. E. 956.

⁹⁷ See post, § 131.

⁹⁸ *Cosser v. Collinge*, 3 Mylne & K. 283; *Tritton v. Bankhart*, 56 Law T. (N. S.) 306; *Teape v. Douse*, 92 Law T. (N. S.) 319; *Arnold v. White*, 5 Grant Ch. 371; *Peer v. Wadsworth*, 67 N. J. Eq. 191, 58 Atl. 379. See *Godfrey v. Black*, 39 Kan. 193, 17 Pac. 849, 7 Am. St. Rep. 544.

In *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N. W. 47, it was held that one who was apparently a subtenant could be enjoined from making the forbidden use, the court, however, referring to him as "as-

other instrument in the sublessor's chain of title.^{98a} But this doctrine does not, it has been decided, authorize an injunction against a subtenant to compel him to take active measures against one holding as his tenant, to compel him to refrain from making a forbidden use of the premises.^{98b}

A stipulation by the lessee, precluding a certain use of the premises, cannot be asserted by a sublessee of a part of the premises, the stipulation not being made for his benefit, and he being neither the covenantee nor an assignee of the covenantee.⁹⁹

k. Waiver of covenant. The mere fact that the landlord fails, for a considerable time, to object to a use of the premises not in accord with the covenant does not, it would seem, involve a waiver of the covenant.¹⁰⁰ Nor is there a waiver for all purposes because he assents to a particular act which would otherwise constitute a breach.¹⁰¹ But if he acquiesces in expenditures

signee," and liable as such under the covenant as one running with the land.

In *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241, an injunction was sustained as against the subtenant on the ground that the lessee, having no right to use the premises in a certain way, could not give such right to others. But, it may be remarked, a subtenant has the right to make a particular use of the premises, not because the tenant gives him such right, but because such right is incident to the right of possession given to him by the tenant. See, also, *Spalding Hotel Co. v. Emerson*, 69 Minn. 292, 72 N. W. 119. In *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812 (ante, § 111, note 860), it is said that the rights of the subtenant as to the use of the premises were to be measured by those of the tenant because it was through him that he occupied the premises. There, apparently, however, there was no express stipulation as to the use of the premises, and the decision is perhaps to be regarded as based on the ground of negligence in using the premises for the storage of an inflammable article. It does not even appear whether the subtenant was a party to the action.

^{98a} *Clements v. Welles*, L. R. 1 Eq. 200; *Dunn v. Barton*, 16 Fla. 765.

^{98b} *Hall v. Ewin*, 37 Ch. Div. 74.

⁹⁹ *Beebe v. Tyre*, 49 Wash. 157, 94 Pac. 940.

¹⁰⁰ See *London, C. & D. R. Co. v. Bull*, 47 Law T. (N. S.) 413; *De Busche v. Alt*, 8 Ch. Div. 286. But in *Willey Lodge No. 21 v. Paris*, 31 Tex. Civ. App. 632, 73 S. W. 69, it was decided that the landlord could not, after a school had been maintained on the premises by the tenant for fifteen years, assert that it was not such a school as was called for by the lease.

¹⁰¹ In *Brooks v. Clifton*, 22 Ark. 54, it is decided that a provision that the premises shall be used for the storage of a certain class of articles only is not wholly waived because

made by the tenant for the purpose of adapting the premises to a particular use, he cannot afterwards object that such use is prohibited by the terms of the lease,¹⁰² there being in such case a valid estoppel.

1. **Remedies for breach.** In case of breach of a covenant as to the use of the premises, the landlord may bring an action for damages,¹⁰³ but more usually he would seek an injunction to restrain the forbidden use, a remedy to which the landlord is well recognized to be entitled.¹⁰⁴ The fact that the landlord might enforce a forfeiture for breach of such covenant does not disentitle him to an injunction.¹⁰⁵

the lessor failed to object to its use for the storage of certain other articles.

In *Gannett v. Albree*, 103 Mass. 372, it was decided that, where the instrument of lease stipulated that the premises should be used "strictly as a private dwelling, and not for any public or objectionable purpose," the fact that the lessor consented to their use for sleeping rooms in connection with a girls' school did not preclude him from objecting to their subsequent use as a boarding house.

That the lessor consents to the assignment of the lease to a railroad company does not entitle the company to use the premises for a railroad track, a use not permitted by the instrument of lease. *Bass v. Metropolitan West Side El. R. Co.*, 27 C. C. A. 147, 82 Fed. 857, 39 L. R. A. 711.

¹⁰² See *Malley v. Thalheimer*, 44 Conn. 41; *London, C. & D. R. Co. v. Bull*, 47 Law T. (N. S.) 413.

¹⁰³ See *Stillman v. Thompson*, 80 Conn. 192, 67 Atl. 528, an action for damages on account of the breach of a covenant to use the premises as a bakery, thereby destroying the value of the good will and of the bakery equipment on the premises.

¹⁰⁴ *Godfrey v. Black*, 39 Kan. 193, 17 Pac. 849, 7 Am. St. Rep. 544; *Hovnanian v. Bedessern*, 63 Ill. App. 353; *Jalageas v. Winton*, 119 Ill. App. 139; *Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; *Spalding Hotel Co. v. Emerson*, 69 Minn. 292, 72 N. W. 119; *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587; *Howard v. Ellis*, 6 N. Y. Super. Ct. (4 Sandf.) 369; *Weil v. Abrahams*, 53 App. Div. 313, 66 N. Y. Supp. 244; *Chautauqua Assembly v. Alling*, 46 Hun (N. Y.) 582; *Dodge v. Lambert*, 15 N. Y. Super. Ct. (2 Bosw.) 570; *Gillilan v. Norton*, 29 N. Y. Super. Ct. (6 Rob.) 546, 33 How. Pr. 373; *Orvis v. National Commercial Bank*, 81 App. Div. 631, 80 N. Y. Supp. 1029; *Jos. Schlitz Brew. Co. v. Nielsen*, 77 Neb. 868, 110 N. W. 746, 8 L. R. A. (N. S.) 494; *Cockburn v. Quinn*, 20 Ont. 519; *Barret v. Blagrove*, 5 Ves. Jr. 555; *Tod-Heatly v. Benham*, 40 Ch. Div. 80.

¹⁰⁵ *Godfrey v. Black*, 39 Kan. 193, 17 Pac. 849, 7 Am. St. Rep. 544; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; *Barret v. Blagrove*, 5 Ves. Jr. 555. Nor does the fact that the lessor has asserted a forfeiture have such an effect. *Joseph Schlitz Brew.*

§ 124. User resulting in nuisance.

If the tenant makes such a use of the premises as to create a nuisance to an adjoining owner, he is obviously liable to the latter in damages, or may be restrained by injunction from continuing the nuisance, the fact that he is in possession for a limited time only being immaterial in this regard. If the lease was made for the purpose of such a use, the lessor will be liable as a joint tortfeasor,¹⁰⁶ but if he cannot be regarded as having connived at such a noxious use of the premises, neither he nor his transferee is liable on account of such use by the tenant.¹⁰⁷

The landlord, if the owner or occupant of adjoining premises, has the same right as any other adjoining owner to object to such a use of the premises by the tenant as to create a nuisance, he not having consented to such use.¹⁰⁸ If not the owner or occupant of neighboring premises, the landlord has, it would seem, apart from express stipulation, no right to object to a particular use of the premises as constituting a nuisance, unless it involves the commission of waste.¹⁰⁹

Co. v. Nielsen, 77 Neb. 868, 110 N. Faulkner, 25 Ky. Law Rep. 1037, 76 W. 746, 8 L. R. A. (N. S.) 494. S. W. 1083. Here the use of the

¹⁰⁶ See ante, § 102, at note 565.

premises for storing manure was regarded as a public nuisance.

¹⁰⁷ Bachert v. Lehigh Coal & Nav. Co., 208 Pa. 362, 57 Atl. 765. See ante, § 121.

¹⁰⁸ Fogarty v. Junction City Press-ed Brick Co., 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756.

A covenant by the lessor to indemnify the lessee against any damage caused by using the premises for a purpose constituting a public nuisance was held to be illegal in Leba-non Carriage & Implement Co. v.

¹⁰⁹ But in Kurrus v. Seibert, 11 Ill. App. (11 Bradw.) 319, it seems to have been considered that merely as landlord one might abate a nuisance on the premises.

CHAPTER XII.

EASEMENTS AND ANALOGOUS RIGHTS.

- § 125. Easements existing at time of lease.
- 126. Express grant or agreement.
- 127. "Appurtenances."
- 128. Implied grant of easement.
- 129. Reservation of easement.
- 130. Acquisition or grant by tenant.
- 131. Restrictive covenants.
- 132. Rights of access and approach.
- 133. Light.
- 134. Water rights.
- 135. Use of adjoining premises.
- 136. Furnishing of power.
- 137. Furnishing of heat.
- 138. Signs and other advertising devices.

§ 125. Easements existing at time of lease.

Upon the making of a lease of land, as upon any other conveyance thereof, easements already existent, appurtenant to the demised premises, pass with the land, and the lessee or his assignee has the right to the enjoyment thereof so long as the tenancy continues.¹ If for instance there is a right of way appurtenant to the demised land, the lessee is entitled to the use

¹ Philadelphia & Reading Coal & Iron Co. v. New York, 21 Fed. 97; 52 N. W. 583, 17 L. R. A. 275, 44 Bedlow v. New York Floating Dry-Dock Co., 112 N. Y. 263, 19 N. E. 800; Brown v. Honeyfield (Iowa) 116 N. W. 731; A. H. Pugh Printing Co. v. Dexter, 5 Ohio N. P. 332; Skull v. Glenister, 16 C. B. (N. S.) 81. In Edmison v. Lowry, 3 S. D. 77, Am. St. Rep. 774, it is said that the lease of property abutting on a public street includes all the rights, incidents and easements in such street belonging to said property and not specially reserved in the lease.

thereof,² and a lessee has been decided to be entitled to water rights enjoyed by his lessor in connection with the premises.³

§ 126. Express grant or agreement.

The lease may, by express provision, create in favor of the lessee easements, or rights in the nature of easements, affecting the lessor's exclusive enjoyment of land retained by him, that is, the lessee may be given, as appurtenant to the demised land, rights as to the use of land retained by the lessor.⁴ For instance, the lease may give the lessee a right of way over land retained by the lessor, or, in the case of a lease of a room or rooms in a building, the lessee may be given a right to use a passageway or staircase in the part of the building retained by the lessor.⁵ So a lessee may be given a right to light coming over other land retained by the lessor, the effect being to preclude any obstruction of such light by the lessor.⁶

Not infrequently the lease expressly gives to the lessee certain

² Morrison v. Chicago & N. W. R. Co., 117 Iowa, 587, 91 N. W. 793; Crook v. Hewitt, 4 Wash. 749, 31 Pac. Oliver v. Dickenson, 100 Mass. 114. 28.

In Avery v. New York Cent. & H. R. R. Co., 26 N. Y. St. Rep. 279, 7 N. Y. Supp. 341, a right in the lessor to have access to a railroad station, created by covenant, was held to pass to the lessee. The right in this case was, however, created by a covenant, and the covenant was regarded as running with the land. The court seems to regard it as a right resting in a contract and an easement as well, but this is, it is conceived, a legal impossibility.

³ Wyman v. Farrar, 35 Me. 64 (lease of factory run by water; lessee has lessor's rights as to water); Stevens v. Wadleigh, 5 Ariz. 90, 46 Pac. 70 (lessee succeeds to lessor's rights as to irrigation from a "community ditch").

The "natural right" of the owner of riparian land to the use of the

⁴ In Basserman v. Trinity Church Soc., 39 Conn. 137, the lease gave the lessees "the privilege of using the well and necessary on the lot next south, so long as they remain," and it was held that the lessees could not demand that they remain after the lessors desired to remove them.

Where the lessor of land abutting on a highway, the fee of which belonged to him, on leasing the premises for a term of years, authorized the lessee to maintain scales in the highway in front of the premises leased, the privilege of so doing was held to terminate with the lease. Berry-Horn Coal Co. v. Scruggs-McClure Coal Co., 62 Mo. App. 93.

⁵ See post, § 132.

⁶ Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175.

privileges or facilities based upon a use to be made by the lessor of land retained by him. For instance, the lessor may agree to furnish light, heat, or power, from premises remaining in his control.⁷ The lessee's right under such an agreement is in its nature contractual and not proprietary, and the term "easement," sometimes used in such connection, seems out of place, the only point of resemblance to an easement being that a burden is imposed on the lessor, as regards the utilization of the premises retained by him, in favor of the leasehold estate, or rather, in favor of the person having such estate.

§ 127. "Appurtenances."

Though the word "appurtenances" is frequently found in a conveyance of land, its use is ordinarily immaterial, since, without it, easements already existent, which are appurtenant to the land, will pass, and easements corresponding to pre-existing *quasi* easements, if "apparent" and "continuous," will be created.⁸ Occasionally, however, the fact that a lease of premises is expressed to be "with the appurtenances" has been regarded as giving the lessee easements or privileges which he would not otherwise have acquired.⁹ Thus in perhaps one or two English cases this word has been regarded as vesting in the lessee an easement of a right of way, corresponding to a pre-existing *quasi* easement, though this was not of such a continuous and apparent character that there was a grant of the easement by implication,¹⁰ and it has been declared in one state that the use of this word gives the lessee "whatever was attached to or used with the premises, as incident thereto, and convenient or essential to the beneficial use or enjoyment thereof,"¹¹ it being in that case regarded as giving to the lessee of a room certain rights in land on which it fronted. In other cases the use of the word was held to give to the lessee of part of a building a right to "exhaust steam"

⁷ See post, §§ 136, 137.

case. See cases collected in Words and Phrases, vol. 1, p. 477 et seq.

⁸ See cases cited 2 Tiffany, Real Prop. § 393, and ante, § 125, post, § 128.

¹⁰ Morris v. Edgington, 3 Taunt. 24; Thomas v. Owen, 20 Q. B. Div.

⁹ The word is occasionally given some effect in a conveyance in fee, but what effect seems to depend on the circumstances of the particular

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¹¹ Doyle v. Lord, 64 N. Y. 432, 437, 21 Am. Rep. 629.

from the lessor's engine as he had been accustomed to have it under previous leases,¹² and the right to use a furnace in the basement of the building for the purpose of heating the upper floors leased.¹³ On the other hand it has been held to give no right to have steam and forced air furnished to the premises, even though there is a local custom to furnish them under like circumstances,¹⁴ nor to give a right of way not previously existent.^{14a}

In one case it was held that the word "appurtenances" could be shown, by oral evidence, to mean that there should not be opened, into the passageway leading to the leased premises, an entrance to an adjoining saloon.¹⁵

The word "appurtenance" is properly confined to things of an incorporeal character, and a conveyance of land "with the appurtenances" will not ordinarily pass land other than that described, on the theory that it is appurtenant thereto, that is, "land cannot be appurtenant to land."¹⁶ And this principle has been applied in connection with a lease.¹⁷ But there are decisions to the effect that it may, in a particular case, be shown that the word was not used in its technical sense, but was used in the sense of "usually occupied or enjoyed with," so as to pass land other than that specifically described,¹⁸ and it was decided in one case that a lease of a lot "with the ap-

¹² *Thomas v. Wiggers*, 41 Ill. 470.

^{14a} *Georke v. Wadsworth* (N. J.

In Parish v. Vance, 110 Ill. App. Eq.) 68 Atl. 71.

50, it was held that the right to have electric light furnished by the

¹⁵ *Lynch v. Hunneke*, 61 N. Y. Super. Ct. 235, 19 N. Y. Supp. 718.

lessor passed as an appurtenance to the rooms leased, as included in the word "appurtenances" in the lease,

¹⁶ Co. Litt. 121 b; cases cited 2 Tiffany, Real Prop. § 393, note 227; Words and Phrases, vol. 1, p. 484.

so that the lessor could not cut it off or withdraw the service, it being absolutely necessary to the les-

¹⁷ *Oliver v. Dickinson*, 100 Mass. 114; *Ogden v. Jennings*, 62 N. Y. 526.

see's business, there being no gas connections and the lessor's agent having stated, before the lease, that it was appurtenant and would be included in the lease.

¹³ *Stevens v. Taylor*, 111 App. Div. 561, 97 N. Y. Supp. 925.

¹⁴ *Watkins v. Greene*, 22 R. I. 34, 46 Atl. 38.

¹⁸ See *Elphinstone*, Interpretation of Deeds, 188; *Hill v. Grange*, 1 Plowd. 164; *Hearn v. Allen*, Cro. Car. 57; *Thomas v. Owen*, 20 Q. B. Div. 225; *Whitney v. Olney*, 3 Mason, 280, Fed. Cas. No. 17,595; *Hill's Lessee v. West*, 4 Yeates (Pa.) 142; *Otis v. Smith*, 26 Mass. (9 Pick.) 293; *Amidown v. Granite Bank*, 90

purtenances" included tide and shore lands, an intention to this effect appearing from other provisions in the lease and the acts of the parties.¹⁹ The word "appurtenance" in the lease of a hotel, does not, it has been decided, cover an iron kettle located on an adjoining lot, and used for heating water for the purposes of the hotel.²⁰

§ 128. Implied grant of easement.

In many cases, upon a conveyance in fee of land, an easement has been implied in favor of the grantee, upon the ground that before the conveyance a *quasi* easement, of an apparent and continuous nature, existed in favor of the land conveyed, that is, that the grantor, before the conveyance, made use of the land retained by him for the benefit of the land subsequently conveyed by him.²¹ It is on this theory, or one analogous thereto, apparently, that a lease has, in some cases, been held to create in the lessee, by implication, rights in the nature of easements, restrictive of the lessor's free enjoyment of the land retained by the latter.²² Accordingly, it has been decided that, upon a lease of a room or rooms in a building, the lessee is entitled to the use of the stairs, hallways and entrances which have ordinarily been used as a means of access thereto, although no mention thereof is made in the instrument of lease,²³ and likewise to the use of closets and wash rooms contiguous to the rooms,²⁴ and to the use

Mass. (8 Allen) 285; Frey v. Drahos, 6 Neb. 1, 29 Am. Rep. 353.

¹⁹ Brown v. Carkeek, 14 Wash. 443, 44 Pac. 887.

²⁰ Barrett v. Bell, 82 Mo. 110, 52 Am. Rep. 361.

²¹ See 1 Tiffany, Real Prop. § 317.

²² In Jones v. Hunter, 1 New Br. Eq. 250, the lessor was, on this theory, restrained from building so as to block up an access to the demised premises through an alleyway.

²³ Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. Unoff. 340, 96 N. W. 487 (lease of room in hotel building to ticket broker; latter is entitled to use of door and hallway leading

thereto from hotel rotunda); Hall v. Irvin, 78 App. Div. 107, 79 N. Y. Supp. 614 (lessee of rooms entitled to use of elevators, hallways, stairs and entrance to building); Hamilton v. Graybill, 19 Misc. 521, 43 N. Y. Supp. 1079 (lessee of two rooms entitled to entrance from hall to each, as existing at time of lease); Miller v. Fitzgerald Dry-Goods Co., 62 Neb. 270, 86 N. W. 1078 (lessee of upper story entitled to use of entryway and stairway leading to rooms).

²⁴ Hall v. Irvin, 78 App. Div. 107, 79 N. Y. Supp. 614; Underwood v. Burrows, 7 Car. & P. 26.

of a doorbell or knocker.²⁵ And a lease of an office room has been regarded as entitling the lessee to maintain signs on the stairway leading thereto.²⁶ A lease of a store in a building has been held to entitle the lessee to the use of a hatchway and hoisting apparatus in common with lessees of other rooms in the building.²⁷ So the right to a "blast" necessary for the lessee's forges, and which had been furnished from the lessor's adjoining premises for several years, has been held to pass under the lease.²⁸ Likewise, a lessee of a building is entitled to the support of an adjoining building owned by the lessor at the time of the lease,²⁹ this being in accordance with the recognized rule in the case of a conveyance in fee.³⁰ How far, in order that an easement may thus be created by implication, it must be necessary to the enjoyment of the premises leased, does not clearly appear. In several of the cases in which such an easement is recognized, its existence is, in part at least, based on the fact that it is necessary for the full enjoyment of the leased premises,^{30a} and conversely, in several cases, the existence of a particular easement is denied, on the ground that it is not necessary to the enjoyment of the premises.³¹

²⁵ *Underwood v. Burrows*, 7 Car. Y. Supp. 754. And see post, § 133, & P. 26. as to easements of light.

²⁶ *Miller v. Fitzgerald Dry-Goods Co.*, 62 Neb. 270, 86 N. W. 1078. In *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388, it is said by See *Whitehouse v. Aiken*, 190 Mass. 468, 77 N. E. 499. Foster, J., that by the lease of a house or store "everything which belongs to it, or is in use with it, and

²⁷ *Browning v. Dalesme*, 5 N. Y. Super. Ct. (3 Sandf.) 13. which is essential to its enjoyment,

²⁸ *Thropp v. Field*, 26 N. J. Eq. (11 C. E. Green) 82. passes as incident, unless specially reserved."

²⁹ *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059. ³¹ *Cummings v. Perry*, 169 Mass. 150, 47 N. E. 618, 38 L. R. A. 149;

³⁰ 1 *Tiffany*, Real Prop. § 317. Id., 177 Mass. 407, 58 N. E. 1083 (a

^{30a} *Miller v. Fitzgerald Dry-Goods Co.*, 62 Neb. 270, 86 N. W. 1078; *Browning v. Dalesme*, 5 N. Y. Super. Ct. (3 Sandf.) 13; *Gans v. Hughes*, 38 N. Y. St. Rep. 490, 14 N. Y. Supp. 930; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059; *Thropp v. Field*, 26 N. J. Eq. (11 C. E. Green) 82. See *Robert v. Thompson*, 16 Misc. 638, 40 N. such implication); *Hill v. Schultz*,

The doctrine that, upon a conveyance of land, which is otherwise inaccessible except by trespass on a stranger's land, the grant of a "way of necessity" will be implied, applies in the case of a conveyance by way of lease³² and so, upon a lease of the upper floors of a building, a way of necessity over the stairs necessary to reach it will no doubt be implied.^{32a}

In England the doctrine has been laid down that when one conveys land for a particular purpose, as for the erection of a house, or for the conduct of a particular business, the grantor thereby precludes himself from using adjoining land in such a way as to interfere with the use of the premises granted for such purpose, since, it is said, this would be "in derogation" of the grant.³³ The principle is evidently applicable in the case of a conveyance by way of lease as well as when the conveyance is in fee. And there are cases in which it has been applied in that connection.³⁴

It has in one jurisdiction been decided that a lease of premises "to be used as a bakery" will give the lessee a right to have the water connection with the pipes on the lessor's adjoining premises remain intact, water being necessary to such use of the premises.³⁵

There are, in this country, occasional decisions and *dicta* which,

40 N. J. Eq. (13 Stew.) 164 (lessee of a store held not entitled to have the cellar steps under his show windows remain covered so that persons could approach close to the windows to inspect the contents, such use of the covering not being necessary to the reasonable enjoyment of the store); Howell v. McCoy, 3 Rawle (Pa.) 256 (lessee of tanyard and bark mill has no right to throw waste matter in the stream to the injury of the lessor's lower land, nor put it on the lessor's adjoining land, this being not necessary but merely convenient to the enjoyment of the leased premises).

³² Powers v. Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; New Orleans City R. Co. v. McCloskey, 35 La. Ann. 784. And see Ramirez v. McCormick, 4 Cal. 245; Motes v. Bates, 74 Ala. 374; Agate v. Lowenbein, 4 Daly (N. Y.) 62.

^{32a} But not when the lease expressly provides for another mode of access. Georke v. Wadsworth (N. J. Eq.) 68 Atl. 71. And see Ramirez v. McCormick, 4 Cal. 245.

³³ Northeastern R. Co. v. Elliot, 1 Johns & H. 145; Caledonian R. Co. v. Sprot, 2 Macq. H. L. Cas. 449; Rigby v. Bennett, 21 Ch. Div. 559; Siddons v. Short, 2 C. P. Div. 572.

³⁴ Hall v. Lund, 1 Hurl. & C. 676; Aldin v. Latimer, Clark, Muirhead & Co. [1894] 2 Ch. 437.

³⁵ Gans v. Hughes, 38 N. Y. St. Rep. 490, 14 N. Y. Supp. 930.

while in terms treating the action of the lessor as a breach of his covenant for quiet enjoyment, apparently base the breach upon the fact that certain rights, more or less in the nature of easements, were included in the lease. So in a case in which a lessor was held liable in damages for interfering with the water privileges attached to the leased premises, in a way which the lease was construed not to permit, it was said that "every grant of any right, interest or benefit, carries with it an implied undertaking, on the part of the grantor, that the grant is intended to be beneficial; and that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted."³⁶ And in another jurisdiction, in an action by the lessee of a cigar store adjoining a hotel with the right of entrance to the hotel, for injury caused by the act of the lessor in "closing" the hotel, the question was said to be "what was leased," and the lessor was held liable because the privilege of entrance from a hotel actually doing business was to be regarded as included in the lease.³⁷ So in a somewhat similar case, involving the closing of an entrance from the lessor's hotel to the lessee's saloon, it was said that "when a person leases a room with doors and passageways so connected with other rooms that these are essential to the use and enjoyment of the room leased, the law implies a covenant that such use shall not be interfered with during the term," it being further said that "the appurtenances of ingress and egress, essential to use and reasonably within the contemplation of the leasing, are as much a part of the estate conveyed as the room itself, and any interference therewith is an invasion of the rights of the lessees for which the law affords a remedy."³⁸

§ 129. Reservation of easement.

The lessor may, in making the lease, expressly reserve an easement in the premises leased in favor of land retained by him,³⁹

³⁶ *Dexter v. Manley*, 58 Mass. (4 of the use of adjoining premises. Cush.) 14, per Shaw, C. J. See post, § 185 f (8).

³⁷ *Coulter v. Norton*, 100 Mich. 389, 59 N. W. 163, 43 Am. St. Rep. 458. ³⁸ *Shaft v. Carey*, 107 Wis. 273, 83 N. W. 288, per Bardeen, J.

The recovery was in terms allowed on the theory that there was an eviction. But it is difficult to see ³⁹ See *Montgomery Amusement Co. v. Montgomery Trac. Co.*, 139 Fed. 353.

any eviction in the mere cessation

the case being similar to the ordinary case of the express reservation of an easement upon a conveyance in fee.⁴⁰ As to whether there may be a reservation, as well as a grant, by implication, of an easement similar to a pre-existing *quasi easement*, the cases in the different jurisdictions are not in harmony.⁴¹ There may, however, in all jurisdictions, be an implied reservation of a way of necessity,⁴² and also, it seems, of a right of support for a building retained from a building conveyed.⁴³

§ 130. Acquisition or grant by tenant.

The tenant, having an estate in the premises, may no doubt acquire an easement appurtenant to the leased premises for the period of the term created by the lease, and it has been held that if he acquires such an easement, not for his own term only, it will enure to the benefit of the landlord upon the expiration of the tenancy.^{43a}

A tenant for years may create an easement in favor of others to endure for the period of his own holding.⁴⁴

§ 131. Restrictive covenants.

In England the courts of equity have established a doctrine that, apart from any question of whether the burden of a covenant can run with the land at law, one who takes land with notice of a previous contract restricting the use of such land, made with the owner of other land,⁴⁵ will be restrained by injunction from making a use thereof in violation of such contract.⁴⁶ And this doctrine has been applied as against a lessee⁴⁷ as well as against

⁴⁰ See 1 Tiffany, Real Prop. § 317. Dock Co., 112 N. Y. 263, 19 N. E. 800.

⁴¹ See 1 Tiffany, Real Prop. § 317. 2 L. R. A. 629.

⁴² 1 Tiffany, Real Prop. pp. 713-715.

In *Vidvard v. Cushman*, 23 Hun (N. Y.) 434, it is decided that the right to use a stairway in a store for the benefit of an adjacent store is not reserved by implication when the use is not necessary for the enjoyment of the latter store.

⁴³ 1 Tiffany, Real Prop. p. 712.

^{43a} *Dempsey v. Kipp*, 61 N. Y. 462; *Bedlow v. New York Floating Dry-*

⁴⁴ *Newhoff v. Mayo*, 48 N. J. Eq. 619, 23 Atl. 265, 27 Am. St. Rep. 455.

⁴⁵ See *Formby v. Barker* [1903] 2 Ch. 539, 554.

⁴⁶ *Tulk v. Moxhay*, 2 Phil. Ch. 774; *Renals v. Cowlshaw*, 9 Ch. Div. 125; *Rogers v. Hosegood* [1900] 2 Ch. 388.

⁴⁷ *Wilson v. Hart*, 1 Ch. App. 463; *Feilden v. Slater*, L. R. 7 Eq. 523; *Fitz v. Iles* [1893] 1 Ch. 77; *Halloway Bros. v. Hill* [1902] 2 Ch. 612.

a grantee in fee. The doctrine has also been extended to cases in which land is laid out into lots under a general scheme of improvement, it being intended that all purchasers of such lots shall improve them, according to such scheme, for the common benefit of all, and in such case the purchaser⁴⁸ or lessee⁴⁹ of one lot has been allowed to enforce by injunction a covenant entered into by either a prior or subsequent purchaser or lessee of another lot, restricting the mode of using or improving the lot so as to bring it into accord with the general scheme.

Apart from any express covenants of this character, one purchaser or lessee may, it seems, be compelled, at the suit of another, to refrain from using or improving his lot so as to infringe upon the general scheme of improvement with knowledge of which he purchased or obtained his lease.⁵⁰ That such a right, as to the adjoining property may exist independently of any express covenant is in effect asserted by English cases which decide that the lessee of a flat in an apartment building, whose written and printed lease shows that the whole building was used or intended to be used for residential flats, and imposes certain regulations upon the lessee in accordance with this intended use, is entitled to an injunction against the lessor, seeking to turn the balance of the building into a club,⁵¹ a hotel,⁵² or public offices.⁵³

The same doctrine as to the binding effect of a restrictive covenant would, it seems, be applied as against an assignee of a lessee, so as to subject him to restrictions imposed by covenants entered into by his assignor, either the lessee or a person from whom the land has passed to the latter, as well as to restrictions incident to a general scheme entered into by one of such persons, and with reference to which the assignee or his predecessor in title obtained the premises.

The doctrine above stated has been enforced not only against an original lessee but also against a sublessee, with the effect of

⁴⁸ See 1 Tiffany, Real Prop. § 352. ⁵¹ Hudson v. Cripps [1896] 1 Ch.

⁴⁹ Spicer v. Martin, 14 App. Cas. 265, approved in Jaeger v. Mansions Consolidated, 87 Law T. (N. S.) 690.

⁵⁰ See De Gray v. Monmouth Beach Club House, 50 N. J. Eq. 329, 24 Atl. 388. ⁵² Alexander v. Mansions Proprietary, 16 Times Law R. 431.

See, also, article by Edward Q. Keasby in 6 Harv. Law R. 43. ⁵³ Gedge v. Bartlett, 17 Times Law Rev. 297.

restraining him from utilizing the premises in violation of any restrictive covenants, contained in the head lease⁵⁴ or elsewhere,⁵⁵ with notice of which he could be charged.

The equitable doctrines above referred to with reference to the enforcement of restrictive covenants and of general schemes of improvement and occupation, have been substantially recognized in a number of the states of this country, or analogous doctrines have been asserted. They have here, however, been but seldom applied as against lessees,⁵⁶ assignees of lessees, or sublessees,⁵⁷ and a discussion thereof in this work would be out of place.⁵⁸ In such states as recognize the running of the burden of covenants generally,⁵⁹ it would seem that, without reference to the equitable doctrine above referred to, the lessee and his assigns would be bound by covenants entered into by the lessor with a third person, before the leasing of the land, as to the use thereof.

§ 132. Rights of access and approach.

The tenant may have a right of approach and access to the leased premises over the adjoining premises of the lessor or of some other adjoining owner or owners by reason of an express grant of such right, either in his favor or in favor of his predecessor in title.

One who takes a lease of premises cannot complain that there is no means of access thereto, it being for him, before taking the lease, to satisfy himself in this respect as in others.⁶⁰ If, however, the lessor retains adjoining premises, there is an implied grant of a way of necessity thereover, provided there is no other

⁵⁴ *Tritton v. Bankart*, 56 Law T. (N. S.) 306; *Hall v. Ewin*, 37 Ch. Div. 74; *John Bros. Abergareo Brewery Co. v. Holmes* [1900] 1 Ch. 188; *Holloway Bros. v. Hill* [1902] 2 Ch. 612. See *Johnstone v. Hall*, 2 Kay & J. 414.

⁵⁵ *Clements v. Welles*, L. R. 1 Eq. 200.

⁵⁶ In *Parker v. Nightingale*, 88 Mass. (6 Allen) 341, 83 Am. Dec. 632, the doctrine was applied as against a lessee.

⁵⁷ *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241, where a sublessee was restrained by injunction from violating a covenant by the lessee not to put the premises to a specified use, seems to involve an application of the doctrine, though it is not in terms referred to.

⁵⁸ The decisions are summarized in 1 *Tiffany, Real Prop. c. 15*.

⁵⁹ See 1 *Tiffany, Real Prop. c. 14*.

⁶⁰ *Handrahan v. O'Regan*, 45 Iowa, 298. See ante, § 86 a.

mode of approach except over the premises of a third person,⁶¹ and such a grant of a way of necessity may, no doubt, be implied upon a lease of a part of a building as well as upon a lease of land.⁶² If, however, there is another mode of approach to the premises, even though less direct and convenient, this doctrine has no application.⁶³

In some cases, as before suggested, a right to pass over adjoining premises to and from those leased may exist on the theory of an implied grant of such an easement, corresponding to a pre-existing *quasi* easement existing before the severance of the tenements.⁶⁴ It is apparently upon this theory, as well as sometimes upon that of a way of necessity, that the tenant of rooms in a building has the right to use all the ordinary modes of access thereto, such as passageways, stairways and elevators, although no mention thereof is made in the instrument of lease.⁶⁵ And, ordinarily at least, the landlord cannot undertake to close a

⁶¹ See cases cited ante, note 32.

⁶² See *Agate v. Lowenbein*, 4 Daly (N. Y.) 62; *Ramirez v. McCormick*, 4 Cal. 245.

In *Chase v. Hall*, 41 Mo. App. 15, an upper floor, which was leased, was accessible at the time of the lease only by an outside stairway temporarily erected on an adjoining lot belonging to a third person. This stairway having been subsequently removed, it was held that the tenant of such upper floor could construct another stairway on the rear of the building, consulting, however, the interest of the reversioner in locating such stairway.

⁶³ *Motes v. Bates*, 74 Ala. 374; *Ramirez v. McCormick*, 4 Cal. 245; *Agate v. Lowenbein*, 4 Daly (N. Y.) 62.

In *Georke v. Wadsworth* (N. J. Eq.) 68 Atl. 71, it was decided that no right to use a stairway to the upper floors leased could be implied as a way of necessity in view of the

fact that the lease expressly provided for the construction of means of communication between such floors and adjoining buildings belonging to the lessee.

⁶⁴ *Crabtree v. Miller*, 194 Mass. 123, 80 N. E. 225. See ante, § 128.

⁶⁵ That he has such right, see *Hall v. N. Irvin*, 78 App. Div. 107, 79 N. Y. Supp. 614; *Eschman v. Atkinson*, 91 N. Y. Supp. 319; *Miller v. Fitzgerald Dry-Goods Co.*, 62 Neb. 270, 86 N. W. 1078. In *Lindblom v. Berkman*, 43 Wash. 356, 86 Pac. 567, it was held that the lessor could not occupy a part of the hallway on the first floor of a building so as to impede the convenience of access to the second floor to the detriment of a tenant thereof, although the lease gave the lessor a right to alter the stairway, and though part of the space occupied by the lessor was obtained by changing the location of the stairway.

means of access which existed at the time of the lease, even though another means of access exists or is provided.⁶⁶

There may be a grant, in effect, of a right of way in favor of the lessee, by reason of the fact that the lessor has estopped himself to deny the existence of such way, as when in the instrument of lease he describes the premises as abutting on a road or street.⁶⁷

A covenant by the lessor to provide a suitable right of way is not satisfied, it has been decided, by showing that a way by necessity already exists.⁶⁸

A provision in the instrument of lease that the "gangways" bounding the premises shall be kept open has been construed as binding both the lessor and lessee to refrain from obstructing such ways.⁶⁹

§ 133. Light.

In a number of the states the rule is apparently established that, upon a conveyance in fee, the grantee does not, by implication, acquire an easement of light in adjoining land belonging to the grantor, unless, according to some cases, the light is absolutely necessary to the use of the building on the land granted.⁷⁰ The same rule has been applied in the case of a lease, it being held that the lessor, or one claiming under him, may erect buildings on land adjoining the premises leased, although this obstructs the passage of light to the latter premises.⁷¹ The courts of one or two states, however, have adopted the English rule, that if one conveys premises on which there is a building, he, or his subsequent grantee, cannot build on adjoining premises so as to cut off

⁶⁶ Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. Unoff. 340, 96 N. W. 487; W. 288; Hamilton v. Graybill, 19 Misc. 521, 43 N. Y. Supp. 1079.

⁶⁷ Thousand Island Park Ass'n v. Tucker, 173 N. Y. 203, 65 N. E. 975, 60 L. R. A. 786; Espley v. Wilkes, L. R. 7 Exch. 298; 1 Tiffany, Real Prop. § 320.

⁶⁸ Bunker v. Pineo, 86 Me. 138, 29 Atl. 959.

⁶⁹ Beckwith v. Howard, 6 R. I. 1.

⁷⁰ See authorities cited 1 Tiffany, Real Prop. p. 706.

⁷¹ Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175 (in this case, however, there was an express covenant on the subject); Palmer v. Wetmore, 4 N. Y. Super. Ct. (2 Sandf.) 316; Myers v. Gemmel, 10 Barb. (N. Y.) 537; Lindsey v. First Nat. Bank, 115 N. C. 553, 20 S. E. 621.

the light as it passed to the building at the time of the conveyance.⁷²

In the case of a lease of a part of a building, that is, of one or more rooms therein merely, the cases even in this country tend to restrict the rights of the lessor or his subsequent transferee, whether by lease or otherwise, to obstruct the passage of light to the portion of the building leased. Thus it has in one state been decided that the lease of a room "with appurtenances" passes an easement, in the yard attached to the building, for the procurement of light and air,⁷³ and in another that one who leases front rooms in his building cannot construct an addition to the building on an unenclosed space in front thereof so as to cut off the light and air from the rooms and cover the lessee's signs.⁷⁴ A like view has been asserted as to the obstruction of the light, passing to that part of the building which is leased, by reason of an alteration of the building itself, it having been decided that the lessor, or one standing in his place, cannot alter the building so as to prevent light and air from passing through a "well" as it did at the time of the lease.⁷⁵ And it has likewise been decided that the tenant of an upper floor cannot obstruct the passage of light to a lower floor through a grating⁷⁶ or skylight.⁷⁷ In

⁷² In New Jersey the lessee, or tioneed, no easement would have any other grantee, has an easement passed, but it also distinguishes the of light in the land retained by the cases deciding that no easement of lessor. *Sutphen v. Therkelson*, 38 light is created by implication on the N. J. Eq. 318; *Ware v. Chew*, 43 N. J. ground that in this particular case Eq. 493, 11 Atl. 746; *Greer v. Van the yard had been appropriated to Meter*, 54 N. J. Eq. 270, 33 Atl. 794. the use of the building and was a And for a dictum to that effect, see part of the same lot.

Janes v. Jenkins, 34 Md. 1, 6 Am. ⁷⁴ *Brande v. Grace*, 154 Mass. 210, Rep. 300. In *Darnell v. Columbus* 31 N. E. 633. But in *Lindsey v. First Show Case Co.*, 129 Ga. 62, 58 S. E. Nat. Bank, 115 N. C. 553, 20 S. E. 631, it was held that the lessee had 621, the rule that no grant of a right an easement in such light and air as to light would be implied was applied as against a lessee of a single floor of a building, the lessor having which he could assert against one improved the adjacent lot so as to subsequently taking a lease of adjoining land from the same lessor. cut off the light needed for the lessee's photographic business.

⁷³ *Doyle v. Lord*, 64 N. Y. 432, 21 ⁷⁵ *Case v. Minot*, 158 Mass. 577, 33 Am. Rep. 629. The opinion is apparently to the effect that if "appurtenances" had not been men- N. E. 700, 22 L. R. A. 536.

⁷⁶ *Spies v. Damm*, 54 How. Pr. (N. Y.) 293.

the various cases referred to, the light in question was presumably necessary for any proper enjoyment of the premises, and they may perhaps be regarded as coming within the exception to the general rule, sometimes asserted, that a grant of a right to light will be implied so far as it is absolutely necessary.⁷⁸

§ 134. Water rights.

The lessee of land abutting on a natural watercourse has the same "natural rights" as to the appropriation and utilization of the water as the landlord, if himself in possession, would have had,⁷⁹ and a tenant may also have the benefit of any rights as to water, created by contract or agreement, in favor of the leased premises, previous to the date of the lease.⁸⁰ The landlord occasionally contracts to furnish water to the tenant for certain purposes or in a certain amount.⁸¹

A lease of land covered by water in a pond gives a right to use the water and to take the fish therein,⁸² and one holding under a lease of land covered by water has a right to the ice which may form above the land leased.⁸³ A lease of land at the edge of a

⁷⁷ O'Neill v. Breese, 3 Misc. 219, 23 N. Y. Supp. 526. Stevens v. Wadleigh, 5 Ariz. 90, 46 Pac. 70.

In Morgan v. Smith, 5 Hun (N. Y.) 220, it was held that the continuance of the obstruction of a sky-light by the tenant of an upper floor under a prior lease was a defense to the claim for rent, the lessor having stated at the time of leasing the lower floor that the obstruction would be removed. ⁸¹ In Ward v. Vance, 93 Pa. 499, the lessor agreed that the premises should be supplied with water in the same manner as then supplied, this being under contract with the owner of adjoining land on which there was a well, and it was held that the lessor was not liable to the lessee because the spring became dry.

⁷⁸ See 1 Tiffany, Real Prop. § 317, note 126. And see, also, Stevens v. Salomon, 39 Misc. 159, 79 N. Y. Supp. 136, to the effect that light ⁸² Smith v. Miller, 5 Mason, 191, Fed. Cas. No. 13,080.

"essential to the beneficial use of the premises" cannot be cut off by the lessor's construction of an addition to the building, a floor of which had been leased. ⁸³ Marsh v. McNider, 88 Iowa, 390, 55 N. W. 469, 20 L. R. A. 333, 45 Am. St. Rep. 240.

As to the right of a tenant at will of premises, to which a right to take ice from a pond was appurtenant, to restrain a subsequent lessee of the pond from turning hot water into the pond in the course of manufacturing operations, see Walker

⁷⁹ Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28.

⁸⁰ Wyman v. Farrar, 35 Me. 64; ufacturing operations, see Walker

pond "for the purpose of building and maintaining an ice house thereon" does not involve a grant of any rights in the pond, it has been decided, nor any right to cut ice therefrom.⁸⁴

It does not seem that, apart from an express provision in the lease, the tenant of a part of a building has any right to demand that the landlord be responsible for the furnishing of water to the premises, though they are "piped" for this purpose.⁸⁵ It has, however, been decided that the landlord could not cut or obstruct the pipe by which water was furnished to premises leased for a business which required water, although the pipe passed through premises retained by him.⁸⁶

§ 135. Use of adjoining premises.

The instrument of lease occasionally contains a covenant on the part of the lessor precluding him from utilizing adjoining or neighboring premises for a purpose which would involve competition with the business which the lessee intends to carry on, or from leasing adjoining or neighboring premises for such a rival business.⁸⁷ It has been held that a covenant by the lessor not to lease the adjoining premises for a particular business is not broken because a subsequent purchaser of the lessor's interest so uses them,⁸⁸ nor because one to whom he does lease them uses them, without authority from the lessor, for such prohibited business,⁸⁹ and on that theory the first lessee is apparently without any remedy in such case. In one jurisdiction, however, such a covenant has been held to give the lessee a right to an injunction, as against both the lessor and one to whom he subsequently leases adjoining premises, to restrain the violation thereof by the carrying on of such business by such second lessee,⁹⁰ and in the same

Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937. ⁸⁸ *Postal Telegraph-Cable Co. v. Western Union Tel. Co.*, 155 Ill. 335,

⁸⁴ *Oliphant v. Richman*, 67 N. J. 40 N. E. 587. *Eq.* 280, 59 Atl. 241.

⁸⁵ *Reynolds v. Meldrum*, 33 N. Y. 61 Atl. 622 (action for damages); *St. Rep.* 664, 11 N. Y. Supp. 568. *Brigg v. Thornton* [1904] 1 Ch. 386;

⁸⁶ *Gans v. Hughes*, 38 N. Y. St. Rep. 490, 14 N. Y. Supp. 930. *Ashby v. Wilson* [1900] 1 Ch. 66 (injunction). And

see *West Side Sav. Bank v. Newton*, 76 N. Y. 616. ⁹⁰ *Waldorf-Astoria Segar Co. v. Salomon*, 109 App. Div. 65, 95 N. Y. Supp. 1053; *Id.*, 184 N. Y. 584, 77 N. E. 1197.

⁸⁷ See *Brigg v. Thornton* [1904] 1 Ch. 386.

jurisdiction it was held that a covenant by the lessor not to "establish" a competing business was broken by the lessor if he leased adjoining premises without restricting the mode of use by the second lessee, and such business was established by his lessee.⁹¹

A covenant not to carry on a competing business would, in most jurisdictions, be enforceable by injunction against a subsequent lessee or grantee,⁹² and in some jurisdictions it might be enforceable against the latter by an action at law as a covenant running with the land.⁹³

A covenant not to lease adjoining premises for the sale of cigars and tobacco has been regarded as broken by a lease for a grocery business, which included the sale of cigars and tobacco,⁹⁴ and a covenant by the lessor not to sell goods of a certain character has been held to embrace sales by persons whom the lessor permitted to do business in connection with his department store in the same building.⁹⁵ On the other hand a covenant, on the lease of a mill, not to let or establish any other seat on the same stream to be used for a rival mill, was regarded as broken only when a rival mill was put in operation by the lessee, and not by the mere leasing of land for that purpose.⁹⁶

The damages recoverable upon the breach of a covenant not to lease adjoining premises for a competing business may include,

⁹¹ *Norman v. Wells*, 17 Wend. (N. cases cited 1. *Tiffany*, Real Prop. pp. Y.) 136. 757, 765.

⁹² *Holloway Bros. v. Hill* [1902] 2 Ch. 612. In this case the covenant was not to suffer or permit such competing business. See, as to enforcement of such a covenant by injunction, ante, § 131. ⁹⁴ *Waldorf-Astoria Segar Co. v. Salomon*, 109 App. Div. 65, 95 N. Y. Supp. 1053; *Id.*, 184 N. Y. 584, 77 N. E. 1197.

⁹³ *Herpolsheimer v. Funke*, 1 Neb. Unoff. 471, 95 N. W. 688.

⁹⁵ A covenant by the lessor not to establish a competing business was held to run with the land in favor of an assignee of the lessee, in *Norman v. Wells*, 17 Wend. (N. Y.) 136. But in *Thomas v. Hayward*, L. R. 4 Exch. 311, a different view was adopted. The decisions as to whether such covenants, not entered into in connection with leases, "touch and concern" the land, are conflicting. See ⁹⁶ A covenant, in the lease of a saloon in a hotel, that the lessee should have the exclusive right to sell liquors in the hotel block, was held to apply to an annex to the hotel subsequently constructed by the lessor. *Shaft v. Carey*, 107 Wis. 273, 83 N. W. 288.

⁹⁶ *Norman v. Wells*, 17 Wend. (N. Y.) 136.

it has been decided, loss of profits caused thereby, if these can be determined with reasonable certainty.^{96a}

It has been decided in England, as before stated, that if the lease of an apartment plainly shows that the whole building was used or intended to be used for residential apartments, and contains certain regulations, in accordance with such purported use, to be observed by the lessee, the latter may obtain an injunction to prevent the lessor from subsequently turning the balance of the building into a club, hotel or public offices.⁹⁷ In this country, likewise, there are occasional decisions to the effect that the tenant has a right to insist upon a continuance by the lessor of the use of adjoining premises which prevailed at the time of the making of the lease, this use contributing to the value of the leased premises for the lessee's purposes, and it has even been held that a cessation of such use of adjoining premises constituted an eviction.⁹⁸ On the other hand, it has been held that one who took a lease of rooms in an office building, for the practice of medicine, could not complain that the balance of the building was afterwards altered and used as a hotel.⁹⁹

It has been decided that the landlord of a building has, as against the tenant of a lower floor, the right to remove the upper floors provided he first roofs the lower floor,^{99a} though in another case in the same jurisdiction it appears to be decided that he must leave undisturbed so much of the second floor as serves as a roof for the first floor, though he is entitled to remove a part of the building back of the rooms leased, provided he furnishes suitable conveniences in place of those in such portion removed.¹⁰⁰

The fact that the use of the lower part of a building by the owner thereof for a printing plant interfered with the use of the upper part as an annex to a hotel, for which purpose it had been

^{96a} Metzger v. Brincat (Ala.) 45 So. 633. Shaft v. Carey, 107 Wis. 273, 83 N. W. 288. See ante, notes 37, 38, and

⁹⁷ Hudson v. Cripps [1896] 1 Ch. 265; Jaeger v. Mansions Consolidated, 87 Law T. (N. S.) 690; Alexander v. Mansions Proprietary, 16 Times Law R. 431; Gedge v. Bartlett, 17 Times Law R. 43; ante, at note 51-53. ⁹⁹ Tucker v. Du Puy, 210 Pa. 461, 60 Atl. 4.

^{99a} Haskins v. George A. Fuller Co., 36 Misc. 38, 72 N. Y. Supp. 440.

¹⁰⁰ Benedict v. International Banking Corp., 88 App. Div. 488, 85 N. Y. Supp. 188, 39 Am. Rep. 649.

⁹⁸ Coulter v. Norton, 100 Mich. 389, 59 N. W. 163, 43 Am. St. Rep. 458;

leased, was held not to impose on the owner any obligation to refrain from such use of the lower part, this being, as was the use of the upper part for hotel purposes, in accord with the intention of the parties at the time of the lease, they mistakenly supposing that the printing plant would not cause any considerable noise or vibration.¹⁰¹

That, in a lease of a suite of rooms in a building, the word "building" is followed by the words "known as the B. Apartment Hotel" has been held to involve no obligation to use the balance of the building as an apartment hotel as distinguished from a hotel for transient guests.¹⁰²

§ 136. Furnishing of power.

As before remarked, a covenant by the lessor to furnish power cannot properly be regarded as an easement in the land retained by the lessor in favor of that leased, but there is some analogy to an easement in that such covenant imposes, in favor of the land leased, a burden upon that retained, so long at least as this latter has not passed out of the lessor to another person.¹⁰³ Whether the burden of such a covenant would pass with the land to another person, that is, whether it is a covenant which touches and concerns the land, within the rule recognized in some jurisdictions that the burden of such a covenant will run with the land, has apparently never been the subject of decision, and would seem on principle to be open to considerable question.¹⁰⁴

Ordinarily, it seems clear, there is no obligation on the lessor to furnish power, in the absence of an express contract to do so.¹⁰⁵ But in one case it was decided that the obligation to fur-

¹⁰¹ *Lyttelton Times Co. v. Warners* [1907] App. Cas. 476. the connecting shaft. The court expressly says that the action was not

¹⁰² *Bristol Hotel Co. v. Pegram*, 49 Misc. 535, 98 N. Y. Supp. 512. upon the contract, but regards the power as something covered by the lease, a withholding of which is

¹⁰³ See ante, at note 7.

¹⁰⁴ In *Chapman v. Kirby*, 49 Ill. 211, an action on the case against the transferee of the portion of the building from which steam power was to be furnished was upheld in favor of the lessee of the other portion of the building, such transferee having cut off the power by severing the connecting shaft. It is difficult to see how a particular form of energy, to be developed in the future by the consumption of fuel, can be the subject of a lease.

¹⁰⁵ See *Pennsylvania Iron Co. v. Diller*, 113 Pa. 635, 6 Atl. 272. In

nish a "blast" for the lessee's forges, as it had been furnished to such forges prior to the lease, from adjoining premises belonging to the lessor, was involved in the making of the lease.¹⁰⁶

Questions have occasionally arisen as to the construction and effect of particular stipulations in regard to the power to be furnished the lessee. Where, upon the making of a lease of a factory, the lessor excepted a room and reserved the privilege of running a saw and lathe therein by use of the water power which ran the factory, it was held to be a question for the jury whether the use actually made by him of the room and power privilege so reserved was within the terms of the reservation, having reference to the previous use of the power in that room, and the necessities of the lessee.¹⁰⁷ A covenant, in connection with a lease of premises for a certain business, to furnish power to a certain amount, has been held to impose an obligation to furnish power of a uniform character when such uniformity was rendered necessary by the nature of the business, and it was not regarded as sufficient that the power was always greater than that named.¹⁰⁸ A provision that the lessor should furnish power to the lessee so long as the lessor should "see fit to let him have it" did not make the lessee a tenant at will of the power, and so entitled to the statutory notice before deprivation of the power.¹⁰⁹ The fact that the lessor and lessee were both mistaken as to the amount of water necessary to furnish the number of horse power stipulated for in the lease, and that the amount of rent was based on this erroneous estimate, was held not to affect the lessee's right to the amount of water necessary to furnish that amount of power.¹¹⁰

The failure to pay rent does not, it has been held, justify the

New Era Mfg. Co. v. O'Reilly, 197 107 *Dexter v. Manley*, 58 Mass. (4 Mo. 466, 95 S. W. 322, it was held *Cush.*) 14.

that the lessor was under no obligation to furnish steam for heating 108 *Trenkmann v. Schneider*, 26 Misc. 695, 56 N. Y. Supp. 770.

or for power by reason of the fact 109 *Shorey v. Farrell*, 114 Mass. 441.

that a steam plant erected for the purpose of furnishing steam for the 110 *McKelway v. Cook*, 4 N. J. Eq. (3 H. W. Green) 103.

building was located in another part of the building to which the lessee had no access. As to the construction of the peculiar language of a covenant to furnish steam and power, see *French v. Burns*, 19 Pa. Super. Ct. 383;

106 *Thropp v. Field*, 26 N. J. Eq. (11 C. E. Green) 82.

landlord in cutting off the power which he has agreed to furnish.¹¹¹ On the other hand, a provision that, in case the lessor should fail to furnish power in accordance with his stipulation, the rent should cease, was not regarded as making the cessation of rent a liquidation of the damages for failing to furnish power, disentitling the lessor to recover other damages.¹¹²

The lessor, failing to furnish power in accordance with his stipulation, has been held, in one jurisdiction, liable for all loss resulting from the consequent destruction of the lessee's business and the depreciation in the value of his stock, fixtures and machinery.¹¹³ There is a decision to the effect that he cannot recover the expense of moving from the premises, since to this expense he would have been subjected even if he had retained possession to the end of his term.¹¹⁴

§ 137. Furnishing of heat.

Not infrequently, in case of the lease of but a part of a building, the lessor contracts to furnish heat for the premises leased.^{114a} For breach of such a covenant the tenant may recover damages.¹¹⁵ In some jurisdictions the breach of such a covenant has been regarded as an eviction.¹¹⁶

Smith v. Wenz, 185 Mass. 229, 70 N. E. 57.

¹¹¹ Chapman v. Kirby, 49 Ill. 211.

¹¹² Fisher v. Barrett, 58 Mass. (4 Cush.) 381.

¹¹³ Chapman v. Kirby, 49 Ill. 211. See ante, note 104.

¹¹⁴ Eddy v. Coffin, 149 Mass. 463, 21 N. E. 870, 14 Am. St. Rep. 441.

^{114a} A stipulation that until heat is furnished a diminished rent shall be paid has been held not to require heat to be furnished. Gatch v. Garretson, 100 Iowa, 252, 69 N. W. 550.

¹¹⁵ In Nemrow v. Assembly Catering & Supply Co., 121 App. Div. 481, 106 N. Y. Supp. 109, it was decided that the damages for failure to supply heat for several days, in violation of a contract made by the lessor with one to whom he leased

the premises for a restaurant, was the falling off in receipts on those days less the value of any food prepared on those days which could thereafter be used.

In McCormick v. Stowell, 138 Mass. 431, loss of rental value by reason of the absence of heat was apparently conceded to be the proper measure of damages. And it was so decided in Borchardt v. Parker, 108 N. Y. Supp. 585.

In Ireland v. Gauley, 95 N. Y. Supp. 521, it was held that the lessee could not recover loss occasioned by his unwillingness to work in the rooms leased owing to insufficient heat when he could have remedied this at small expense.

¹¹⁶ Bass v. Rollins, 63 Minn. 226, 65 N. W. 348; Minneapolis Co-Oper-

In New York there are several *dicta* to the effect that even though there is no express contract on the part of the lessor to furnish heat, there is, if the means of supplying heat is, as is ordinarily the case on a lease of an apartment, in the possession and control of the landlord, an obligation upon the latter to supply it, entitling the tenant, in case it is not supplied, to relinquish possession and so relieve himself from liability for rent subsequently to accrue.^{116a}

There is a *dictum* to the effect that the lessor is liable for injury to a sick child of the tenant by reason of a lack of heat on the premises, the landlord having contracted to furnish the heat.¹¹⁷ In another jurisdiction an action for the death of the tenant's child, as a result of the failure to furnish heat as agreed, was regarded as an attempt to recover for personal injury in an action of contract, and so not maintainable.¹¹⁸ It would seem that if one who has contracted to furnish heat has actually entered upon the furnishing of heat, he may owe a duty to the tenant or to members of the latter's family to exercise care in carrying out the undertaking, for a failure to do which, as by sudden stoppage of the supply without warning, he might be held liable in damages. Such a liability would be tortious rather than contractual in character.^{118a} Even regarding such an action for personal injury as one in tort, recovery might ordinarily be denied on the ground that personal injury from the failure to furnish heat might have been avoided by the adoption of other means for obtaining the necessary heat, or by removal from the premises until the resumption of the heat supply.

§ 138. Signs and other advertising devices.

The lessee of rooms in a building has ordinarily, in the absence

active Co. v. Williamson, 51 Minn. 53, Supp. 85; Jackson v. Paterno, 58 52 N. W. 986, 38 Am. St. Rep. 473; Misc. 201, 108 N. Y. Supp. 1073.

Riley v. Pettis County, 96 Mo. 318, 117 O'Donnell v. Rosenthal, 110 Ill. 9 S. W. 906; O'Gorman v. Harby, 18 App. 225.

Misc. 228, 41 N. Y. Supp. 521. And 118 Dancy v. Walz, 112 App. Div. 355, 98 N. Y. Supp. 407.

116a Tallman v. Murphy, 120 N. Y. 118a See a somewhat analogous 345, 24 N. E. 716; Ryan v. Jones, 2 case in Pittsfield Cottonwear Mfg. Misc. 65, 20 N. Y. Supp. 842; Gale v. Co. v. Pittsfield Shoe Co., 71 N. H. Heckman, 16 Misc. 376, 38 N. Y. 522, 53 Atl. 807, where one who had

of a provision to the contrary, the right to place signs to a reasonable extent on the walls enclosing those particular rooms, the walls being a part of the premises leased,¹¹⁹ and he may be given, by special stipulation, the right to place signs elsewhere in or on the building.¹²⁰

It has been decided that an express permission to a lessee to place signs upon the outer walls of the rooms leased is *prima facie* to be exercised with reference to the condition of the walls at the time of the lease, and that such a provision does not revoke a prior license to an older tenant to place signs on such walls, his signs not interfering with the later tenant's full enjoyment of his license.¹²¹ A provision that no sign should be placed on the front of the premises detrimental to other tenants was held to apply to a sign extending three inches below the floor line of the leased premises, so that a shadow was cast thereby into the premises of the tenant of the lower floor, a dealer in high class paintings.¹²²

The lease of a portion of a store building to a retail dealer in merchandise has been held to include the right to use, for the display of goods, a show window space, so that the lessors could not obstruct such space by showcases of their own,¹²³ or by the erection of a canopy.¹²⁴ Nor can another lessee obstruct the view of a show window or showcase which the tenant has the right to maintain in that place,¹²⁵ provided, at least, its maintenance in that place can be regarded as having been within the contemplation of the parties to the lease.¹²⁶

contracted to furnish heat to A's building was held liable for injury to the property of A's tenant caused by the bursting of water pipes resulting from the sudden stoppage of the heat supply.

123 *Herpolsheimer v. Funke*, 1 Neb. Unoff. 471, 95 N. W. 688.
124 *Saratoga European Hotel & Restaurant Co. v. Mossler*, 76 Ill. App. 688.

125 *Snyder v. Hersberg*, 11 Phila. (Pa.) 200.

119 See ante, § 26 c (2), at note 547.
126 *Whitehouse v. Aiken*, 190 Mass. 547.

120 See *Snyder v. Hersberg*, 11 Phila. (Pa.) 200, 33 Leg. Int. 158.
In *Dickerson v. Jenkins*, 14 Misc.

121 *Pevey v. Skinner*, 116 Mass. 129.
115, 35 N. Y. Supp. 605, it was held that where portions of a floor were

122 *Oehme v. Shotland*, 99 App. Div. 173, 90 N. Y. Supp. 958.
leased to different persons, they being separated by a railing four feet

A lease of merely a part of a building, a floor therein, for instance, is not ordinarily construed as including the roof, and consequently the lessor may utilize the roof for advertising without reference to the wishes of the lessee.¹²⁷ And the same view has been taken in the case of the lease of a store in a one-story building as to the right to use the space on the front above the joists of the ceiling.¹²⁸

high erected by the tenants, one tenant could not complain because the view of his business was cut off by the erection, by the other tenant, within his own space, of racks above the railing.

¹²⁷ *Macnair v. Ames* (R. I.) 68 Atl. 950; *O. J. Gude Co. v. Farley*, 28 Misc. 184, 58 N. Y. Supp. 1036.

¹²⁸ *Booth v. Gaither*, 58 Ill. App. 263.

CHAPTER XIII.

TAXES AND INSURANCE.

- § 139. Taxes usually payable by landlord.
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§ 139. Taxes usually payable by landlord.

In this country the statutes imposing taxes on land, as on other property, are framed on the theory that the owner of the property is to pay the tax, and the owner of a reversion in land, the landlord, is alone regarded as the owner for this purpose,

the tenant being looked upon merely as a temporary occupant.¹ The theory of the imposition of the tax on the landlord rather than on the tenant is well expressed in a North Carolina case, in which it is said that while, as a general rule, whoever is owner of the land for the time being is bound to pay the tax, as when there is a particular estate in one person with a remainder to another, the case of landlord and tenant, when rent is reserved, forms an exception to the rule, "for the rent is in lieu of the land, and the landlord is in the permanency of the profits of the land, the profit of the tenant being the fruit of his own labor. Hence, in such cases, the landlord is bound to pay the tax, and if the tenant be compelled to pay, he may recover from the landlord or deduct the amount out of the rent."² But in that case it is decided that, if no rent is reserved, the tenant is liable for the tax, since, in such case, the landlord "receives nothing in lieu of the land, and the entire profits are enjoyed by the tenant," who consequently "does not come within the reason for making the case of ordinary tenants paying rent, an exception to the general rule."³ On principle, it seems, one holding under a lease for life should stand exactly in the same position, as regards freedom from liability for taxes, as one holding under a lease for years, but a different view has been taken in two cases, it being decided that such a tenant is under the same obligation to

¹ See *Bettison v. Budd*, 17 Ark. at tax sale, see ante, § 78 i (1), 546, 65 Am. Dec. 442; *Clinton v.* and as to the position of a purchaser *Shugart*, 126 Iowa, 179, 101 N. W. at a tax sale as regards the tenant, 785; *Weichselbaum v. Curlett*, 20 see ante, § 78 n (3).

Kan. 709, 27 Am. Rep. 204; *State v.* ² *Willard v. Blount*, 33 N. C. (11 Campbell, 23 La. Ann. 445; *Phila-* Ired. Law) 624, per Pearson, J.

delphia W. & B. R. Co. v. Appeal ³ The Connecticut statute (Gen. Tax Court, 50 Md. 397; *Speed v. St.* St. 1902, § 2341) provides that an estate for life or years "by gift or *Louis County Ct.*, 42 Mo. 382; *Leach v. Goode*, 19 Mo. 501; *East Tennessee, V. & G. R. Co. v. City of Morristown* (Tenn. Ch. App.) 35 S. W. 771; *Hart v. Hart*, 117 Wis. 639, 94 N. W. 890. That the landlord is, in the absence of agreement otherwise, liable for special assessments, see cases cited post, § 143 c (4).

Willard v. Blount, 33 N. C. (11 Ired. Law) 624, per Pearson, J.

As to tenant's right to purchase

pay taxes as is one to whom land is limited for life, with remainder to another.⁴

By the statutes of some states, the tax may be collected by the taxing authorities directly from the tenant, but this is merely for the sake of convenience of collection, and such statutes invariably, it is believed, contain provisions allowing the tenant to deduct from the rent payments of taxes made by him, or to collect the amount thereof by action against the landlord.⁵

A so-called "lease" to one and his heirs and assigns, for a sum paid in advance, vests the absolute ownership in the "lessee," even though the lease is subject to forfeiture in certain contingencies, and he is consequently liable for the taxes.⁶ Such a "lease" is in fact the conveyance of the fee.⁷ And so in Pennsylvania it has been decided that the owner of a rent reserved on a conveyance in fee is not liable for the taxes on the land.⁸ But in Missouri it has been decided that a lease "forever" of a railroad bridge, subject to a forfeiture for breach of certain covenants, did not render the lessee the "owner" within the statute taxing such bridges.⁹

⁴ *Carter v. Youngs*, 42 N. Y. Super. Ct. (10 Jones & S.) 418; *Prettyman Zab.* 402; *Smith v. Specht*, 28 N. v. Walston, 34 Ill. 175. In the latter case no reference is made to the fact that the tenant holds under a lease, and the court merely cites decisions stating the general rule that a life tenant must keep down the taxes.

⁵ *Delaware* Rev. Code 1893, p. 876; 3 *Burns' Ann. St. Indiana* 1901, § 8596; *Maryland* Code Pub. Gen. Laws 1904, art. 81, § 66; *Massachusetts* Rev. Laws 1902, c. 12, §§ 15, 20; 1 *Gen. St. New Jersey*, p. 554, § 449; 3 *Gen. St.* p. 3287, § 33; *New York* Rev. St. (9th Ed.) vol. 2, p. 1704; *Bell. & C. Codes Oregon*, § 3145; *Pepper & Lewis' Dig. Pennsylvania*, Landl. & Ten. §§ 2, 3; *Virginia* Code 1904, §§ 624, 630 (Tenant's goods liable to amount of rent if landlord's goods exhausted); *Wisconsin* Rev. St. 1898, § 1154. See

State v. Blundell, 24 N. J. Law (1 J. Eq. 47, 42 Atl. 599; *Hammon v. Sexton*, 69 Ind. 37; *Newburyport Turnpike Corp. v. Upton*, 12 Mass. 575; *Lynde v. Brown*, 143 Mass. 337, 9 N. E. 735; *Caldwell v. Moore*, 11 Pa. 58.

⁶ *Connecticut Spiritualist Camp-meeting Ass'n v. Town of East Lyme*, 54 Conn. 152, 5 Atl. 849.

⁷ The court in the above cited case says that it is a "determinable or base fee." According to the common-law authorities it is rather a fee simple subject to a condition subsequent.

⁸ *Philadelphia Library Co. v. Ingham*, 1 Whart. (Pa.) 72; *Irwin v. Bank of United States*, 1 Pa. 349; *Franciscus v. Reigart*, 4 Watts (Pa.) 98, 39 Am. Dec. 60.

⁹ *State v. Mississippi River Bridge*

The view taken in this country, that the landlord is the person to pay the taxes, is entirely different from that taken in England. There the taxes are always payable by the tenant, and even though, in the case of one or two classes of taxes, the statute provides that the tenant may, upon paying them, deduct them from the rent, such a tax is still, as regards the public, a tax on the tenant and not on the landlord, since its payment can be enforced only against the former.

§ 140. Effect of exemption of landlord.

Although, as between the landlord and tenant, the landlord is ordinarily liable for the taxes, the tenant does not escape liability to taxation upon his interest in the land merely because the property of the landlord is not taxable, as in the case of a lease by the state or by a state agency.¹⁰ And this is *a fortiori* the case as regards improvements made by the tenant during the term.¹¹

§ 141. Tax on improvements made after demise.

Improvements which are removable by the tenant at the end of the term have been regarded as properly taxable to him and not to the landlord,¹² and the fact that the landlord has agreed to pay the value of the improvements at the end of the term does not impose on the landlord any obligation in this regard not otherwise existent.¹³ Such an agreement has even been regarded

Co., 109 Mo. 253, 19 S. W. 421; Id., Taxes & Assessments, 80 N. Y. 573; 134 Mo. 321, 35 S. W. 592. East Tennessee, V. & G. R. Co. v.

¹⁰ Ex parte Gaines, 56 Ark. 227, 19 City of Morristown (Tenn. Ch. App.) S. W. 602; Morris Canal & Banking 35 S. W. 771. In Phinney v. Foster, Co. v. Haight, 36 N. J. Law, 471; 189 Mass. 182, 75 N. E. 103, a covenant by the lessor to save the lessee Fall v. City of Marysville, 19 Cal. 391. In Illinois it is so provided by Statute. Hurd's Rev. St. 1905, c. 120, § 60. See People v. International Salt Co., 233 Ill. 223, 84 N. E. 278. view of the context to impose no liability on the lessor for taxes on the tenant's improvements, and the

¹¹ San Francisco v. McGinn, 67 Cal. 110, 7 Pac. 187; Burbank v. Board of Assessors, 52 La. Ann. 1506, 27 So. 947 (even though to belong to landlord at the end of the term). ¹³ Leach v. Goode, 19 Mo. 501.

¹² People v. Commissioners of

as showing that the improvements in the meanwhile belong to the tenant and are as such taxable to him.¹⁴ On the other hand, the fact that the lease provides that certain improvements to be erected by the tenant shall "become" the property of the landlord at the end of the term has been held not to defer until then the latter's ownership of the improvements for the purpose of taxation.¹⁵ In one state it has been decided that improvements erected by the lessee under a "perpetual lease" from a municipality are subject to taxation by the municipality.¹⁶ Such a lease, indeed, would seem to make the lessee the owner in fee simple of the land, and so subject to taxation as regards the land as well as the improvements.

§ 142. Indemnification of tenant paying tax.

The English cases are to the effect that if the tenant pays taxes on the premises which, as between him and the landlord, it is the duty of the latter to pay, he may deduct the amount of such payment from the installment of rent next falling due,¹⁷ or may sue the landlord for the amount thereof, if the landlord has expressly assumed the tax,¹⁸ or if the latter is by force of the statute directly liable for the tax.¹⁹ It is further decided, however, that the deduction of the rent thus paid by the tenant must be made from the installment of rent next falling due, for that if the tenant pays the rent in full after having paid the tax, such fresh payment of the amount of the tax, unless made to avoid distress for rent,²⁰ is voluntary, and cannot afterwards be recovered by him by action,²¹ nor be deducted from the rent subsequently accruing.²²

¹⁴ *People v. Brooklyn Board of Assessors*, 93 N. Y. 308.

¹⁵ *People v. Barker*, 153 N. Y. 98, 47 N. E. 46.

¹⁶ *Luttrell v. Knox County*, 89 Tenn. 253, 14 S. W. 802.

¹⁷ *Graham v. Tate*, 1 Maule & S. 609.

¹⁸ *Watson v. Home*, 7 Barn. & C. 285.

¹⁹ *Earle v. Maugham*, 14 C. B. (N. S.) 626.

²⁰ *Graham v. Tate*, 1 Maule & S. 609; *Baker v. Greenhill*, 3 Q. B. 148.

²¹ *Denby v. Moore*, 1 Barn. & Ald. 123; *Saunderson v. Hanson*, 3 Car. &

P. 314; *Cumming v. Bedborough*, 15 Mees. & W. 438; *Spragg v. Ham-*

mond, 2 Brod. & B. 59.

²² *Andrew v. Hancock*, 1 Brod. & Ald. 516; *Dawes v. Thomas* [1892]

In this country it seems that, the landlord being primarily liable for the tax, the tenant would have the clear right to deduct the amount of taxes paid by him from the next installment of rent, or to recover the same by action, provided, at least, the payment by the tenant could be regarded as under compulsion, as when it is made to prevent a distress for the taxes on his chattels, or to prevent a sale for taxes, which would have the effect of destroying his leasehold interest or right of occupancy.²³ As before stated, in several states where the statute provides that the taxes may be collected from the tenant in the first instance, he is expressly given the right to deduct the amount thereof from the rent or to recover it by action.²⁴ Under a provision in the instrument of lease that the taxes shall be reimbursed by the lessor to the lessee, the latter is entitled to reimbursement annually, it has been held, and is not obliged to wait till the end of the term.²⁵

§ 143. Contract by lessee to pay taxes.

a. **Language evidencing contract.** Quite frequently the lease contains a covenant on the part of the lessee to pay the taxes on the premises.²⁶ By the English cases a liability is imposed on the lessee, for taxes which otherwise he could claim from the landlord, by his agreement to pay rent "clear of all taxes, charges and impositions,"²⁷ or "without any deduction or abate-

²³ See *Rogers v. McKenzie*, 73 N. C. 487; *Walker v. Harrison*, 75 Miss. 665, 23 So. 392; *Williams v. Towl*, 65 Mich. 204, 31 N. W. 835; *Waggen-er v. McLaughlin*, 33 Ark. 195. In the latter case it is decided that the tenant paying the tax has a lien on the land for reimbursement.

In *McPherson v. Atlantic & P. R. Co.*, 66 Mo. 103, where the lease entitled the lessee to deduct from the rental all taxes which he had paid, or might be liable to pay, and the law imposed no personal liability for taxes on anyone, but the taxes were a lien on the land, and consequently the only liability of the

lessee was to lose his leasehold by sale under the lien, it was held that the stipulation amounted to an appropriation of a reserved fund out of the rent to the payment of taxes, and that the lessee had a right to deduct the amount of the taxes from the rent as against a garnishing creditor of the lessor.

²⁴ See ante, at note 5.

²⁵ *Boutte v. Dubois*, 11 La. Ann. 755.

²⁶ *Hurd's Rev. St. Ill.* 1905, c. 6, § 9, provides that no alien lessor of farming lands can provide for payment of taxes by the tenant.

²⁷ *Giles v. Hooper*, Carth. 135. So

ment,'²⁸ or "free from all outgoings"²⁹ or to pay a "net rent."³⁰

b. **Payment as rent.** In a few cases the covenant to pay taxes has been regarded as one to pay them as part of the rent. Thus, where one occupied another's land by permission, in consideration of his making repairs and paying taxes, it was apparently considered that the landlord had a lien for the amount of the taxes as for rent,³¹ and it has been decided that the amount of the annual taxes which the lessee agreed to pay could be recovered in a suit on a bond given by the lessee to secure rent.³² In some of the cases the view that such a covenant is equivalent to one to pay rent is based upon a construction of the particular language used as showing an intention to that effect.³³ There are, on the other hand, cases clearly to the effect that taxes agreed to be paid are not part of the rent,³⁴ and there is much to be said in support of such a view.^{34a}

c. **Taxes within the contract—**(1) **Taxes levied after demise.** Questions sometimes arise as to whether the lessee's covenant to pay taxes is broad enough to cover a particular tax, having regard to the time of the assessment or levy of the tax. It has been decided that a covenant by the lessee to pay all taxes "during the existence of the lease" does not extend to taxes assessed before, but payable during the term.³⁵ And so a covenant by the lessee that he will pay all taxes "which may be lawfully levied and assessed" was construed as not binding him for a tax previously assessed and levied, which was already, under

in *Semmes v. McKnight*, 5 Cranch, *Manus v. Fair Shoe & Clothing Co.*,
C. C. 539, Fed. Cas. No. 12,653. 60 Mo. App. 216.

²⁸ *Bradbury v. Wright*, 2 Doug. 624. ³² *Neagle v. Kelly*, 146 Ill. 460, 34 N. E. 947.

²⁰ *Parish v. Sleeman*, 1 De Gex, F. & J. 326. ³³ *Gedge v. Shoenberger*, 83 Ky. 91; *Knight v. Orchard*, 92 Mo. App. 466; *Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co.*, 118

³⁰ *Bennett v. Womack*, 7 Barn. & C. 627.

³¹ *Roberts v. Sims*, 64 Miss. 597, 2 So. 72; *Gedge v. Shoenberger*, 83 Ky. 91. In the latter case where the lease was at a yearly rental named, "also to pay all taxes and assessments," the court thought that this was evidently intended as an agree-

ment to pay the taxes as a part of the rent. This case is approved in *Mc-*
^{34a} See post, § 169 h.
³⁵ *McManus v. Fair Shoe & Cloth-*
ing Co., 60 Mo. App. 216.

the statute, a charge on the property and a debt of the lessor.³⁶ A lessee who agreed to pay the taxes becoming due after the date of the lease was held liable for taxes which became certain as to amount only after that date, by reason of the action of the board of supervisors in then setting down on the rolls, previously prepared, the amounts to be paid on each piece of property.³⁷

A tax not due and payable till after the term, it has been held, is not within a covenant to pay all taxes to be "levied" during the term, the levy being regarded as not taking place till the tax books were placed in the hands of the collector.³⁸ But a different construction was placed upon a covenant to pay all taxes "assessed or levied" during the term.³⁹ And under a provision that the lessees should pay all taxes "laid, levied or charged upon" the property during the term, the lessee was held liable for taxes assessed during the term, taxes being "laid" when they are assessed, and the assessment was regarded, for this purpose, as including only the listing and valuation of the land, and the subsequent action of the board of equalization, and not the determination of the rate of taxation.⁴⁰ A covenant to pay "all assessments and taxes that may be levied on or claimed from" the land during the term, has been held to include general taxes payable during the term, and also a special tax becoming a lien on the property during the term.⁴¹

Taxes duly levied, charged, and confirmed during the term have been regarded as within a covenant to pay "all taxes, levies or assessments during the continuance of the lease," although not payable till after the term.⁴² A like construction has been placed even on a covenant "to pay all the taxes and assessments whatsoever, whether in the nature of taxes now in being or not, which may be payable for and in respect of said premises, or any part thereof, during said term."⁴³

³⁶ *Cleveland v. Spencer*, 19 C. C. A. 559, 73 Fed. 559.

³⁷ *Skidmore v. Hart*, 13 Hun (N. Y.) 441.

³⁸ *Valle v. Fargo*, 1 Mo. App. 344.

³⁹ *Waterman v. Harkness*, 2 Mo. App. 494.

⁴⁰ *Elliot v. Gantt*, 64 Mo. App. 248.

⁴¹ *Clemens v. Knox*, 31 Mo. App. 185.

⁴² *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236.

⁴³ *Wilkinson v. Libbey*, 83 Mass. (1 Allen) 375. And to the same general effect, see *Richardson v. Gordon*, 188 Mass. 279, 74 N. E. 344; *Ogden v. Getty*, 100 App. Div. 430, 91 N. Y. Supp. 664.

The fact that, in a lease expiring in October, 1874, a covenant by the lessee to pay all taxes assessed during the term was followed by the words "including taxes for the fiscal year 1873-1874," was held not to relieve the lessee from liability for the taxes for the fiscal year 1874-1875, which were levied and became a lien during the term, but that the quoted words must be regarded as surplusage.⁴⁴

(2) **Tax laws enacted after demise.** In a number of quite early English cases the question was considered whether a covenant in a lease to pay taxes included taxes imposed by virtue of a law enacted after the date of the lease.⁴⁵ The rule recognized and adopted in these cases is, as stated in the course of a decision rendered in this country, "that if the tax or assessment be made under a law existing at the time of the covenant, it is within it; or if there be no law existing at the time authorizing or requiring it, but it is afterwards enacted, still, if the assessment or tax be of the same kind with taxes or assessments made under former acts, it is presumed to have been in the contemplation of the parties, as a tax *in viris*, though not *in esse*. But if such tax or assessment be different in kind from such as have been theretofore *in esse*, it is not to be presumed that the parties contemplated any unusual exercise of power in the legislature, such as it had never before exercised."⁴⁶ Accordingly, in the case from which this quotation was made, it was decided that a covenant to pay all taxes and assessments that might be assessed upon the premises did not bind the lessee for the payment of benefits assessed upon property for the improvement of adjoining streets, under an act passed after the making of the lease, the cost of such improvements having previously, in that state, been paid for out of the general taxes. Usually, however, a covenant to pay taxes and assessments has been regarded as covering special assessments for local improvements under an act passed subsequently to the date of the lease.⁴⁷ Such an effect has been

⁴⁴ Blythe v. Gately, 51 Cal. 236.

⁴⁵ Love v. Howard, 6 R. I. 116.

⁴⁶ Davenant v. Bishop of Sarum, 2 Lev. 68; Hopwood v. Barefoot, 11 Mod. 240; Brewster v. Kidgill, 12 Mod. 166; Brewster v. Kitchin, 1 Ld. Raym. 317; Giles v. Hooper, Carth. 135.

⁴⁷ Post v. Kearney, 2 N. Y. (2 Comst.) 394, 51 Am. Dec. 303; Garner v. Hannah, 13 N. Y. Super. Ct. (6 Duer) 262; Bleecker v. Ballou, 3 Wend. (N. Y.) 263.

given in one state to a covenant to pay "all the taxes, rates, charges and assessments which shall or may from time to time, and at any time, during the term, be levied, assessed or made on the demised premises, or in respect of the same for or on account of any matter or any cause whatever," although, at the date of the lease, special assessments for local improvements were unknown, the court saying that the full language of the covenant showed an intention to cover every form of civil imposition.⁴⁸ And the same effect has there been given to a covenant to pay "all taxes and assessments levied on the premises during the term."⁴⁹

(3) **Invalid taxes.** A tenant assuming the payment of all taxes on the premises thereby assumes only such taxes as may be legal and valid.⁵⁰ But where the lessee, having assumed the taxes, afterwards agreed with the lessor that, if the latter would pay a particular tax which had been imposed, he, the lessee, would repay the lessor, and the lessor accordingly paid it, the lessee was held liable in an action for money paid, though the tax was illegal and uncollectible.⁵¹

(4) **Special assessments.** The cases are generally to the effect that a covenant by the lessee to pay the taxes on the premises does not require him to pay special assessments imposed for local improvements.⁵² And so it has been held that the lessee, covenanting to pay all taxes, state, city and parish, and to keep the sidewalks in repair, was not bound to pay an assessment for paving the street.⁵³ Even a covenant to pay a certain rent "besides all taxes and other public dues in any manner accruing" has been held not to include such an assessment.⁵⁴ In Iowa, how-

⁴⁸ Walker v. Whittemore, 112 Mass. 187. Co., 167 Ill. 215, 47 N. E. 367; Ittner v. Robinson, 35 Neb. 133, 52 N. W. 846; Beals v. Providence Rubber Co., 11 R. I. 381, 21 Am. Rep. 472; Mc-

⁴⁹ Simonds v. Turner, 120 Mass. 328. Vickar Gaillard Realty Co. v. Garth, 111 App. Div. 924, 97 N. Y. Supp. 640.

⁵⁰ Clark v. Coolidge, 8 Kan. 189; Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N. W. 624; Hart v. Town of Cornwall, 14 Conn. 228. See New York El. R. Co. v. Manhattan R. Co., 63 How. Pr. (N. Y.) 14.

⁵¹ Municipality No. 2 v. Curell, 13 La. 318.

⁵² Bolling v. Stokes, 2 Leigh (Va.) 178, 21 Am. Dec. 606. In this case, Brooke, J., says: "The words of the covenant may be satisfied by the

⁵³ Soulard v. Peck, 49 Mo. 477.

⁵⁴ De Clerq v. Barber Asphalt Pav.

ever, an agreement by the lessee to pay "all taxes assessed on the lot during the continuance of the lease" was held to include assessments for paving and curbing, even though this language was followed by the words "to wit, for the years," enumerating the calendar years covered by the lease.⁵⁵ And in Missouri a covenant to pay both general and "special" taxes has been regarded as showing *prima facie* an intention that the lessee shall pay a special assessment for street improvements.⁵⁶

A covenant by the lessee to pay all "assessments" on the property is held, in this country, to make him liable for the amount of special assessments for local improvements.⁵⁷ And the same effect has apparently been given to the word "duties," it having been decided that the lessee was bound for special assessments when he covenanted to pay "all taxes and duties levied or to be levied" during the term,⁵⁸ or "the rates, taxes and duties

application of them to the ordinary Pump Co., 22 Mo. App. 8; Lucas v. and usual taxes and public dues. McCann, 50 Mo. App. 638.

To extend them to an expense unknown by the parties, incalculable as to amount, uncertain as to time, and in which the lessee could have no certain interest, would be to disregard all the circumstances under which the contract was made. It is impossible to suppose that a sum so uncertain in amount, and which might be as large as the sum that was in fact paid, could have been taken into the calculation of the value of the lot at the time the lease was made." But now in Virginia (Code 1904, § 2453), as well as in West Virginia (Code 1906, § 3069), it is provided that a covenant by the lessee "to pay the taxes" shall have the effect of a covenant that all taxes, levies and assessments upon the demised premises, or upon the lessor on account thereof, shall be paid by the lessee or those claiming under him.

⁵⁵ *Cassaday v. Hammer*, 62 Iowa, 359, 17 N. W. 588.

⁵⁶ *Thomas v. Hooker-Colville Steam*

A covenant to comply with and execute all laws, orders and regulations of the state or municipal authorities does not involve an obligation to pay special assessments. *McVickar Gaillard Realty Co. v. Garth*, 111 App. Div. 924, 97 N. Y. Supp. 640.

⁵⁷ *Codman v. Johnson*, 104 Mass. 491; *Post v. Kearney*, 2 N. Y. (2 Comst.) 394, 51 Am. Dec. 303; *Griffen v. Phoenix Pottery Co.*, 14 Wkly. Notes Cas. (Pa.) 266, afg. 16 Phila. 569; *Vorse v. Des Moines Marble & Mantel Co.*, 104 Iowa, 541, 73 N. W. 1064; *Borgman v. Spellmire*, 4 Ohio N. P. 416, 7 Ohio Dec. 344, 22 Am. Dec. 759; *City of New York v. Cashman*, 10 Johns (N. Y.) 96 (lease providing for payment by lessee of "all taxes, assessments, impositions and payments"); *Oswald v. Gilfert*, 11 Johns. (N. Y.) 443 ("all taxes and assessments of every kind").

⁵⁸ *Blake v. Baker*, 115 Mass. 188.

of every kind * * * that shall be levied or assessed on the premises or on the lessors of the same.'⁵⁹

As before stated, a covenant to pay taxes and assessments is regarded as covering special assessments imposed under a statute later than the lease, provided at least they are of the same nature as assessments previously in existence in that jurisdiction.⁶⁰

Paving with Belgian blocks, at a cost twice the annual rental of the property, a street previously paved with cobble stones, has been held to be chargeable to the lessor and not to the lessee, under a provision in the instrument of lease that the lessee should pay assessments for paving and repairing adjoining streets, but that the lessor should pay those for public purposes of an extraordinary character and for permanent improvements.⁶¹

Though the work is done before the beginning of the term, it is regarded as "assessed" during the term for the purpose of a covenant by the lessee, if the certificate was issued, and the amount thereof inserted in the assessment roll during the term.⁶²

The liability of the lessee for the whole amount of an assessment, under his covenant to pay all assessments, is not diminished by the fact that both he and the lessor have been allotted damages for injury to their interests caused by the improvement, and he cannot ask that his liability to the lessor be reduced by the

⁵⁹ *Curtis v. Pierce*, 115 Mass. 186. But in the earlier case of *Twycross v. Fitchburg R. Co.*, 76 Mass. (10 Gray) 293, it was held that the lessee's covenant "to pay all taxes or duties levied or to be levied" on the premises did not make him liable for the cost of a sidewalk constructed by the city for which the lessor had paid, the city being authorized by the statute to do the work at the owner's expense if the latter refused to do it. This case is distinguished in *Codman v. Johnson*, 104 Mass. 491, on the ground that in the earlier case the burden was imposed by the statute on the owner personally, and it was not levied on the estate nor made a lien on it. In the later case the covenant was to pay "taxes and assessments," but a distinction in this respect is not suggested.

⁶⁰ In *Torrey v. Wallis*, 57 Mass. (3 Cush.) 442, a provision that the lessee should pay all costs, charges and expenses, except the yearly taxes, was construed, in connection with the context, to refer only to the expenses of additions and repairs to be made by the lessee, and not to charges for street improvements.

⁶¹ See ante, § 143 c (2).

⁶² *Ten Eyck v. Rector, etc., of Protestant Episcopal Church*, 141 N. Y. 588, 65 Hun, 194, 36 N. E. 739, affg. 29 Abb. N. C. 150, 20 N. Y. Supp. 157.

⁶³ *Shepardson v. Elmore*, 19 Wis. 424.

amount of damages which the lessor has received.⁶³ Nor is his liability thereunder affected by the fact that the officials having the improvement in charge have undertaken to apportion the benefits between the lessor and the lessee.⁶⁴ It is likewise immaterial that, after the making of the lease, a statute was passed providing that the owner of land leased should pay any assessment thereon and might collect of the lessee an additional rent equal to ten per cent per annum on the net amount so paid by him.⁶⁵

It has been decided that a provision of the statute that the "owner" of a lot, assessed for street improvements, may pay the assessment in yearly installments instead of immediately, upon waiving any illegality therein and agreeing to pay it with interest, did not enable the lessee so to defer the payment of part of the assessment until after the end of the term, and thereby free himself from liability therefor.⁶⁶

In England the word "assessments" in a covenant of this character has been held not to apply to municipal charges for street paving,⁶⁷ while the word "duties" has been regarded as broad enough for this purpose.⁶⁸ A covenant to pay "duties" imposed on the premises has been there held also to apply to a charge for putting a new drain in the premises upon the demand of the municipal authorities.⁶⁹ The same, or a somewhat broader, effect has been there given to covenants to pay "impositions,"⁷⁰ "charges imposed,"⁷¹ and "outgoings."⁷²

⁶³ *Trinity Church v. Cook*, 11 Abb. Pr. (N. Y.) 371, 21 How. Pr. 89; C. P. 149.

Arthur v. Harty, 17 Misc. 641, 40 N. Y. Supp. 1091.

⁶⁴ *Arthur v. Harty*, 17 Misc. 641, 40 N. Y. Supp. 1091.

⁶⁵ *Walker v. Whittemore*, 112 Mass. 187. See Mass. Rev. Laws, c. 50, § 8.

⁶⁶ *Vorse v. Des Moines Marble & Mantel Co.*, 104 Iowa, 541. 73 N. W. 1064.

⁶⁷ *Tidswell v. Whitworth*, L. R. 2 S. 48.

C. P. 326; *Allum v. Dickinson*, 9 Q. B. Div. 632; *Wilkinson v. Collyer*, 13 Q. B. Div. 1; *Baylis v. Jiggins* [1898] 2 Q. B. 315.

⁶⁸ *Thompson v. Lapworth*, L. R. 3

⁶⁹ *Budd v. Marshall*, 5 C. P. Div. 481; *Brett v. Rogers* [1897] 1 Q. B. 525; *Farlow v. Stevenson* [1900] 1 Ch. 128.

⁷⁰ *Foulger v. Arding* [1902] 1 K. B. 700; *In re Warriner* [1903] 2 Ch. 367; *Goldstein v. Hollingsworth* [1904] 2 K. B. 578.

⁷¹ *George v. Coates*, 88 Law T. (N.

⁷² *Aldridge v. Ferne*, 17 Q. B. Div. 212; *Stockdale v. Ascherberg* [1903] 1 K. B. 873 [1904] 1 K. B. 447; *Harris v. Hickman* [1904] 1 K. B. 13.

(5) **Miscellaneous cases.** An agreement by the lessee to "pay all assessments whatsoever levied" has been held to refer only to charges for local improvements, and not to make him liable for general state, county and city taxes.⁷³

A covenant by the lessor to hold the tenant harmless from all taxes for city purposes but no others whatever, has been regarded as showing an intention that other taxes should be paid by him.⁷⁴

A statutory provision for a tax on corporate receipts and earnings "by way of license for its corporate franchises" was held to provide for a license fee for the exercise of the corporate franchise and not for a tax on the franchise, and consequently not to be within a covenant by the lessee to pay taxes on the corporate property and franchises.⁷⁵

An increase of taxes upon the demised premises after the execution of the lease will, it has been considered, be presumed to be the result of an improvement made by the tenant, for the purpose of imposing on him liability under a covenant to pay any increase in taxes due to improvements which may be made by him.⁷⁶

A covenant by the lessee to pay all taxes "on the premises" or "assessed" on the lessor "for and in respect of the premises" has been held not to extend to a tax imposed on the rent as the property of the lessor,⁷⁷ and the same view was taken of a covenant binding the lessee to pay all taxes imposed or assessed on the "demised premises," or on the lessors "in respect thereof."⁷⁸ So it has been held in another state that one to whom land is

The above is but a partial statement of the effect of the numerous English cases construing such covenants. See Fawcett, *Landl. & Ten.* (3d Ed.) 388-395; Woodfall, *Landl. & T.* (16th Ed.) c. 15.

⁷³ *Stephani v. Catholic Bishop of Chicago*, 2 Ill. App. (2 Bradw.) 249.

⁷⁴ *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

⁷⁵ *Jersey City Gaslight Co. v. United Gas Imp. Co.*, 46 Fed. 264.

See, also, as to a franchise tax, *Security Trust Co. v. Liberty Bldg. Co.*, 96 App. Div. 436, 89 N. Y. Supp. 340; *Lewiston & A. R. Co. v. Grand Trunk R. Co.*, 97 Me. 261, 54 Atl. 750.

⁷⁶ *Eichner v. Cohen*, 48 Misc. 541, 96 N. Y. Supp. 279. And see, as to a somewhat similar covenant, *Gridley v. Einbigler*, 98 App. Div. 160, 90 N. Y. Supp. 721; *Id.*, 182 N. Y. 566, 75 N. E. 1130.

⁷⁷ *Van Rensselaer v. Dennison*, 8 Barb. (N. Y.) 23.

⁷⁸ *Woodruff v. Oswego Starch Factory*, 70 App. Div. 481, 74 N. Y. Supp. 961.

granted in fee subject to a rent is not liable for a tax on the rent, under his covenant to pay all taxes on the premises.⁷⁹

d. **Apportionment of tax.** One who, in taking a lease of part of a piece of property which is taxed as a whole, agrees to pay taxes, is liable for a proportionate part of the taxes,⁸⁰ and the fact that the lessor has never requested the assessors to assess such part separately is immaterial.⁸¹ The apportionment should, it has been held, be according to a usage which existed in that locality, to apportion the taxes for this purpose with reference to the rents paid.⁸²

A provision in a lease of part of a building that "in case the taxes now levied on said premises should be increased," the lessee shall pay such increase, was held to bind him to pay the increase in the taxes on the whole building, this construction of the covenant being, however, in part based on the fact that the lessee had already acquired the leasehold interest in the balance of the building.⁸³

e. **Effect of exemption.** A covenant by the lessee, upon a lease from a city, to pay all taxes on the premises, has been held not to involve payment by the lessee of taxes on the reversionary interest of the city, this being exempt from taxation.⁸⁴ But where a lease by a charitable association provided that the tenant should pay all taxes, an act subsequently passed exempting the property from taxation, so long as used for charitable purposes, was held not to relieve the lessee from the obligation of paying the amount of the taxes to the lessor, the act having been evidently intended for the benefit of the charitable society and not of the lessee.⁸⁵

The fact that the lessee's property is by statute exempt from taxes does not, it has been held, exempt the property leased, although the lessee has covenanted to pay the taxes.⁸⁶

⁷⁹ Robinson v. Allegany County, 7 Pa. 161; Peart v. Phipps, 4 Yeates 386. ⁸³ Stimson v. Crosby, 180 Mass. 296, 62 N. E. 267.

⁸⁰ Williams v. Craig, 2 Edw. Ch. (N. Y.) 297. ⁸⁴ Philadelphia, W. & B. R. Co. v. Appeal Tax Court, 50 Md. 397.

⁸¹ Wall v. Hinds, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64. ⁸⁵ German Soc. v. City of Philadelphia, 9 Phila. (Pa.) 245.

⁸² Codman v. Hall, 91 Mass. (9 Allen) 335; Amory v. Melvin, 112 Mass. 83. ⁸⁶ Com. v. Chesapeake & O. R. Co., 94 Ky. 16, 21 S. W. 342.

f. **Availability of contract to taxing power.** In one case it has been decided that, when there is a covenant by the lessee to pay the taxes, the city must proceed against the tenant's property, in the first instance, to collect the tax, if it has notice of the "landlord's equity," unless there exists some "countervailing equity," and that it may be enjoined from first proceeding against the landlord or his property.⁸⁷ The soundness of the view that the taxing power should thus be hampered in the collection of taxes by a covenant to which it is not a party may perhaps be doubted. In another state there is a holding that such a covenant does not justify a personal judgment against the lessee in favor of the municipality for the amount of a special assessment for public improvements, such personal liability being purely statutory and against the owner of the property only.⁸⁸ But it has elsewhere been decided that a lessee under a lease for twenty-five years covenanting to pay taxes may be regarded as the "owner" for the purpose of assessment.⁸⁹

g. **Transfer of leasehold or reversion.** A covenant by the lessee to pay taxes runs with the land, and consequently the assignee of the leasehold interest is liable thereunder,⁹⁰ and the lessor's transferee is no doubt entitled to the benefit thereof.⁹¹

In New York it appears to have been decided that a covenant to pay taxes and assessments is continuous in its nature, so that the assignee is liable though the breach originally occurred before the assignment.⁹² And in Missouri there is a decision to the

⁸⁷ *Gouverneur v. City of New York*, who takes an assignment in February is liable for them under the covenant. *Trask v. Graham*, 47 2 Paige (N. Y.) 434.

⁸⁸ *Davis v. Cincinnati*, 36 Ohio St. Minn, 571, 50 N. W. 917.

⁸⁹ *New York Guaranty & Indemnity Co. v. Tacoma R. & Motor Co.*, 93 Fed. 51.

⁹⁰ *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *Post v. Kearney*, 2 N. Y. (2 Comst.) 394; *Martin v. O'Connor*, 43 Barb. (N. Y.) 514; *Trinity Church v. Cook*, 11 Abb. Pr. (N. Y.) 371, 21 How. Pr. 89; *West Virginia C. & P. R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696.

⁹¹ See *Hendrix v. Dickson*, 69 Mo. App. 197; *Vorse v. Des Moines Marble & Mantle Co.*, 104 Iowa, 541, 73 N. W. 1064. See post, § 149 b (2), note 112. In Ohio the transferee is regarded as entitled to sue thereon as being the party "beneficially interested." *Broadwell v. Banks*, 134 Fed. 470. See post, § 149 b (1).

⁹² *Astor v. Hoyt*, 5 Wend. (N. Y.) 603, 618; *Coffin v. Talman*, 8 N. Y. (4 Seld.) 465. See post, §§ 149 b (9), 158 a (2) (c).

When taxes are payable in January, but not delinquent till June, one

effect that the substantial breach of the covenant does not occur until the tax is paid by the covenantee, and that consequently the lessor's heir, having paid the tax after the lessor's death, is the proper party to sue on the covenant, rather than the personal representative, although the tax became due and payable before the lessor's death.⁹³ The assignee of the leasehold is liable for the taxes which become due after the assignment to him, though they are on account of a period prior thereto.^{93a}

An assignee of the leasehold in part of the premises is liable for a proportionate part of the tax, calculated, it seems, with reference to the value of such part as compared with that of the whole.⁹⁴

The assignee of the leasehold is liable only for taxes which become due before his reassignment to another, his liability depending entirely on the privity of estate.⁹⁵

Although the assignee becomes liable, the lessee is still liable on his covenant by reason of privity of contract, and if he is forced to pay the taxes he may in turn recover from his assignee, who is primarily liable.⁹⁶

Although the lessor's transferee is entitled to the benefit of the covenant, the lessor, it has been decided, may also sue thereon, if he is under an obligation to his transferee, as by a covenant against incumbrances, to pay the taxes, and, they being a lien on the property at the time of the transfer, he pays them upon the lessee's failure so to do.⁹⁷

h. Termination of liability. The fact that the lease provides that, on the destruction of the buildings by fire, the lessor may terminate the lease, and that he does terminate it accordingly, does not relieve the lessee from liability under his covenant for the taxes previously assessed,⁹⁸ and *a fortiori* is he unable to re-

⁹³ Hendrix v. Dickson, 69 Mo. App. 197. But ordinarily the right of action arises on the covenantor's failure to pay without any payment by the covenantee. Post, at note 108.

^{93a} McKeon v. Wendelken, 25 Misc. 711, 55 N. Y. Supp. 626.

⁹⁴ Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3. See ante, § 143 d.

⁹⁵ Mason v. Smith, 131 Mass. 510. See post, § 158 a (2) (n).

⁹⁶ Mason v. Smith, 131 Mass. 510; Wills v. Summers, 45 Minn. 90, 47 N. W. 463. See post, § 157 a (2).

⁹⁷ Wills v. Summers, 45 Minn. 90, 47 N. W. 463.

⁹⁸ Sargent v. Pray, 117 Mass. 267; Paul v. Chickering, 117 Mass. 265; Carnes v. Hersey, 117 Mass. 269.

cover such taxes if they have been paid by him.⁹⁹ Nor does the fact that the lease provides for a suspension of rent upon the destruction of the building affect the liability under such covenant for the whole amount of the taxes.¹⁰⁰ It has been decided that a covenant to pay taxes in equal monthly installments is no longer binding after eviction by the landlord, followed by the enforcement by him of a forfeiture for breach of condition.^{100a} And a surrender by the tenant has been regarded as terminating all liability for taxes for the previous year, which were not yet due.^{100b}

The lessee's liability under his covenant is not affected by the fact that a part of the premises is taken for public use.¹⁰¹

It has been decided that a release of the lessee from "further" liability under the lease does not relieve him from liability for taxes already accrued.¹⁰²

The landlord's acceptance of rent after the lessee's breach of his covenant to pay taxes does not involve a waiver of his claim for breach of the covenant.¹⁰³

i. **Time of payment.** A covenant by the lessee to pay taxes when "due and payable" was held not to require him to pay them until after public notice by the receiver of taxes, as provided by statute, that they were "due and payable."¹⁰⁴ Generally the obligation of the lessee under his covenant is to pay the tax in time to avoid a sale of the lessor's property for non-payment, or the enforcement of personal liability for the tax against the lessor,¹⁰⁵ and before any penalty or interest becomes due by reason of delay in payment.¹⁰⁶ A covenant to pay the taxes "promptly" was regarded as broken by a failure to pay

⁹⁹ Wood v. Bogle, 115 Mass. 30.

¹⁰⁰ Minot v. Joy, 118 Mass. 308.

^{100a} Hall v. Joseph Middleby, Jr., 197 Mass. 485, 83 N. E. 1114. It was said that in such a case there is a "failure of consideration."

^{100b} American Bonding Co. v. Pueblo Inv. Co. (C. C. A.) 150 Fed. 17, 9 L. R. A. (N. S.) 557.

¹⁰¹ Patterson v. City of Boston, 37 Mass. (20 Pick.) 159.

¹⁰² O'Fallon v. Nicholson, 56 Mo. Barb. (N. Y.) 41. 238.

¹⁰³ Conger v. Duryee, 90 N. Y. 594.

¹⁰⁴ Whitman v. Nicol, 38 N. Y. Super. Ct. (6 Jones & S.) 528 (decision by two judges out of three).

¹⁰⁵ McFarlane v. Williams, 107 Ill. 33; Allen v. Dent, 72 Tenn. (4 Lea) 676 (so as not to become a burden on the lessor).

¹⁰⁶ Ricou v. Hart, 47 La. Ann. 1370, 17 So. 878; Manice v. Millen, 26

taxes due on the first of one month until the twelfth day of the second succeeding month.¹⁰⁷

j. Accrual of right of action. Upon the failure of the lessee to pay the tax in accordance with his covenant, the lessor may immediately sue for the breach, and it is immaterial whether he first himself pays the tax,¹⁰⁸ though the covenant may be framed so as to make the lessee liable only for failure to refund taxes previously paid by the lessor.¹⁰⁹ It has been decided that the lessor need not make demand upon the lessee for payment before bringing suit,¹¹⁰ though in a case in which the lease provided that in case of the lessee's neglect to pay a special assessment, the lessor might pay it and recover the amount as rent, it was held that there was no breach of the lessee's covenant until he was notified of the lessor's payment of the assessment.¹¹¹ In one state it has been decided that the fact that the leasehold interest is sold for the tax does not involve a breach of the covenant, since this does not affect the lessor.¹¹²

k. Damages for breach. The lessor may recover, for breach of the lessee's covenant to pay taxes, the amount of the taxes,¹¹³ with interest, it has been decided,¹¹⁴ but not the amount of a penalty imposed for nonpayment, since it is his, the lessor's duty, to pay the taxes on the lessee's default in time to save the penalty.¹¹⁵ And if the property is sold for the unpaid taxes, the

¹⁰⁷ Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696.

¹¹¹ Dockrill v. Schenk, 37 Ill. App. 44.

¹⁰⁸ Broadwell v. Banks, 134 Fed. 470; Wilkinson v. Libbey, 83 Mass. (1 Allen) 375; Bowditch v. Chickering, 139 Mass. 283, 30 N. E. 92; Trinity Church v. Higgins, 48 N. Y. 532; Hawkins v. Mosher, 13 Hun (N. Y.) 563; Fontaino v. Schulenburg & Boeckler Lumber Co., 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648; Vorse v. Des Moines Marble & Mantel Co., 104 Iowa, 541, 73 N. W. 1064.

¹¹² Goode v. Ruehle, 23 Mich. 30.

¹⁰⁹ See Burnes v. McCubbin, 3 Kan. 221, 87 Am. Dec. 468; Dockrill v. Schenk, 37 Ill. App. 44.

¹¹³ Fontaino v. Schulenburg & Boeckler Lumber Co., 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648; Sargent v. Pray, 117 Mass. 267; Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3; Richardson v. Gordon, 188 Mass. 279, 74 N. E. 344; Garner v. Hannah, 13 N. Y. Super. Ct. (6 Duer) 262.

¹¹⁰ Davis v. Burrell, 10 C. B. 821; Hooper v. Woolmer, 10 C. B. 370.

¹¹⁴ Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3; Sargent v. Pray, 117 Mass. 267.

¹¹⁵ Sargent v. Pray, 117 Mass. 267. So it was decided that the lessee could not be charged with the

lessor, it has been decided, cannot recover the value of the property, but is still restricted to the amount of the unpaid taxes, and the fact that he was a nonresident and had no actual notice of their nonpayment is immaterial in this regard.¹¹⁶

§ 144. Water rates.

The question whether the landlord or the tenant is liable, as between themselves, for charges for water furnished to the premises, is one of some difficulty, upon which the decisions are not in accord. In several jurisdictions it has been explicitly decided that the landlord is under no obligation to pay for water used by the tenant, in the absence of any agreement to that effect, although the premises are, at the time of the lease, fitted with pipes and fixtures intended for the distribution of water,¹¹⁷ or the water is essential to the use of the premises for the purpose for which the lease was obtained, and for which it allows them to be used.¹¹⁸ In one of the decisions to this effect, in answer to the argument that the water rate is a tax and therefore is payable by the landlord, it is said: "Water, as supplied here, is a commodity which the tenant requires, but which he can purchase of others if he chooses to submit to that inconvenience. The price charged for it is not a tax any more than the price charged for gas, electricity, steam or coal, some of which are as necessary commodities as water. Nor does the fact that the city supplies water and a private corporation supplies gas make one a tax rather than the other."¹¹⁹ In New York, on the other hand, it is held that the charge for water must be paid by the landlord and not by the tenant using the water,¹²⁰ but there

amount of a penalty when the lease Ricker, 173 Mass. 564, 54 N. E. 254; provided that the lessor might pay Sheldon v. Hamilton, 22 R. I. 230, 47 the taxes on the lessee's failure to Atl. 316; Stein v. McArdle, 24 Ala. pay them and that the amount so 344 (semble).

paid should be regarded as additional 118 Leighton v. Ricker, 173 Mass. rent. Webster v. Nichols, 104 Ill. 564, 54 N. E. 254.

160. 119 Sheldon v. Hamilton, 22 R. I. 230, 47 Atl. 316.

116 Fontaino v. Schulenburg & 230, 47 Atl. 316.
Boeckler Lumber Co., 109 Mo. 55, 18 120 Darcey v. Steger, 23 Misc. 145,
S. W. 1147, 32 Am. St. Rep. 648. 50 N. Y. Supp. 638; Bristol v. Ham-

117 McCarthy v. Humphrey, 105 macher, 30 Misc. 426, 62 N. Y. Supp.
Iowa, 535, 75 N. W. 314; Leighton v. 517. In Jamesin v. Thomen, 24

the charge is made by the statute a lien on the land, and is collectible as a part of the regular taxes on the property, and the person using the water is not subject to any liability therefor.¹²¹ Even in that state the tenant was held liable for a charge for water which would not have been incurred had the tenant not used the premises in violation of a covenant in the lease, and the landlord, having paid such charge, was allowed to recover it from the tenant.¹²² In Maryland it has been assumed, without discussion, that the landlord must pay the ordinary water rates assessed according to the size of the building, while for water furnished in large quantities for particular uses by the tenant, and charged for according to metre measurements, the tenant was held liable.¹²³

In two cases, at least, in which it is held that the landlord is not liable for the water charges, there are suggestions to the effect that the case would be different if the charges were made a lien on the premises,¹²⁴ and, as stated above, the existence of such a lien is apparently one reason for the view taken in New York that the landlord must pay the charge rather than the tenant,¹²⁵ the theory being, it seems, that since the charge is a lien on the lessor's property, it is to be regarded as his debt, and that the lessee cannot be regarded as assuming another's debt in the absence of an express stipulation to that effect.

The liability for a water rate, as between landlord and tenant, may be fixed by the express terms of the lease, and this should always be done. In New York, where, as before stated, the landlord is liable in the absence of express agreement, it has been de-

Wkly. Law Bul. (Ohio) 334, it seems to be held that if the lessee states that he will not pay for the water, the landlord cannot thereafter pay for the water which had been turned on by his order and recover the amount of the payment from the lessee. The opinion is obscure.

¹²¹ See *Moffatt v. Henderson*, 50 N. Y. Super. Ct. (18 Jones & S.) 211.

¹²² *De Forest v. Byrne*, 1 Hilt. (N. Y.) 43.

¹²³ *Williams v. Kent*, 67 Md. 350, 10 Atl. 228. In *Sheldon v. Hamilton*,

22 R. I. 230, 47 Atl. 316, likewise, it is said that an agreement by the landlord to pay for water would be much more readily inferred when the water is to be paid for according to the number of water appliances in the building than when the charge is according to the metre measurement.

¹²⁴ *Sheldon v. Hamilton*, 22 R. I. 230, 47 Atl. 316; *Leighton v. Ricker*, 173 Mass. 564, 54 N. E. 254.

¹²⁵ See ante, at note 120.

cided that the lessee becomes liable under a covenant by him to pay all ordinary taxes and assessments.¹²⁶ On the other hand a covenant by the lessee to pay the regular annual charge for water was there held not to bind him for a charge for extra water, measured by metre.¹²⁷ And a covenant to pay the water tax "assessed on the premises" was not regarded as including a rate for water furnished to other buildings on the same lot.¹²⁸ It has also been there decided that a covenant by the lessee of part of a building, to pay the annual water rent "assessed or imposed according to law," did not require him to pay any part of the charge assessed by metre against the whole building, for the reason that it was not imposed according to law as regards his portion of the building until a separate metre was placed in that portion, to measure the water used therein.¹²⁹ Elsewhere it has been decided that a covenant by the lessee of a portion of a building to pay all water rents charged on the demised premises did not require him to pay any portion of a rent assessed against the entire building,¹³⁰ and that a condition of re-entry for nonpayment of water rates did not authorize a re-entry for such nonpayment by a tenant of part of the building, when there was but one metre for the entire building, and the lessor had made no attempt to apportion the bill for water among the various tenants.¹³¹

The fact that the lessor has paid the water rate for one year without objection has been decided not to show any agreement by him to pay such rates.^{131a}

A provision that the tenant shall pay his own water bills, it has been decided, is not merely intended to relieve the landlord from any obligation to look after the bills, but involves a

¹²⁶ *Garner v. Hannah*, 13 N. Y. for all the water used in the building. *Myers v. Reade*, 112 App. Div. Super. Ct. (6 Duer) 262.

¹²⁷ *Moffat v. Henderson*, 50 N. Y. 363, 98 N. Y. Supp. 620. Super. Ct. (18 Jones & S.) 211.

¹²⁸ *Steinhardt v. Burt*, 27 Misc. 182, 22 N. E. 479. 782, 57 N. Y. Supp. 751.

¹²⁹ *Bristol v. Hammacher*, 30 Misc. 266, 63 N. E. 902. 426, 62 N. Y. Supp. 517. *Aliter* when

there was a separate metre for the 230, 47 Atl. 316. *Jamesin v. Thotenant's premises*, even though a men, 24 Wkly. Law Bul. (Ohio) 334, single bill was rendered by the city seems to support a contrary view.

¹³⁰ *Kingsbury v. Powers*, 131 Ill.

¹³¹ *Harford v. Taylor*, 181 Mass.

^{131a} *Sheldon v. Hamilton*, 22 R. I.

covenant by the lessee to pay them, within a provision in the lease authorizing a forfeiture for breach of covenants.¹³²

In England the water rates are payable by the tenant in the absence of agreement otherwise, and it has there been decided that a covenant by the lessor to pay all rates, taxes and impositions whatsoever "imposed" by the city did not render him liable for a water rate, since a charge to which one is liable only by his own consent cannot be regarded as "imposed" on him.¹³³ Likewise it was held that a covenant by the lessor to pay "all water rates imposed or assessed upon the premises or upon the lessor or lessee in respect of the premises" bound him for a rate calculated according to the annual value but not for water supplied for trade purposes by special agreement.¹³⁴

§ 145. Insurance.

a. **In absence of contract.** The tenant is, in the absence of a contract in that regard, under no obligation to insure the buildings and other improvements on the premises for the benefit of the landlord.¹³⁵ Conversely, the landlord is under no such obligation towards the tenant, and the latter cannot claim any share in the proceeds of insurance taken out by the landlord for his own benefit.¹³⁶ Even though the insurance taken out by the landlord is in terms made payable to the tenant, the latter is not entitled, it has been decided, to appropriate the proceeds for his own purposes, it appearing that the parties intended that the money paid on the policy should be applied to replacing the building destroyed.¹³⁷

Since the contract of insurance on property is one of indemnity, the landlord cannot, if the lessee restores the buildings to their former condition, in accordance with the covenants of the lease, assert any claim against the insurer.¹³⁸

The landlord, having insured for his own protection, is not bound, in favor of the tenant, to expend the proceeds of the

¹³² *Hand v. Suravitz*, 148 Pa. 202, 23 Atl. 1117.

¹³³ *Badcock v. Hunt*, 22 Q. B. Div. 145.

¹³⁴ *In re Floyd* [1897] 1 Ch. 633.

¹³⁵ *Hart v. Hart*, 117 Wis. 639, 560 N. W. 890.

¹³⁶ *Roesch v. Johnson*, 69 Ark. 30, 62 S. W. 416.

¹³⁷ *Hayes v. Ferguson*, 83 Tenn. (15 Lea) 1, 54 Am. Rep. 398.

¹³⁸ *Darrell v. Tibbitts*, 5 Q. B. Div.

insurance in restoring the buildings,¹³⁹ unless there is an express provision requiring him so to do.

b. **Contract to insure.** Not infrequently the lessee contracts to insure or keep insured the buildings or improvements on the premises for a certain sum or for their value.

A covenant to insure in the name of the lessor is not complied with by insurance in the name of the lessee,¹⁴⁰ nor does such insurance satisfy a covenant to insure in the name of the lessor and lessee jointly.¹⁴¹ But a covenant by the lessee to insure, without stating for whose benefit, has been regarded as satisfied by insurance for the benefit of the lessor and lessee, according to their respective interests, and as not requiring him to renew a pre-existing policy in favor of the lessor alone.¹⁴²

A covenant by the lessee to keep the building insured for the lessor's benefit was held not to be complied with by the taking out of insurance by the lessee's subtenant, by agreement with the lessee, though the proceeds thereof were to be applied to rebuilding, the lessor not being in privity with such subtenant so as to have a right of action against him.¹⁴³

The lessee's covenant to insure and keep insured the buildings does not require him to effect one policy and keep that policy in force, but he must keep them insured by one policy or another, and it is a breach if he permits the buildings to be uninsured at any time.¹⁴⁴ The fact that he allowed the smaller portion of the buildings to remain uninsured for two months was held to constitute a breach, even though a new policy was then effected in strict conformity with the covenant.¹⁴⁵ Even if the lessee could be regarded as having a reasonable time within which to effect insurance, the burden is on him of accounting for any

¹³⁹ *Leeds v. Cheetham*, 1 Sim. 146; *Roesch v. Johnson*, 69 Ark. 30, 62 335.

S. W. 416.

¹⁴⁰ *Penniall v. Harborne*, 11 Q. B. 368.

¹⁴¹ *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Hey v. Wyche*, 12 Law J. Q. B. 83. But insurance in the lessor's name alone would be a compliance with the covenant. *Havens v. Middleton*, 10 Hare, 641.

¹⁴² *Sherwood v. Harral*, 39 Conn.

¹⁴³ *Keteltas v. Coleman*, 2 E. D. Smith (N. Y.) 408. And see, apparently to the effect that insurance by the subtenant is insufficient, dictum of Maule, J., in *Logan v. Hall*, 4 C. B. 623.

¹⁴⁴ *Doe d. Flower v. Peck*, 1 Barn. & Adol. 428.

¹⁴⁵ *Penniall v. Harborne*, 11 Q. B.

delay.¹⁴⁶ A covenant by the lessee to "write insurance" to a certain amount has been regarded as not broken by a failure to renew the insurance so written.¹⁴⁷ A covenant by the lessee to insure the buildings and machinery to a certain amount for the benefit of the lessor has been regarded as satisfied when the lessee placed part of that amount on the buildings and the balance on the machinery of the lessee, a lien for rent on which was given to the lessor by the lease.¹⁴⁸

The covenant to insure and keep insured is continuing in its nature, and the lessee cannot, on the destruction of the property, repudiate liability in damages for his failure to insure, on the theory that, the lessee having failed to obtain insurance on the day named, he was relieved from liability for subsequent failure to keep the premises insured.¹⁴⁹ An acceptance of rent by the lessor, after knowledge of the lessee's failure to insure, is a waiver only of the previous breaches of a covenant to insure and keep insured.¹⁵⁰

A covenant to insure the buildings on the premises and, in case of loss, to apply the proceeds of the insurance to the restoration of the buildings, has been considered to run with the land, so that the transferee of the lessor is entitled to the benefit thereof, and the assignee of the leasehold is liable thereunder.¹⁵¹ And even though the buildings were not in existence at the date of the lease, but were to be built by the lessee, and the word "assigns" was not used, it was held that the assignee of the leasehold was liable on a covenant to insure, since it might be inferred from the language of the lease, which was in terms made "at and for the rents and conditions" specified, to hold "upon the terms and conditions" expressed, that the covenant was one which was intended to relate to the land as well as to

368; *Wilson v. Wilson*, 14 C. B. 616 (one month's delay).

¹⁴⁶ *Doe d. Darlington v. Ulph*, 13 Q. B. 204.

¹⁴⁷ *Johnson v. Kindred State Bank*, 12 N. D. 420, 96 N. W. 588.

¹⁴⁸ *Guetzkow Bros. Co. v. Breese*, 96 Wis. 591, 72 N. W. 45.

¹⁴⁹ *Rhone v. Gale*, 12 Minn. 54.

¹⁵⁰ *Doe d. Muston v. Gladwin*, 6 Q. B. 953.

¹⁵¹ *Vernon v. Smith*, 5 Barn. & Ald. 1; *Shirk v. Adams*, 130 Fed. 441; *Thomas v. Von Kapff*, 6 Gill & J. (Md.) 372. A covenant to insure, it has been said, does not run with the land unless the proceeds of insurance are to be applied to the restoration of the building. *Northern Trust Co. v. Snyder's Adm'r*, 46 U. S. App. 179, 587.

the buildings.¹⁵² One who had a mechanic's lien on the building and was allowed by the lessee to take possession was held not to be the assignee of the lease, so as to render him liable on the lessee's covenant to insure, or to entitle the lessor to claim the benefit of a policy taken out by him for his own protection.¹⁵³

In case of breach of the lessee's covenant to insure, the amount of recovery is, it seems, if no loss has taken place, the amount of premiums which the lessor may have to pay to effect the insurance,¹⁵⁴ while in case of loss the amount of recovery has been decided to be the sum for which he agreed to insure, provided this is no greater than the amount of the loss, and not the amount of premiums which he would have paid.¹⁵⁵

¹⁵² *Masury v. Southworth*, 9 Ohio St. 340. See, as to the necessity of the word "assigns," post, § 149 b (4).

¹⁵³ *Merchants Ins. Co. v. Mazange*, 22 Ala. 168.

¹⁵⁴ *Mayhew v. Hardesty*, 8 Md. 479; *Masury v. Southworth*, 9 Ohio St. 340. See *Hey v. Wyche*, 12 Law J. Q. B. 83.

Where the lessor agreed to insure, but the lessee was to pay all "extra insurance" occasioned by the use which he might make of the premises, and the lessor, upon receiving payment from the lessee for "extra insurance" for one year, gave a receipt reading "in full settlement of all extra insurance," this receipt was regarded as showing an intention to settle all the matter of extra insurance once for all and it was consequently held that the lessor could not recover from the lessee the amount which he paid as "extra insurance" for that year upon the failure of the company in which he first insured. *Quincy v. Carpenter*, 135 Mass. 102.

¹⁵⁵ *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 Law. Ed. 515. The decision is based in part upon the fact that the covenant to insure was entered into in consideration of the lessor's agreement to rebuild in case of fire and to suspend the rent so long as the premises remained uninhabitable.

In *Lincoln Trust Co. v. Nathan*, 122 Mo. App. 319, 99 S. W. 484, where the lessor agreed to construct improvements in the building leased, to belong to the lessor, and to insure them, and in case of their destruction to apply the insurance money to replacing them, and owing to the lessor's failure to reconstruct the building on its subsequent destruction by fire the improvements could not be replaced, it was held that the lessor was entitled to a portion of the insurance money measured by the proportion between the whole term and the time during which the lessee actually enjoyed possession.

CHAPTER XIV.

TRANSFER OF THE REVERSION.

- § 146. Voluntary transfer.
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 - b. Transfer of "lease."
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- 148. Transferor's rights and liabilities.
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 - (5) Demise of incorporeal thing.
 - (6) Covenants relating to personal chattels.
 - (7) Leases not under seal.
 - (8) Title of lessor.
 - (9) Breaches previous to transfer.
 - (10) Mode of transfer.
 - (11) Transfer of partial interest.
 - (12) Release by transferor.

§ 146. Voluntary transfer.

a. **General considerations.** By the making of a lease, as before stated, the lessor deprives himself of the right of present possession, though his estate otherwise continues as it was before. Such estate, so deprived of the right of present possession, is referred to as an "estate in reversion" or, more frequently, as a "reversion." The name "reversion," as thus applied, evidently has its origin in the fact that the lessor, though deprived

of the right of present possession, is entitled, by reason of his estate, to have the possession "revert" to him upon the expiration of the term created by the lease. So far as the word "reversion" may suggest that the lessor has no present estate or ownership in the land, but merely a right to have the ownership revert to him upon the expiration of the leasehold, it is misleading, but its use as descriptive of the lessor's estate is sanctioned by the unquestioned practice of centuries.

The lessor's reversion, or estate in reversion, may be transferred by the lessor to another, and by the latter again transferred, and so again by the last transferee, and each transferee becomes the landlord for the time during which he holds title to the reversion.

The ordinary mode in which such a transfer, with its consequent change of landlords, occurs, is by voluntary conveyance by the lessor, or by his transferee, of his estate in the land. Such a conveyance need not, it would seem, refer in terms to the lease, a conveyance of the premises by the landlord being necessarily subject to the rights of the tenant, and consequently being of a reversionary interest only, provided the grantee, if a purchaser for value, has notice, actual or constructive, of the lease.¹ Such notice the grantee may have from the tenant's possession of the premises,² or from the record of the lease, if the lease is

¹ See *Whittemore v. Smith*, 50 Conn. 376; *Yule v. Fell*, 123 Iowa, 662, 99 N. W. 559; *Blake v. Ashbrook*, 91 Ill. App. 45; *Anderson v. Conner*, 43 Misc. 384, 87 N. Y. Supp. 449; *Biddle v. Hussman*, 23 Mo. 597; *McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719. So the assignee of the leasehold takes subject to a sublease of which he has notice. *Teater v. King*, 35 Wash. 138, 76 Pac. 688.

In *Winestine v. Ziglatzki-Marks Co.*, 77 Conn. 404, 59 Atl. 496, it was decided that since a conveyance of land by a disseisee is in that state invalid (see ante, § 75), and the possession of one holding under a lease by a married woman of her land, in which her husband does not

join, renders him a disseisor, a subsequent conveyance by husband and wife would be regarded as intended to be subject to the lease in order that it might be upheld, that is, it would be regarded as a conveyance of a reversion and not of a mere right of entry.

² *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Barnhart v. Greenshields*, 9 Moore P. C. 18, 32; *Hunt v. Luck* [1901] 1 Ch. 45; *Thompson v. Pioche*, 44 Cal. 508; *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. 193; *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713, 9 L. R. A. 487; *McRae v. McMinn*, 17 Fla. 876; *Parker v. Gortatowsky*, 127 Ga. 560, 56 S. E. 846; *Coari v. Olsen*, 91 Ill. 273; *Barrett v. Geisinger*, 148 Ill. 98, 35

within the recording laws, as leases, except for brief periods, usually are.³ In case the lease is within the recording laws, and is not recorded, and the grantee, being a purchaser for value, has no notice thereof otherwise, he will take free from any rights in the tenant under the lease. If, on the other hand, the lease is not within the recording laws, the grantee, although a purchaser for value, and without notice thereof, will, it seems, take subject thereto.^{4,5}

N. E. 354; *Leebrick v. Stahle*, 68 Iowa, 515, 27 N. W. 490; *Buck v. Pa.* 376, 11 Atl. 809, 18 Atl. 520, 6 L. Holloway's Devises, 25 Ky. (2 J. J. R. A. 205. Marsh.) 163, 180; *Hull v. Noble*, 40 Me. 459; *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648; *Disbrow v. Jones*, Har. (Mich.) 48; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; *Stone v. Snell*, 77 Neb. 441, 109 N. W. 750; *Chesterman v. Gardner*, 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265; *Anderson v. Conner*, 43 Misc. 384, 87 N. Y. Supp. 449; *Hood v. Fahnestock*, 1 Pa. 470; *Hotenstein v. Lerch*, 104 Pa. 454; *Simanek v. Nemetz*, 120 Wis. 42, 97 N. W. 508.

By the weight of authority, the tenant's possession is notice not only of his rights under the lease, but also of any rights which he may have under a subsequent agreement not incorporated in the instrument of lease, such as a contract for the purchase of the land. *Daniels v. Davison*, 16 Ves. Jr. 249, 17 Ves. Jr. 433; *Allen v. Anthony*, 1 Mer. 282; *Barnhart v. Greenshields*, 9 Moore P. C. 18, 32; *Coari v. Olsen*, 91 Ill. 273; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Anderson v. Brinser*, 129 Pa. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205. In *Red River Valley Land & Inv. Co. v. Smith*, 7 N. D. 236, 74 N. W. 194, the opinion approves a *dictum contra* in *Leach v. Ansbacher*, 55 Pa. 85, which was dis-

approved in *Anderson v. Brinser*, 129 Pa. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205.

A purchaser is not, it has been held, by the possession of the tenant under a lease, charged with notice of a claim by the tenant that by a contract prior to the lease he had acquired an absolute right to the land in fee. *Smith v. Miller*, 63 Tex. 72, 66 Tex. 74, 17 S. W. 399. But apart from any question of notice, the tenant would ordinarily be precluded from asserting any such right as against the purchaser. Ante, § 78.

In *Brown v. Roland*, 11 Tex. Civ. App. 648, 33 S. W. 273, it was decided that a purchaser was not, by the tenant's possession, charged with notice of his right to certain fixtures. The opinion seems rather to misinterpret *Smith v. Miller*, 63 Tex. 72, supra.

³ *Jones v. Marks*, 47 Cal. 242; *Commercial Bank v. Pritchard*, 126 Cal. 600, 59 Pac. 130; *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *Chapman v. Gray*, 15 Mass. 439; *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280; *Bova v. Norigian*, 28 R. I. 319, 67 Atl. 326; *Lucas v. Sunbury & E. R. Co.*, 32 Pa. 458. See *Johnson v. Stagg*, 2 Johns. (N. Y.) 510.

^{4,5} *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280; *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. 873 (semble). But it has been held

In view of the fact that a transfer of the land by the reversioner is thus necessarily, in almost every case, subject to the prior rights of the tenant under the lease, it is not clear why a transfer by the lessor, not expressly saving the tenant's rights under the lease, should be regarded, as has occasionally been done, as involving a wrong to the latter,⁶ it being in some cases referred to as an "eviction."⁷ A transaction between other persons, thus injuring the tenant only by reason of his failure to take the usual and proper precautions, by entering into possession or recording his lease, to give notice of the lease and so to protect his rights, seems to contain no element of an eviction, properly so called. If such a conveyance by the lessor is an eviction, it must be so, it is conceived, whether the lessee is or is not protected as against the subsequent grantee or lessee by reason of the latter's notice of the lease, and so the lessee, although he could not legally be disturbed by him, because of such notice, would have the right to relinquish possession and refuse to pay rent, merely because the lessor has transferred his reversion to another. It is hardly conceivable that the subsequent transfer, if an eviction when the transferee has no notice of the lease, is not an eviction when he has such notice. The

that the assignee of the leasehold is not affected by parol lease or license by the lessee as to part of the premises in favor of the lessor of which he had no notice. *Burr v. Spencer*, 26 Conn. 159, 68 Am. Dec. 379.

⁶ See *Nichol v. McDonald*, 69 Ark. 341, 64 S. W. 263; *Staples v. Flint*, 28 Vt. 794.

In *Maule v. Ashmead*, 20 Pa. 482, the administratrix of the lessor was held liable as for breach of the covenant for quiet enjoyment because the lessee was turned out by the transferee of the administratrix. It is stated that the conveyance did not contain any reservation in favor of the lessee, but it does not appear whether this was the ground of liability. That a subsequent conveyance by a grantor in fee is not a

breach of a covenant for title in the prior deed, see *Rawle, Covenants for Title*, § 128, note, criticising *Curtis v. Deering*, 12 Me. (3 Fairf.) 499. *Williamson v. Williamson*, 71 Me. 442, and *Lukens v. Nicholson*, 4 Phila. (Pa.) 22 are to the same effect as the case thus criticised. In *Wade v. Comstock*, 11 Ohio St. 71, the liability of the grantor, in such a case, under his covenant of warranty, is denied, but it is said: "No one can doubt but that the grantor, if by his agency the title was subsequently defeated, would be liable to the grantee for the damages thereby occasioned. It would be a wrongful act in fraud of the rights of the grantee." See, also, *Foster v. Woodward*, 141 Mass. 160, 6 N. E. 853.

⁷ See post, § 185 f (6).

only theory, apart from that of eviction, on which the lessor, thus making a transfer of the land without expressly reserving the rights of the tenant under the lease, could be regarded as committing a wrong against the tenant, would seem to be that such transfer constitutes a fraud upon the tenant. There is, however, but slight ground for the inference of fraud in such a case. The failure to insert in the conveyance an express reference to the lease would ordinarily be the result either of negligence, or of a failure to regard such insertion as in any way obligatory on the lessor, the lessee being in a position to protect his rights in the premises and presumably having done so.

A landlord, instead of transferring the reversion in the whole land, may transfer the reversion in part, he thus remaining landlord as to the part retained, and his transferee becoming landlord as to the part transferred.⁸

b. **Transfer of "lease."** Not infrequently one finds a mention of the transfer or assignment of the "lease" by a lessor, and occasionally this expression is used, apparently, as synonymous with a transfer of the reversion.⁹ Such expression can, it is submitted, properly be used only of a transfer by the lessee or his assignee, the word "lease" being in such case used elliptically, as it is frequently used in other connections, to designate the estate created by the lease, the leasehold interest.¹⁰ The expression "transfer of a lease," when used with reference to a transfer by the lessor, cannot well refer to a transfer of the estate in reversion, since such estate exists independently of the lease, though it is not reversionary in character until after the lease has been made, and the only meaning which can properly be attached to this mode of expression is a transfer by the lessor of the rights created in his favor by the lease, so far as they can exist independently of and apart from the reversion, the chief, and usually the only one of which, is that to rent. A transfer or assignment of a lease, when spoken of as the act of the reversioner, should therefore, it seems, ordinarily be regarded as meaning

⁸ *Moodie v. Garnance*, 3 Bulst. 153; 102 Ill. App. 381; *Iowa Sav. Bank v. West v. Lassels*, Cro. Eliz. 851; *Lin-Frink*, 1 Neb. Unoff. 14, 26, 92 N. W. ton v. Hart, 25 Pa. 193, 64 Am. Dec. 916; *Merchants' State Bank v. Ruet-691*; *Leiter v. Pike*, 127 Ill. 287, 20 tell, 12 N. D. 519, 97 N. W. 853. N. E. 23, 2 L. R. A. 549.

¹⁰ See ante, § 12 a, at note 17.

⁹ See *Keeley Brew. Co. v. Mason*,

merely a transfer of the rent to become due, with perhaps any rights created by covenant on the part of the lessee looking towards the collection of the rent rather than the protection of the reversion,¹¹ and the expression, at best one to be avoided owing to its ambiguity, is generally, it would seem, construed in this sense.¹²

c. **Execution of conveyance.** The requirements with reference to a conveyance of an estate in reversion are ordinarily the same as in the case of a conveyance of an estate of the same quantum in possession, the fact that there is an outstanding leasehold estate not changing the character of the estate conveyed. At common law there could be no transfer of an estate of freehold in reversion unless there was livery of seisin, to which the tenant consented, or a grant, that is, a conveyance under seal,¹³ and this requirement of a sealed conveyance applied

¹¹ In *Isman v. Hanscom*, 217 Pa. 133, 66 Atl. 329, the transfer by the lessor of "all right, title and interest in the lease, and all benefits and advantages to be derived therefrom," was held to pass the right to take advantage of an option given to the lessor by the instrument of lease to purchase the improvements placed on the premises by the lessee.

¹² *Bordereaux v. Walker*, 85 Ill. App. 86; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Huerstel v. Lorillard*, 29 N. Y. Super. Ct. (6 Rob.) 260; *Id.*, 30 N. Y. Super. Ct. (7 Rob.) 251.

In *Lennen v. Lennen*, 87 Ind. 130, the court discusses the effect of "the assignment of the lease" by the lessor. The reporter, in his head-note, carelessly states that an assignment of the lease by the *lessee* was in question. The court in this case says that "it is one thing to sell the reversion and another thing to assign the lease. In the one case, an interest in the land itself passes; in the other, only a right to enforce the covenants and conditions of the

lease is transferred. A man may sell his interest in a lease, and yet retain his reversionary interest intact." This, it is submitted, goes too far as regards the effect of a so-called "assignment of the lease." It cannot be intended to transfer the right to covenants inserted to protect the reversion; nor, it seems, can such an assignment of the lease transfer a right to enforce a condition, this belonging to the owner of the reversion who would obtain the benefit of the forfeiture. That such covenants do not pass upon an "assignment of the lease" is clearly decided in *Allen v. Wooley*, 1 Blackf. (Ind.) 148. That they do not pass upon an assignment of the rent as such, see *McDougall v. Ridout*, 9 U. C. Q. B. 239.

¹³ *Co. Litt.* 49 a; *Sheppard's Touchstone*, 230; *Watkins, Conveyancing* (Preston's Ed.) 123; *Williams, Real Prop.* (18th Ed.) 310; *Thursby v. Plant*, 1 Wms. Saund. 234, note (3); *Doe d. Were v. Cole*, 7 Barn. & C. 243, 248.

to the case of a "concurrent" lease.¹⁴ After the passage of the Statute of Uses, however, a reversion could be conveyed by bargain and sale,¹⁵ and this was valid without any sealed instrument, or indeed any instrument whatever.¹⁶ The effect of the Statute of Enrollments, passed shortly after the Statute of Uses,¹⁷ was to render an indenture, that is, a sealed instrument, necessary for the purpose of a bargain and sale, but this statute is presumably in force in few, if any states, in this country, and consequently an unsealed conveyance of a reversion can, provided there is the necessary consideration, and provided further the Statute of Uses is in force in the particular jurisdiction, always be supported as a bargain and sale, unless a seal be required by the local statutory provisions as to conveyances of land, without reference to the common law requirement of a seal on the conveyance of a reversion without livery of seisin.

The requirements of a transfer by will of a reversion, as of any other property interest, are determined by the provisions of the local statute as to the execution of wills.

The fact that the lease is under seal evidently does not of itself necessitate that the transfer of the reversion be under seal.¹⁸

¹⁴ Bac. Abr., Leases (N); Brawley Partridge, 108 Mass. 556; Warren v. Wade, McClell. 664. As to concurrent leases, see the subsection next following.

¹⁵ Watkins, Conveyancing, 123; 2 Preston, Abstracts, 85; Challis, Real Prop. (2d Ed.) 349; 2 Sanders, Uses & Trusts, 67.

¹⁶ Chibborne's Case, 2 Dyer, 229 a; Com. Dig., Bargain & Sale, B 1, 4; Gilbert, Uses, 87, 271.

¹⁷ See 1 Tiffany, Real Prop. § 403.

¹⁸ This seems to be assumed in Holliday v. Marshall, 7 Johns. (N. Y.) 211; Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31.

In Keeley Brew. Co. v. Mason, 102 Ill. App. 381, it is decided that the "assignment of the lease" by the lessor was sufficient though not under seal, although, it seems, the lease was under seal; citing Sanders v. Partridge, 108 Mass. 556; Warren v. Leland, 2 Barb. (N. Y.) 613; Stillman v. Harvey, 47 Conn. 26; Barrett v. Trainor, 50 Ill. App. 420; Borderaux v. Walker, 85 Ill. App. 86; Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31. All except the last of these cases involved an assignment of the leasehold by the lessee, not of the reversion by the reversioner.

In Massachusetts it has, however, been decided that if the instrument of lease is under seal, one to whom the "lease" is transferred by an instrument not under seal cannot sue on a covenant for rent contained in the instrument (Wood v. Partridge, 11 Mass. 488; Bridgham v. Tileston, 87 Mass. [5 Allen] 371), the theory being that an assignment should be by an instrument of as high a na-

If a transfer, for instance, of a fee simple estate in possession is, in the particular jurisdiction, valid without a seal, it could not well be invalid merely because it is subject to a leasehold estate in another person which was created by a sealed instrument.

d. **Subsequent lease by landlord.** Not only may a landlord transfer his reversion in a part of the land leased, but he may transfer a part of his reversion in the whole land, that is, he may create another lesser estate therein in favor of a third person, and this he may do in either one of two ways, (1) by a "lease in reversion," or (2) by a "concurrent lease." By a "lease in reversion" is meant a lease to take effect in possession after the ending of a leasehold estate previously existing.^{18a} If such lease is by its terms to commence in possession when such prior leasehold estate comes to an end, it will do so, although such estate comes to an end before the expiration of the term named in the prior lease, as for instance when there is a surrender or forfeiture thereof; while if by its terms the second lease is to commence in possession after a certain number of years, it will not commence till that time, although previously thereto the pre-existing leasehold comes to an end, either by its express terms, or by a surrender or forfeiture.¹⁹ Likewise, in the former case, the term will begin immediately if the prior lease is for any reason void or nonexistent.²⁰ Until entry under a lease in reversion, the lessee has merely an *interesse termini*.²¹

A landlord, although he has made a lease in reversion, retains

ture as the instrument which it pur- interest sought to be transferred is
ports to transfer. The transfer of alone material, that is, if the inter-
the "lease" referred to in these cases est, whether the reversion or the
may have involved a transfer of the rent, passes, the right to sue on the
rent merely, and not of the rever- covenant passes. See post 180 c (2),
sion (§ 146 b, ante), and, so con- at note 582.

sidered, the necessity of a seal upon ^{18a} See Bishop of Bath's Case, 6
the transfer might have been based Coke, 34 b; 1 Platt, Leases, 443.
on the fact that an incorporeal thing ¹⁹ Bac. Abr., Leases (L) 1.
can be transferred only by grant ²⁰ Co. Litt. 46 b; Bac. Abr., Lease
(post, § 180 c [2], at notes 577-599). (L) 1.

Whether the reversion or the rent ²¹ Smith v. Day, 2 Mees. & W. 684;
alone is transferred, the right to sue Joyner v. Weeks [1891] 2 Q. B. 31;
on the covenant passes as an inci- Logan v. Green, 39 N. C. (4 Ired.
dent to the interest transferred, and Eq.) 370; Lewis v. Baker [1905] 1
consequently the sufficiency of the Ch. 46.
instrument of transfer to pass the

his rights against the previous lessee, such as the right to sue for or distrain for rent, that is, he is still the reversioner and landlord,²² and he, rather than the reversionary lessee, has been regarded as the person entitled to assert a claim against the prior lessee by reason of a wrongful holding over by the latter.²³

A "concurrent lease" is one granted by the owner of the reversion, to take effect, not after the termination of the pre-existing lease, but before such termination, and by it, if in proper form to transfer the reversion, the lessee named therein becomes substituted in place of the former landlord, and is, from the time at which it is by its terms to begin, and for the term during which it is to endure, entitled to the rent under the previous lease,²⁴ may claim the benefit of the covenants and conditions thereof,²⁵ and may give a valid notice to terminate a periodic tenancy created by the former lease.^{26, 27}

e. **Subsequent mortgage by landlord.** The landlord, whether the original lessor or his transferee, may execute a mortgage upon the land, which, like an absolute conveyance, will ordinarily be subject to the prior lease, that is, it will not affect the right to possession under the lease.²⁸ In jurisdictions where a mort-

²² *Smith v. Day*, 2 Mees. & W. 684; *Blatchford v. Cole*, 5 C. B. (N. S.) 514. See *Alexander v. Loeb*, 230 Ill. 454, 82 N. E. 833, where the instrument of lease provided specifically that the possession should not pass to the lessee during the time the lessors were prevented from delivering possession of the premises by the action of the prior lessees.

²³ *Blatchford v. Cole*, 5 C. B. (N. S.) 514 (action for double value for wrongful holding over not maintainable by lessee in reversion); *Thomas v. Wightman*, 129 Ill. App. 305 (stipulated penalty for holding over recoverable by lessor in spite of lease in reversion made by him); *United Merchants' Realty & Imp. Co. v. Roth*, 122 App. Div. 628, 107 N. Y. Supp. 511 (lessee in reversion not entitled as landlord to hold previous tenant holding over for another term). As

to person entitled to sue to recover possession from prior lessee, see post, § 215.

²⁴ *Harmer v. Bean*, 3 Car. & K. 307; *Morris v. Niles*, 12 Abb. Pr. (N. Y.) 103; *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861; *Logan v. Green*, 39 N. C. (4 Ired. Eq.) 370; *Russo v. Yuzolino*, 19 Misc. 28, 42 N. Y. Supp. 482.

²⁵ *Co. Litt.* 215 a; *Wright v. Burroughes*, 3 C. B. 685; *Burton v. Barclay*, 7 Bing. 745.

^{26, 27} *Doe d. Jarvis v. McCarthy*, 5 New. Br. (3 Kerr) 63. And the lessor cannot give such notice. *Wordsley Brewery Co. v. Halford*, 90 Law T. (N. S.) 89.

²⁸ *Moss v. Gallimore*, 1 Doug. 279; *Rogers v. Humphreys*, 4 Adol. & E. 299, 313; *Burden v. Thayer*, 44 Mass. (3 Metc.) 76, 37 Am. Dec. 117.

gage transfers the legal title, the effect will be to make the mortgagee the reversioner and landlord in place of the mortgagor.²⁹ In other jurisdictions it can have no such effect.³⁰

f. **Attornment.** It was formerly necessary in England, in order that the relation of landlord and tenant might arise between the transferee of the reversion and the tenant of the land, that the tenant "attorn" to such transferee, that is, consent to the transfer, or, what is the same thing, consent to be the tenant of the transferee.³¹ This requirement was based upon the personal nature of the relation between the landlord and the tenant in early times, and was dispensed with by Statute 34 Anne, c. 16, §§ 9, 10, providing that all grants and conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made, provided that "no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition of nonpayment of rent, before notice shall be given to him of such grant."³²

This statute, it has been decided in an English case, does not apply to a transfer of the reversion on an oral lease, the transfer being made after an assignment of the leasehold, so as to give the transferee a right to maintain an action for rent against the original lessee, he not being, after his assignment, a tenant with-

²⁹ Moss v. Gallimore, 1 Doug. 279; Co. v. Peabody Coal Co., 99 Ill. App. Comer v. Sheehan, 74 Ala. 452; Cof- 427.

fey v. Hunt, 75 Ala. 236; King v. ³¹ See Litt. § 551; Butler's note to Housatonic R. Co., 45 Conn. 226; Co. Litt. 309 a; 2 Sheppard's Touch-Mirick v. Hoppin, 118 Mass. 582; stone, c. 13, pp. 253-266. Compare Kimball v. Lockwood, 6 R. I. 138; ante, § 19 a.

Burden v. Thayer, 44 Mass. (3 Metc.) ³² See Doe d. Agar v. Brown, 2 76, 37 Am. Dec. 117; Russell v. Allen, El. & Bl. 331; Doe d. Wright v. 84 Mass. (2 Allen) 42; Kimball v. Smith, 8 Adol. & E. 260; Cook v. Pike, 18 N. H. 419. Moylan, 1 Exch. 67; Scaltock v. Har-

³⁰ Teal v. Walker, 111 U. S. 242, ston, 1 C. P. Div. 106.
28 Law. Ed. 415; David Bradley &

in the statute.³³ In this case it was conceded that there was no covenant for rent passing with the reversion, since the lease was oral, and the action seems to have been equivalent to an action of debt for rent at common law.

In a number of states in this country the statute of Anne, dispensing with the necessity of an attornment, but saving the rights of a tenant paying rent before notice of the transfer, has been substantially adopted or re-enacted,^{34,35} and in others the requirement of attornment has been regarded as inapplicable owing to the absence of the feudal relation in which it had its origin.³⁶ In Illinois attornment was, at one time, regarded as strictly necessary on a transfer of the reversion,³⁷ but has been held to have been dispensed with by the statute, hereafter referred to,³⁸ giving the transferee of the reversion all the remedies of the lessor.³⁹ And in other states, occasionally, it seems to have been regarded as a still existent requirement.⁴⁰ The American statutes on the subject, it may be remarked, differ from the English statute in that they ordinarily protect the tenant who pays rent "without notice of the transfer," while the Eng-

³³ *Allcock v. Moorhouse*, 9 Q. B. *Abbott v. Hanson*, 24 N. J. Law (4 Div. 366.) 493; *Jones v. Rigby*, 41 Minn.

^{34,35} *Alabama* Code 1907, § 3365; 530, 43 N. W. 390; *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266; *California* Civ. Code, § 1111; *Dela-* *Kelly v. Bowerman*, 113 Mich. 446, ware Rev. Code 1893, p. 866; *Idaho* 71 N. W. 836; *Pelton v. Place*, 71 Vt. Civ. Code 1901, § 2414; *Burns' Ann.* 430, 46 Atl. 63; *Mussey v. Holt*, 24 St. *Indiana* 1901, § 7096; *Kansas* N. H. 248, 55 Am. Dec. 234. Gen. St. 1905, § 4063; *Kentucky* St. 1893, § 2298; *Mississippi* Code 1906,

§ 2836; *Montana* Rev. Codes 1907, § See *Mackin v. Haven*, 187 Ill. 480, 58 4625; 1 Gen. St. *New Jersey*, p. 875, N. E. 448; *Hayes v. Lawver*, 83 Ill. § 109; *New York* Real Prop. Law, § 182.

213; *North Carolina* Revision 1905, ³⁷ *Fisher v. Deering*, 60 Ill. 114. § 947; *North Dakota* Rev. Codes 1905, ³⁸ See post, § 149 b (1), at note 86. § 4980; *South Carolina* Civ. Code, § ³⁹ *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. 31.

2413; *South Dakota* Civ. Code, § 946; ⁴⁰ See *Winkelmeier v. Katzelbur-* *Virginia* Code 1904, § 2783; *West Vir-* *ger*, 77 Mo. App. 117 (summary pro- ginia Code 1906, § 3396. ceeding); *Duke v. Compton*, 49 Mo.

³⁶ See *King v. Housatonic R. Co.*, App. 304 (summary proceeding); 45 Conn. 226; *Perrin v. Lepper*, 34 *Smith v. Aude*, 46 Mo. App. 631; Mich. 292; *Burden v. Thayer*, 44 *Thompson v. Chapman*, 57 Ga. 16; Mass. (3 Metc.) 76, 37 Am. Dec. 117; *Stewart v. Gregg*, 42 S. C. 392, 20 *Funk's Lessee v. Kincaid*, 5 Md. 404; S. E. 193.

lish statute protects him only in making payments before notice of the transfer "shall be given to him."^{40a}

It was decided in England, after the passage of the Statute of Uses, that any conveyance of a reversion which took effect under that statute, that is, as a bargain and sale or covenant to stand seised, was effectual without any attornment.⁴¹ In England the effect of this view in dispensing with the necessity of attornment, before the statute of Anne, was much restricted by the requirement that a conveyance by way of bargain and sale must be by indenture and enrolled,⁴² but in any state of this country, in which the Statute of Uses is, and the Statute of Enrollments is not, in force, a conveyance of a reversion, made for a valuable consideration, or which recites the payment of such a consideration, might, it seems, in the absence of any recognition of the statute of Anne or any local re-enactment thereof, be regarded as taking effect by way of bargain and sale,⁴³ for the purpose of dispensing with the necessity of an attornment.

The requirement of an attornment upon a transfer of the reversion applied at common law in the case of a "concurrent lease," that is, a transfer of the reversion for a limited period,⁴⁴ as well as when the entire reversion was transferred. But the statute of Anne, above referred to, dispenses, it seems, with the necessity of an attornment in the former as well as in the latter case.⁴⁵

^{40a} See post, § 180 d, at note 609.

⁴¹ Bro. Abr., Attornment, pl. 29; Co. Litt. 309 b; Sir Moyle Finch's Case, 6 Coke, 68 b; Anonymous, 1 Dyer, 30 a; Anonymous, 2 And. 203. And see the opinion of Mr. Justice Buller in *Birch v. Wright*, 1 Term R. 385.

⁴² Statute of Enrollments (27 Hen. 8, c. 16).

⁴³ See 2 Tiffany, Real Prop. §§ 378, 384.

⁴⁴ Bac. Abr., Leases (N); Anonymous, 3 Leon. 17.

⁴⁵ Doe d. Agar v. Brown, 2 El. & Bl. 331, 348; Doe d. Jarvis v. McCarthy, 5 New Br. (3 Kerr) 63; Hendrickson v. Beeson, 21 Neb. 61,

31 N. W. 266; McDonald v. Hanlon, 79 Cal. 442, 21 Pac. 861. Vice Chancellor Page Wood, however, in *Edwards v. Wickwar*, L. R. 1 Eq. 403, decided, without discussion, that attornment is necessary in such a case. It is generally assumed that he overlooked the statute of Anne. See note to report of the case in *Edwards v. Wickwar*, 35 Law J. Ch. 309; Foa, Landl. & Ten. (2d Ed.) 355; Woodfall, Landl. & Ten. (16th Ed.) 222.

In *Comstock v. Cavanagh*, 17 R. I. 233, 21 Atl. 498, 12 L. R. A. 57, also, it is held that attornment is necessary in such a case, the court saying that the statute of Anne is inapplicable because there is a transfer

§ 147. Transfer by operation of law.

There may be a transfer of the reversion, not only by the voluntary act of the owner thereof, but also by operation of law. One case of such transfer occurs when the landlord dies intestate the reversion, if in fee, passing, in most states, to his heir or heirs,⁴⁶ and if a chattel interest only, passing to his personal representative.⁴⁷

Likewise, if the interest of the landlord is sold under a judgment, mortgage or other lien, which is *subsequent* to the lease, the purchaser becomes the landlord in the former owner's place, since the reversion passes by the sale.⁴⁸ In such case the purchaser takes only what the lessor has, that is, his estate in re-

of a mere right to the possession 161; *Chamberlain v. Dunlop*, 126 N. Y. 45, 26 N. E. 966; *Stinson v. Stinson*, 38 Me. 593; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312.

of an attornment which, at the common law, caused the second lease to take effect merely as creating an *interesse termini* (See *Bac. Abr.*, Lease [N]; *Rawlyns' Case*, 4 Coke, 53 a), it is somewhat difficult to understand the reason given for the nonapplicability of the statute. The statement seems equivalent to saying that the statute dispensing with an attornment does not apply because an attornment is necessary. The court cites *Edwards v. Wickwar*, L. R. 1 Eq. 403, *supra*, which no doubt supports it, but it also cites *Doe d. Agar v. Brown*, 2 El. & Bl. 331, 348, which is directly contrary to its conclusion. This case is cited approvingly in *Moshassuck Encampment No. 2 v. Arnold*, 25 R. I. 65, 54 Atl. 771. In *White v. Kane*, 53 Mo. App. 300, it is assumed that attornment is necessary in order to create a liability as against the lessor in favor of a lessee under a concurrent lease.

⁴⁷ *Sacheverel v. Frogate*, 1 Vent. 161.

⁴⁸ *Butt v. Ellett*, 86 U. S. (19 Wall.) 544; *Smith v. Aude*, 46 Mo. App. 631; *Epley v. Eubanks*, 11 Ill. App. (11 Bradw.) 272; *Lanchashire v. Mason*, 75 N. C. 455; *Rhyn v. Guevara*, 67 Miss. 139, 6 So. 736; *Abrams v. Sheehan*, 40 Md. 446; *Gross v. Chittim* (Tex. Civ. App.) 18 Tex. Ct. Rep. 906, 100 S. W. 1006. In some of these cases the courts appear to be under the impression that it is the time of the sale, and not of the lien under which the sale is made, that determines the rights of the purchaser, losing sight of the fact that the rights of one purchasing upon a sale under a lien are fixed by the date of the lien. See *ante*, § 78 n (3), *post*, at notes 49-54.

In case of sale under a power in a mortgage or deed of trust subsequent to the lease, the purchaser succeeds to the lessor's rights. *Otis v. McMillan*, 70 Ala. 46.

⁴⁶ *Sacheverel v. Frogate*, 1 Vent.

version, and the rights of the tenant under the outstanding lease remain such as they would be in the case of a voluntary transfer of the reversion. If, on the other hand, the premises are sold under a judgment, mortgage or other lien *prior* to the lease, the purchaser comes in by title paramount to the lease,⁴⁹ and he is entitled to possession as against the tenant thereunder.⁵⁰ And as the tenant under a lease has no rights in the land as against the purchaser under a prior incumbrance, so such purchaser has, apart from statute, no rights as landlord against such tenant, unless the latter accepts a new lease from the purchaser, or, which is the same thing, attorns to him.⁵¹ The purchaser's title dates back to the date of the lien under which he claims,⁵² and he is in the same position towards the tenant under the lease as that in which one to whom the owner of land conveys the absolute title would be towards a tenant under a lease which such owner might make after thus divesting himself of the title, that is, he is an absolute stranger towards such tenant. The enforcement of the lien divests all intermediate estates and interests to the same extent as would the enforcement of a condition subsequent at common law. The courts occasionally lose sight of the above distinction between a sale under a prior and one under a subsequent lien, speaking of a purchaser under a prior lien as being entitled to the rent under the lease.⁵³ It may be remarked that if the purchaser at the sale made to enforce such prior lien

⁴⁹ See ante, § 78 n (3).

⁵⁰ *Fitzgerald v. Beebe*, 7 Ark. 310; *Simers v. Saltus*, 3 Denio (N. Y.) 214.

⁵¹ *McDermott v. Burke*, 16 Cal. 580; *Bartlett v. Hitchcock*, 10 Ill. App. (10 Bradw.) 87; *Simers v. Saltus*, 3 Denio (N. Y.) 214; *Sprague Nat. Bank v. Erie R. Co.*, 22 App. Div. 526, 48 N. Y. Supp. 65; *Peters v. Elkins*, 14 Ohio, 344; *Heidelbach, Seasingood & Co. v. Slader*, 1 Handy (Ohio) 456. See the statement of this view, with special reference to the position of a purchaser under a prior mortgage, ante, § 73 c.

⁵² See *Freeman, Executions*, § 195; *Jones, Mortgages*, §§ 1654, 1897; Kle-

ber, *Judicial Sales*, 205, 207, 423; 19 Am. & Eng. Enc. Law (2d Ed.) 36.

⁵³ *Whalin v. White*, 25 N. Y. 462; *Condon v. Marley*, 7 Kan. App. 383, 51 Pac. 924; *Harris v. Foster*, 97 Cal. 292, 32 Pac. 246, 33 Am. St. Rep. 187; *Henshaw v. Wells*, 28 Tenn. (9 Humph.) 568. The assertion of a like view in *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364, is based in terms on a Pennsylvania decision, which is, however, based on a local statute of that state (Act June 16, 1837) giving the purchaser at sheriff's sale the right to rent under an existing lease. See as to this statute, post, at notes 57-62.

could be regarded as entitled to the rights of a reversioner as against the tenant, he would necessarily enjoy them subject to the same limitations as the lessor himself, and the result would be that the lien could be rendered practically valueless by the making of a long lease at an exceedingly low rent.⁵⁴ The reason of the distinction referred to, however, lies deeper than this, in the very nature of a lien enforceable by sale.

In Alabama there is a statutory provision that if land sold on execution or under a decree or mortgage is in possession of a tenant, notice to him by the purchaser, or his vendee, of the purchase, vests the right to possession in him, as if such tenant had attorned to him.⁵⁵ This statute, it has been decided, does not create the relation of landlord and tenant between the purchaser and the tenant of the former owner, but merely precludes such tenant from asserting, as against the purchaser seeking to obtain possession, defenses which a tenant could not assert against his landlord.⁵⁶

In Pennsylvania there is a statutory provision that if any lands or tenements sold under execution are, at the time of sale, in the possession of a tenant under a lease, the purchaser shall, upon receiving a deed, be deemed the landlord of such tenant with the like remedies to recover rent accruing after the acknowledgment of the deed to him.⁵⁷ This statute, while it does not change the rule that a purchaser under a judgment subsequent to the lease necessarily becomes the landlord,⁵⁸ has been held to give the purchaser under either a prior or a subsequent lien the option either to affirm the lease and treat the tenant as his tenant,⁵⁹ holding him as such liable for rent,⁶⁰ or to "disaffirm" the

⁵⁴ See *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211. The opinion in this case well states the effect of a sale under a prior lien, but is, it is submitted, open to question in so far as it asserts that the tenant under the lease is liable in use and occupation to the purchaser, since the relation of landlord and tenant is necessary to support this action. The existence of such a relation is expressly denied in this case.

⁵⁵ Code 1907, § 5747.

⁵⁶ *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272, 11 So. 211.

⁵⁷ Act June 16, 1836, § 119; *Pepper & Lewis' Dig., Execution*, § 164.

⁵⁸ *Hemphill v. Tevis*, 4 Watts & S. (Pa.) 535.

⁵⁹ *Menough's Appeal*, 5 Watts & S. (Pa.) 432; *Borrell v. Dewart*, 37 Pa. 134; *Hayden v. Patterson*, 51 Pa. 261; *Duff v. Wilson*, 69 Pa. 316.

⁶⁰ *Farmers' & Mechanics' Bank v. Ege*, 9 Watts (Pa.) 436; *Hemphill v. Tevis*, 4 Watts & S. (Pa.) 535.

lease, in which latter case the tenant, it is said, is a tenant at will, so long as he remains in possession,⁶¹ and is liable for use and occupation.⁶²

There are in some states statutory provisions with reference to the time from which a purchaser at execution sale shall be entitled to "the rents" of the premises, which might possibly be construed as placing the purchaser under a lien prior to the lease in the position of a reversioner.

Other cases, besides those previously mentioned, in which the reversion is transferred by operation of law, quite frequently occur, as when it passes under bankruptcy or receivership proceedings, or when it is sold by order of court to pay debts for purposes of partition.⁶³

§ 148. Transferor's rights and liabilities.

The mutual rights and liabilities of lessor and lessee are of a two-fold character, as being based either on "privity of estate" or on "privity of contract." Rights and liabilities based on privity of estate are those which result from the existence of the relation of tenancy, while those based on privity of contract are those which arise from covenants or other contracts entered into either by the lessor or lessee.

Upon a transfer of the reversion, whether by voluntary act or by operation of law, the transferor ceases to be the landlord, and the privity of estate between him and the tenant thus coming to an end, he can no longer assert rights against the tenant based thereon, nor be subjected to liabilities in that regard.⁶⁴

As regards the rights of the lessor based upon the covenants or other contracts of the lease, that is, on privity of contract, it seems that, after the transfer of the reversion, since the benefits thereof pass to the transferee,⁶⁵ the lessor has no right to assert

⁶¹ *Bittinger v. Baker*, 29 Pa. 66, 70 Am. Dec. 154; *Adams v. McKes-* ton Delaware Falls Co., 7 N. J. Eq. (3 Halst.) 489; *Stevenson v. Han-* son, 53 Pa. 81, 91 Am. Dec. 183. cock, 72 Mo. 612; *Evans v. Hamrick*.

⁶² *Stockton's Appeal*, 64 Pa. 58; 61 Pa. 19, 100 Am. Dec. 595; *Burns Mozart Bldg. Ass'n v. Friedjen*, 12 Phila. (Pa.) 515. v. Cooper, 31 Pa. 426.

⁶³ See *English v. Key*, 39 Ala. 113; *Black v. Davis, Batty*, 80. ⁶⁴ See *Walker's Case*, 3 Coke, 22 a;

Wagner v. Cohen, 6 Gill. (Md.) 97, 26 Am. Dec. 559; *Corrigan v. Tren-* ⁶⁵ See post, § 149 b.

any claims on account of breaches occurring after the transfer,⁶⁶ though he may as regards those previously occurring.⁶⁷ It has, however, been decided in one case that the original lessor could sue on account of the lessee's breach of his covenant to pay taxes, when he, the lessor, was under an obligation to his transferee, by reason of his covenant against incumbrances, to see that the taxes were paid and had accordingly paid them.^{67a}

Though a lessor transferring his reversionary interest loses, it seems, any right of action for subsequent breaches of the lessee's covenants, he still remains liable on his own covenants, since one cannot, by his own act, without the consent of the other party, relieve himself from a contractual liability,⁶⁸ the same principle being applicable here as in the case of an assignment of the leasehold, by which the original lessee is not relieved from liability on his covenants.⁶⁹

⁶⁶ *Scheidt v. Belz*, 4 Ill. App. (4 Bradw.) 431; *Stoddard v. Emery*, 128 Pa. 436, 18 Atl. 339, 5 L. R. A. 597; *Demarest v. Willard*, 8 Cow. (N. Y.) 206. And see to this effect *Green v. James*, 6 Mees. & W. 656; opinion of Best, J., in *Vernon v. Smith*, 5 Barn. & Ald. 1; 1 Smith's Leading Cases (8th Am. Ed.) 157, notes to *Spencer's Case*; 2 Platt, Leases, 386.

That the lessor could not, after assigning, recover rent, has been not infrequently stated or decided. *Walker's Case*, 3 Coke, 22 a; *Doe d. Palmer v. Andrews*, 4 Bing. 348, 356, per Gaselee, J.; *Peck v. Northrop*, 17 Conn. 217; *Abbott v. Hanson*, 24 N. J. Law (4 Zab.) 493; *Grundin v. Carter*, 99 Mass. 15; *West Shore Mills Co. v. Edwards*, 24 Or. 475, 33 Pac. 987; *Moore v. Turpin*, 1 Sneer Law (S. C.) 32, 40 Am. Dec. 589; *Lancashire v. Mason*, 75 N. C. 455.

In *Payne v. James*, 42 La. Ann. 230, 7 So. 457, it was decided that the lessor could sue upon a covenant to return the premises in good condition, though he had transferred

the reversion, he having expressly reserved the right of action to recover for any injury done to the premises during the term. The opinion does not clearly explain how one person can by stipulation have the right to recover for a subsequent injury to another. It is said that he was compelled to sell for a lower price owing to injuries done to the reversion, but, as explicitly stated in the opinion, there was no right of action till the end of the term, and the lessee might in the meanwhile have repaired.

⁶⁷ See *Anonymous*, Skin. 367; *Midgley v. Lovelace*, Carth. 289, Holt. 74; *Harley v. King*, 2 Crompt. M. & R. 18; 2 Platt, Leases, 386.

^{67a} *Wills v. Summers*, 45 Minn. 90, 47 N. W. 463.

⁶⁸ *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130, 61 N. E. 816; *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485; *Stuart v. Joy* [1904] 1 K. B. 362.

⁶⁹ See post, § 157 a (2).

§ 149. Transferee's rights and liabilities.

a. **By reason of privity of estate.** As regards rights and liabilities arising from privity of estate, that is, from the relation of landlord and tenant, the transferee of the reversion, although merely by way of a concurrent lease,⁷⁰ becomes substituted in the place of his assignor, whether the original lessor or a previous transferee. Accordingly the transferee may recover rent against the tenant, whether the original lessee or an assignee of the leasehold, in an action of debt as distinguished from an action on the covenant to pay rent,⁷¹ though he cannot bring debt against the lessee for rent falling due after the latter has assigned his term, since there is no privity of estate in such case to support it.⁷² So the transferee has the same rights as his transferor to demand that the tenant refrain from either voluntary or permissive waste,⁷³ this being a right based on privity of estate, and he has the same right as the lessor had to assert a forfeiture upon a disclaimer by the tenant of the tenancy,⁷⁴ or upon a breach of an express condition in the lease.⁷⁵

b. **By reason of privity of contract—(1) Statutory provisions.** As regards the rights and liabilities arising from privity of contract, that is, from the covenants of the lease, the transferee of the reversion is in approximately the same position as the original lessor, so far as they are of such a character as to "run with the land." This is usually in terms based on the statute of 32 Hen. 8, c. 34, or of state statutes more or less similar thereto.

Lord Coke and some of his contemporaries on the bench seem to have been of opinion that even at common law the benefit of covenants by the lessee at least to pay rent and repair passed

⁷⁰ See ante, § 146 d, at note 25.

⁷² *Humble v. Glover*, Cro. Eliz.

⁷¹ *Walker's Case*, 3 Coke, 22 a; *Ards v. Watkin*, Cro. Eliz. 637, 651; *Thurshy v. Plant*, 1 Wms. Saund. 237, 1 Lev. 259; *Allen v. Bryan*, 5

73 Y. B. 5 Hen. 7, 19 a. See *Shinn v. Guyton & Herington Mule Co.*, 109 Mo. App. 557, 83 S. W. 1015.

Barn. & C. 512; *Howland v. Coffin*, 29 Mass. (12 Pick.) 125; *Patten v. Deshon*, 67 Mass. (1 Gray) 325; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134. That recovery in an action of debt for rent is based on privity of estate, see § 171, at note 123.

74 *Evans v. Enloe*, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22.

⁷⁵ *Page v. Esty*, 54 Me. 319.

to transferees of the reversion,⁷⁶ but this view is opposed by other authorities⁷⁷ as well as by the language of the recital in the statute just referred to. But whatever may have been the law before the statute, it has been the usual custom of the courts, in adjudicating questions of the rights and liabilities of transferees of the reversion, to base their decisions upon a statute.

The statute of 32 Hen. 8, c. 34, passed shortly after the dissolution of the monasteries and the confiscation of their property by the crown, after reciting, among other things, that by the common law no stranger to any covenant, action or condition could take any advantage thereof, but only such as were parties and privies thereto, enacted that all persons and bodies politic, their heirs, successors and assigns, having any gift or grant from the king of any lands or other tenements or hereditaments, or of any reversion of the same which belonged to the dissolved monasteries, or by any other means came to the king's hands, or which at any time before the passage of the act did belong or appertain to any other person or persons and thereafter came to the king's hands, and also all other persons being grantors or assignees of the king or any other person, and their heirs, executors, successors and assigns, should have like advantages against the lessees, their executors, administrators and assigns, by entry, for nonpayment of the rent or for doing waste or other forfeiture; and by action only, for not performing other conditions, covenants or agreements, expressed in the indentures of leases and grants, against the said lessees and grantees, their executors, administrators and assignees, as the lessors and grantors, their heirs or successors, might have had. The second section provided that all lessees and grantees of lands or other tenements or hereditaments, for terms of years, life or lives, their executors, administrators or assigns, should have like action and remedy against all persons and bodies politic, their heirs, successors and assigns, having any gift or grant, of the king or any other person, of the reversion of the lands, tenements or hereditaments so leased, or any parcel thereof, for any condition or cove-

⁷⁶ See *Athowe v. Heming*, 1 Rolle, 80, 81; s. c., *sub nom.*, *Attoe v. Hemmings*, 2 Bulst. 281; *Brett v. Cum-berland*, 1 Rolle. 359, 360, 3 Bulst. 163. ⁷⁷ *Barker v. Damer*, 3 Mod. 336. *Carth.* 182; *Thrale v. Cornwall*, 1 Wils. (pt. 1) 165; *Isherwood v. Oldknow*, 3 Maule & S. 382, 394.

nant expressed in the indentures of their leases, as the same lessees might have had against the lessors and grantors, their heirs and successors.

Whatever may have been the purpose of this statute, and there seems some reason for inferring from its language that the purpose was to protect merely the crown and its assigns,⁷⁸ its language seems sufficient, as has always been recognized, to give the lessors, and also to their assigns, the right to enforce covenants and conditions against lessees and their assigns, and to give reciprocal rights to lessees and their assigns, to enforce any covenant against the lessors and their assigns.

There are in a number of the states of this country somewhat similar statutory provisions, the purpose of which is to make the burden and benefit of covenants and conditions in the lease pass to transferees of the reversion and also to assignees of the lease. The California statute⁷⁹ for instance, provides that the transferee of real property, upon which rent has been reserved, or to whom any such rent is transferred, shall have the same remedies for recovery of rent, for nonperformance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or devisor might have had; and that whatever remedies the lessor of real property has against his immediate lessee for the breach of any agreement in the lease, or for the recovery of the possession, he shall have against the assignee of the lessee, except where the assignment is made by way of security for a loan, and is not accompanied by possession of the premises; and that whatever remedies the lessee may have against the lessor for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against incum-

⁷⁸ A writer who has made a special "privity of estate" with the previous investigation of the question is of lessors, that is, they were not in the the opinion that the burden as well position of assigns, and that the as the benefit of covenants ran at effect of the statute was merely to common law in favor of and against dispense with the requirement of assigns, and that the statute of privity, it being in other respects Henry VIII was passed merely because the crown and its assigns, but declaratory of the common law. *Sims, Covenants which Run with the Land*, pp. 66, 77, 80.

⁷⁹ Civil Code, §§ 821-823.

brances or relating to the title or possession. These provisions have been substantially adopted in other states, the legislation of which is moulded on that of California.⁸⁰ In California ⁸¹ and at least one of these states, ⁸² there are also provisions as to what covenants shall run with the land,⁸³ which seem merely to re-enact the law as established in England. In still other jurisdictions there are provisions as to the effect of a transfer or assignment, more or less similar to those of California.⁸⁴ In Mississippi and New Jersey⁸⁵ the language of the English statute, omitting the recitals, is closely followed. In Illinois⁸⁶ the statute provides that the grantees of any demised lands or of the reversion thereof, the assignees of "the lessor of any demise," and the heirs, and personal representatives of the lessor, grantee, or assignee, shall have the same remedies as their grantor or lessor might have had, and further that the lessees of any lands, their assigns or personal representatives, shall have the same remedy against the lessor, his grantees, assignees, or his or their representatives, as such lessee might have had, except with reference to covenants against incumbrances or relating to title or possession. These provisions are sufficient to transfer the benefit of covenants to the transferee of the lessor or of the lessee, and perhaps to impose the burden thereof on the transferee of the reversion, but they do not appear to provide for the imposition of such burden on the transferee of the lessee. In the states in which there is no local enactment on the subject, presumably the English law upon the subject is ordinarily to be regarded as in force.⁸⁷ In two of such states, however, the contrary

⁸⁰ *Idaho* Civ. Code, §§ 2378-2380; *Law*, § 193; *North Carolina* Revision 1905, § 1989; *Virginia* Code 1904, 4523; *North Dakota* Rev. Codes 1905, §§ 2781-2782; *West Virginia* Code §§ 4802, 4803; *Oklahoma* Rev. St. 1906, §§ 3394, 3395; *Wisconsin* Rev. 1903, § 3335; *South Dakota* Civ. St. 1898, §§ 2194-2195.
⁸¹ *Idaho* Civ. Code, §§ 2378-2380; *Law*, § 193; *North Carolina* Revision 1905, § 1989; *Virginia* Code 1904, 4523; *North Dakota* Rev. Codes 1905, §§ 2781-2782; *West Virginia* Code §§ 4802, 4803; *Oklahoma* Rev. St. 1906, §§ 3394, 3395; *Wisconsin* Rev. 1903, § 3335; *South Dakota* Civ. St. 1898, §§ 2194-2195.

⁸² *Idaho* Civ. Code, §§ 2378-2380; *Law*, § 193; *North Carolina* Revision 1905, § 1989; *Virginia* Code 1904, 4523; *North Dakota* Rev. Codes 1905, §§ 2781-2782; *West Virginia* Code §§ 4802, 4803; *Oklahoma* Rev. St. 1906, §§ 3394, 3395; *Wisconsin* Rev. 1903, § 3335; *South Dakota* Civ. St. 1898, §§ 2194-2195.
⁸³ *Idaho* Civ. Code, §§ 2378-2380; *Law*, § 193; *North Carolina* Revision 1905, § 1989; *Virginia* Code 1904, 4523; *North Dakota* Rev. Codes 1905, §§ 2781-2782; *West Virginia* Code §§ 4802, 4803; *Oklahoma* Rev. St. 1906, §§ 3394, 3395; *Wisconsin* Rev. 1903, § 3335; *South Dakota* Civ. St. 1898, §§ 2194-2195.

⁸⁴ *Idaho* Civ. Code, §§ 2378-2380; *Law*, § 193; *North Carolina* Revision 1905, § 1989; *Virginia* Code 1904, 4523; *North Dakota* Rev. Codes 1905, §§ 2781-2782; *West Virginia* Code §§ 4802, 4803; *Oklahoma* Rev. St. 1906, §§ 3394, 3395; *Wisconsin* Rev. 1903, § 3335; *South Dakota* Civ. St. 1898, §§ 2194-2195.

⁸⁵ *Idaho* Civ. Code, §§ 2378-2380; *Law*, § 193; *North Carolina* Revision 1905, § 1989; *Virginia* Code 1904, 4523; *North Dakota* Rev. Codes 1905, §§ 2781-2782; *West Virginia* Code §§ 4802, 4803; *Oklahoma* Rev. St. 1906, §§ 3394, 3395; *Wisconsin* Rev. 1903, § 3335; *South Dakota* Civ. St. 1898, §§ 2194-2195.
⁸⁶ *Idaho* Civ. Code, §§ 2378-2380; *Law*, § 193; *North Carolina* Revision 1905, § 1989; *Virginia* Code 1904, 4523; *North Dakota* Rev. Codes 1905, §§ 2781-2782; *West Virginia* Code §§ 4802, 4803; *Oklahoma* Rev. St. 1906, §§ 3394, 3395; *Wisconsin* Rev. 1903, § 3335; *South Dakota* Civ. St. 1898, §§ 2194-2195.

⁸⁷ *Idaho* Civ. Code, §§ 2378-2380; *Law*, § 193; *North Carolina* Revision 1905, § 1989; *Virginia* Code 1904, 4523; *North Dakota* Rev. Codes 1905, §§ 2781-2782; *West Virginia* Code §§ 4802, 4803; *Oklahoma* Rev. St. 1906, §§ 3394, 3395; *Wisconsin* Rev. 1903, § 3335; *South Dakota* Civ. St. 1898, §§ 2194-2195.

has been asserted.⁸⁸ The rights and liabilities arising from such covenants are, as we have before stated, based on privity of contract, and not on privity of estate, and the effect of the statute is, it seems, to transfer this privity of contract, along with the reversion.^{89,90}

Apart from the English statute above stated, or any local statute of a similar character, it seems that the transfer of a reversion might be construed as intended to pass the right of action for subsequent breaches of covenants entered into by the lessee,⁹¹ so as to render applicable the doctrine, not apparently very modern,⁹² allowing the assignee of a chose in action to sue thereon in the name of the assignor,⁹³ or so as to bring

v. Coffin, 29 Mass. (12 Pick.) 125; Keb. 439, 448, 468, 492; Sacheverell Patten v. Deshon, 67 Mass. (1 Gray) 325; Streaper v. Fisher, 1 Rawle (Pa.) 155, 18 Am. Dec. 604.

⁸⁸ In *Baldwin v. Walker*, 21 Conn. 168, 181, it appears to be assumed that the statute was not in force, but the court in effect adopted it by refusing to follow the common-law rule that the transferee of the reversion is not entitled to the benefit of a covenant by the lessor.

There are in Ohio several cases in which the statute is stated not to be in force. See *Crawford v. Chapman*, 17 Ohio, 449; *Masury v. Southworth*, 9 Ohio St. 340; *Sutliff v. Atwood*, 15 Ohio St. 186; *Taylor v. DeBus*, 31 Ohio St. 473. But in *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604, the opinion refers to *Spencer's Case*, 5 Coke, 16, as a controlling authority. In this state the courts regard the transferee of the reversion as entitled to sue upon the lessees' covenants by force of the local statute allowing the assignee of a chose in action to sue thereon in his own name. See post, note 94.

^{89,90} See *Walker's Case*, 3 Coke, 22 b; *Thursby v. Plant*, 1 Wms. Saund. 237, 1 Lev. 259, 1 Sid. 401, 2

v. Froggatt, 2 Wms. Saund. (pt. 2) 367 a; *Brett v. Cumberland*, 1 Rolle, 359, 3 Bulst. 163; *Midgley v. Lovelace*, Carth. 289, Holt, 74, 12 Mod. 45; *Isherwood v. Oldknow*, 3 Maule & S. 382, 395; *Grogan v. Magan*, Alc. & N. 366, 373.

The English statute provides for the passing of the benefit of conditions as well as of covenants upon a transfer of the reversion. Its effect with reference to conditions will be considered in another connection (post, § 194 g, at note 181), and here we will consider its effect as regards covenants only.

⁹¹ See *Rawle, Covenants for Title*, § 226.

⁹² See *Pollock, Contracts* (6th Ed.) 204 et seq., and Appendix (F).

⁹³ That the transferee may so sue, on the covenants in the instrument of lease, in the transferor's name, in cases not within the statute, see *Thompson v. Rose*, 8 Cow. (N. Y.) 266; *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368. And see, also, *Bridgham v. Tileston*, 87 Mass. (5 Allen) 371; *Allcock v. Moorhouse*, 9 Q. B. Div. 366. But it might be questioned whether a remote grantee would

the case within one of the numerous state statutes allowing an assignee of a chose in action to sue thereon at law in his own name.⁹⁴

(2) **Covenants which run with the land.** The particular covenants, the benefit of which, or liability under which, pass to the transferee, by force of statute or otherwise, are said to "run with the land," or, less usually, "with the reversion." The covenants which run with the reversion will also, with few if any exceptions, run with the leasehold. That is, if a covenant entered into by the lessee is such that the benefit thereof will pass to a transferee of the reversion, the liability thereunder will pass to a transferee of the leasehold, and if, on the other hand, a covenant entered into by the lessor is such that the liability thereunder will pass to a transferee of the reversion, the benefit thereof will pass to a transferee of the leasehold. For this reason it is convenient and proper to consider in one place the various covenants which may run with the land, and the restrictions which may exist upon their running either with the reversion or with the leasehold.

By *Spencer's Case*,^{94a} the leading case upon this branch of the law, certain limitations were imposed upon the passing of the burdens and benefits of covenants in leases. The more important of these limitations is to the effect that a covenant will not run with the land "if it be merely collateral to the land, and does not touch or concern the thing demised," that is, the land. Generally speaking, it seems, a covenant by the lessor or lessee will run as touching and concerning the land if it is such as to benefit either the landlord or tenant by reason of his relation to this particular land. The cases do not, however, assert any clear and satisfactory criterion in this regard, and it is necessary to refer to the various decisions upon the running of specific covenants.

The following covenants have been held to be such as to

have this right, the common-law force (ante, note 88), this effect has theory being that the assignee sued as the attorney of the assignor. See *Masury v. Southworth*, 9 Ohio St. 340; *Pollock, Contracts* (6th Ed.) 204; *Smith v. Harrison*, 42 Ohio St. 180; *Perkins v. Parker*, 1 Mass. 117. *Broadwell v. Banks*, 134 Fed. 470.

⁹⁴ In Ohio, where the statute of 32 Hen. 8, c. 34, is said not to be in force (ante, note 88), this effect has been given to such a statute. *Masury v. Southworth*, 9 Ohio St. 340; *Smith v. Harrison*, 42 Ohio St. 180; *Broadwell v. Banks*, 134 Fed. 470. ^{94a} 5 Coke, 16, 1 *Smith's Leading Cases* (11th Ed.) 55.

run with the land. For quiet enjoyment,⁹⁵ further assurance,⁹⁶ renewal,⁹⁷ to terminate the tenancy on notice,⁹⁸ or on a sale,⁹⁹ to repair,¹⁰⁰ to relinquish possession at the end of the term peaceably or in good repair,¹⁰¹ to repair, renew and replace fixtures constituting a part of the realty, but not mere chattels,¹⁰² in a mining lease, to pay for injury to the surface.¹⁰³ Also covenants not to assign¹⁰⁴ or sublet,¹⁰⁵ to sell the land to the lessee,¹⁰⁶ to

⁹⁵ *Noke v. Awder*, Cro. Eliz. 436; *Campbell v. Lewis*, 3 Barn. & Ald. 392; *Shelton v. Codman*, 57 Mass. (3 Cush.) 318.

⁹⁶ *Middlemore v. Goodale*, Cro. Car. 503.

⁹⁷ *Roe d. Bamford v. Hayley*, 12 East, 464; *Simpson v. Clayton*, 4 Bing. N. C. 758; *Muller v. Trafford* [1901] 1 Ch. 54; *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23, 2 L. R. A. 549; *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267, 83 N. E. 870, 15 L. R. A. (N. S.) 243; *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470; *Blackmore v. Boardman*, 28 Mo. 420; *Blount v. Connolly*, 110 Mo. App. 603, 85 S. W. 605; *Piggot v. Mason*, 1 Paige (N. Y.) 412; *Wilkinson v. Pettit*, 47 Barb. (N. Y.) 230; *Barclay v. Steamship Co.*, 6 Phila. (Pa.) 558; *Warner v. Cochrane*, 63 C. C. A. 207, 128 Fed. 553.

In *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470, it was decided that a covenant by the lessor for renewal, "unless the party of the first part (the lessor) wishes the land for building purposes," was subject to the same limitation in favor of the transferee of the reversion, that is, he could refuse to renew if he wished to use the land for such purposes.

⁹⁸ *Roe d. Bamford v. Hayley*, 12 East, 464; *Roberts v. McPherson*, 62 N. J. Law, 165, 40 Atl. 630.

⁹⁹ *Dierig v. Callahan*, 35 Misc. 30, 70 N. Y. Supp. 210.

¹⁰⁰ *Spencer's Case*, 5 Coke, 16; *Dean & Chapter of Windsor's Case*, 5 Coke, 24; *Williams v. Earle*, L. R. 3 Q. B. 739; *Hayes v. New York Gold Min. Co.*, 2 Colo. 273; *Gordon v. George*, 12 Ind. 408; *Pollard v. Shaffer*, 1 U. S. (1 Dall.) 230; *Myers v. Burns*, 33 Barb. (N. Y.) 401; *McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719; *Silberberg v. Trachtenberg*, 58 Misc. 536, 109 N. Y. Supp. 814.

¹⁰¹ *Matures v. Westwood*, Cro. Eliz. 599; *Martyn v. Clue*, 18 Q. B. 661; *Morgan v. Hardy*, 17 Q. B. Div. 770; *Lehmaier v. Jones*, 100 App. Div. 495, 91 N. Y. Supp. 687; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; *Hayes v. New York Gold Min. Co.*, 2 Colo. 273; *Shelby v. Hearne*, 14 Tenn. (6 Yerg.) 512; *Pasteur v. Jones*, 1 N. C. 393 (Conf. R. 194); *Peck v. Christman*, 94 Ill. App. 435.

¹⁰² *Williams v. Earle*, L. R. 3 Q. B. 739.

¹⁰³ *Norval v. Pascoe*, 34 Law J. Ch. 82.

¹⁰⁴ *Williams v. Earle*, L. R. 3 Q. B. 739; *West v. Dobb*, L. R. 4 Q. B. 634; *Varley v. Coppard*, L. R. 7 C. P. 505. See post, § 152 i.

¹⁰⁵ *Brolaskey v. Hood*, 6 Phila. (Pa.) 193.

¹⁰⁶ *Prout v. Roby*, 82 U. S. (15 Wall.) 471 (semble); *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455; *Page v. Hughes*, 41 Ky. (2 B. Mon.) 445; *Maughlin v. Perry*, 35 Md. 352;

purchase the lessee's improvements¹⁰⁷ provided at least assigns are named,¹⁰⁸ and provided further the improvements are not mere chattels, but are part of the land,¹⁰⁹ and to allow the removal of the lessee's improvements.¹¹⁰ Also covenants to pay rent,¹¹¹ or taxes and assessments,¹¹² or charges,¹¹³ and to allow reduc-

Peters v. Stone, 193 Mass. 179, 79 N. McClary v. Jackson, 13 Ont. 310; E. 336; Van Horne v. Crain, 1 Paige Emmett v. Quinn, 7 Ont. App. 306. (N. Y.) 455; Lazarus v. Heilman, 11 109 Gorton v. Gregory, 3 Best & S. Abb. N. C. (N. Y.) 93; Hagar v. 90. Buck, 44 Vt. 285, 8 Am. Rep. 368; 110 This seems to be assumed in Dietz v. Mission Transfer Co., 95 Snowden v. Memphis Park Ass'n, 75 Cal. 92, 30 Pac. 380 (semble). Tenn. (7 Lea) 225.

The lessee may, by his conduct, 111 Stevenson v. Lambard, 2 East, become estopped to assert a right 575; Parker v. Webb, 3 Salk. 5; Wil- to a conveyance as against the trans- liams v. Bosanquet, 1 Brod. & B. feree of the reversion. Race v. 238; Midgleys v. Lovelace, 12 Mod. Groves, 43 N. J. Eq. 284, 7 Atl. 667. 45; Salisbury v. Shirley, 66 Cal. 223.

A covenant by the lessor giving the 5 Pac. 104; Baldwin v. Walker, 21 "refusal" to the lessee if the lessor Conn. 168; Allenspach v. Wagner, desires to sell has been held to run. 9 Colo. 127, 10 Pac. 802; Webster v. Laffan v. Naglee, 9 Cal. 662, 70 Am. Nichols, 104 Ill. 160; Outtoun v. Du- Dec. 678. lin, 72 Md. 536; Pfaff v. Golden, 126

In England it has been decided Mass. 402; Fennell v. Guffey, 139 that a covenant giving the lessee Pa. 341, 20 Atl. 1048; State v. Mar- an option to purchase does not run tin, 82 Tenn. (14 Lea) 92, 52 Am. with the land, it not concerning the Rep. 167.

land regarded as the subject-matter 112 Salisbury v. Shirley, 66 Cal. of the lease. Woodall v. Clifton 223, 5 Pac. 104; Hayes v. New York [1905] 2 Ch. 257. Gold Min. Co., 2 Colo. 273; In re

107 Hunt v. Danforth, 2 Curt. 592, Huddell, 16 Fed. 373; Peck v. Christ- Fed. Cas. No. 6,887; Bailey v. Rich- man, 94 Ill. App. 435; Mason v. ardson, 66 Cal. 416; Frederick v. Cal- Smith, 131 Mass. 510; Lehmaier v. lahan, 40 Iowa, 311; Stockett v. How- Jones, 100 App. Div. 495, 91 N. Y. ard, 34 Md. 121; Lametti v. Ander- Supp. 687; Wills v. Summers, 45 son, 6 Cow. (N. Y.) 302, 6 Wend. 326; Minn. 90, 47 N. W. 463; Hendrix v. Baillie v. Rodway, 27 Wis. 172; Ecke Dickson, 69 Mo. App. 197; Post v. v. Fetzer, 65 Wis. 55, 26 N. W. 266. Kearney, 2 N. Y. (2 Comst.) 394, 51

108 Bailey v. Richardson, 66 Cal. Am. Dec. 303; State v. Martin, 82 416, 5 Pac. 910; Thompson v. Rose, 8 Tenn. (14 Lea) 92, 52 Am. Rep. 167; Cow. (N. Y.) 268; Hansen v. Meyer, West Virginia, C. & P. R. Co. v. Mc- 81 Ill. 321, 25 Am. Rep. 282; Oving- Intire, 44 W. Va. 210, 28 S. E. 696; ton Bros. Co. v. Henshaw, 47 Misc. Commercial Bldg. & Loan Ass'n v. 167, 93 N. Y. Supp. 380; Bream v. Robinson, 90 Md. 615, 45 Atl. 449; Dickerson, 21 Tenn. (2 Humph.) Fontaine v. Schulenburg & Boeckler 126; Berrie v. Woods, 12 Ont. 693; Lumber Co., 109 Mo. 55, 18 S. W.

tions out of rent.¹¹⁴ Also covenants, in connection with the lease of a saloon, to buy all beer or wine from the lessor,¹¹⁵ and to conduct the house in a proper and orderly manner.¹¹⁶ Also covenants by a lessee not to carry on any business,¹¹⁷ or a particular business,¹¹⁸ upon the premises, and covenants to reside on the premises,¹¹⁹ to continue a particular business thereon,¹²⁰ not to plough a part of the land,¹²¹ not to cut timber,¹²² not to sell off any hay or fodder but to leave all manure,¹²³ to leave cotton seed on the farm,¹²⁴ to manure the land,¹²⁵ to allow the lessor free passage; for himself and his licensees, over the premises,¹²⁶ and to grind at the lessor's mill all corn grown on the demised premises.¹²⁷

A covenant by the lessee to insure has been held to pass when by statute¹²⁸ or by the terms of the covenant¹²⁹ the proceeds of insurance must go to rebuilding, and even when it is optional with the lessee whether so to apply the proceeds or to pay them over to the lessor.¹³⁰

A covenant to supply water has been regarded as running

- 1147, 32 Am. St. Rep. 648 (semble). 119 Tatem v. Chaplin, 2 H. Bl. 133.
 See ante, § 143 g. 120 Bradford Oil Co. v. Blair, 113
 113 Torrey v. Wallis, 57 Mass. (3 Pa. 83, 4 Atl. 218, 57 Am. Rep. 442.
 Cush.) 442. 121 Cockson v. Cock, Cro. Jac. 125.
 114 Baylye v. Hughes, Cro. Car. 122 Verplanck v. Wright, 23 Wend.
 137. (N. Y.) 506.
 115 Clegg v. Hands, 44 Ch. Div. 123 Chapman v. Smith [1907] 2 Ch.
 503; White v. Southend Hotel Co. 97.
 [1897] 1 Ch. 767; Manchester Brew- 124 Cobb v. Johnson, 126 Ga. 618,
 ery Co. v. Coombs [1901] 2 Ch. 608. 55 S. E. 935.
 And see citations in *Hinde v. Gray*, 125 Sale v. Kitchingham, 10 Mod.
 1 Man. & G. 208, note. 158.
 116 Fleetwood v. Hull, 23 Q. B. Div. 126 Cole's Case, 1 Salk. 196; s. c.,
 35. So in the case of a covenant to *sub nom.*, Bush v. Collis, 1 Show. 389.
 conduct the business according to 127 Vyvyan v. Arthur, 1 Barn. & C.
 law. *Crowe v. Riley*, 63 Ohio St. 1, 415.
 57 N. E. 956. 128 Vernon v. Smith, 5 Barn. &
 117 Rolls v. Miller, 27 Ch. Div. 71. Ald. 1.
 118 Granite Bldg. Corp. v. Greene. 129 Masury v. Southworth, 9 Ohio
 25 R. I. 586, 57 Atl. 649; Bishop St. 340; Thomas v. Vonkapff, 6 Gill.
 of St. Albans v. Battersby, 3 Q. B. & J. (Md.) 381; Douglass v. Murphy,
 Div. 359; Wertheimer v. Wayne 16 U. C. Q. B. 113.
 Circ. Judge, 83 Mich. 56, 47 N. W. 130 Northern Trust Co. v. Snyder,
 47, 10 L. R. A. 80. See ante, § 123 j. 22 C. C. A. 47, 76 Fed. 34.

with the land,¹³¹ as has one by the lessee to comply with the rules and regulations of the lessor, a camp meeting association.¹³² And a covenant, in connection with the lease of a warehouse, with reference to the settlement of any discrepancy between the estimated contents and the actual contents,¹³³ and one by a lessee to indemnify the lessor railroad company against any loss by reason of injury to property on the premises caused by fire started by the lessor's engine, have also been held to run.¹³⁴

(3) **Covenants which do not run with the land.** A covenant by the lessor not to build or keep, within a certain distance of the demised premises, a house for the conduct of the particular trade for which the lessee obtained the lease has been held not to concern the land so as to run therewith.¹³⁵ And the same view was taken of a covenant by the lessor that the lessee should have exclusive trading rights for the whole settlement, which was located on land belonging entirely to the lessor in fee.¹³⁶ But it was decided in another jurisdiction that a covenant by the lessor of a mill site not to erect another mill within a named distance did touch and concern the land so as to run therewith.¹³⁷ A proviso for re-entry in case the lessee violates the game laws has also been held not to run.¹³⁸ An agreement by the lessor,

¹³¹ *Jourdain v. Wilson*, 4 Barn. & Exch. 311. And see, to the same effect, *Shaber v. St. Paul Water Co.*, 30 Minn. 179, 14 N. W. Ann. 343, 7 So. 580.

¹³² *Taylor v. Owen*, 2 Blackf. 874.

¹³³ *Round Lake Ass'n v. Kellogg*, (Ind.) 301, 20 Am. Dec. 115.

¹³⁴ *N. Y. 348*, 36 N. E. 326; *Id.*, 47 N. Y. St. Rep. 668, 20 N. Y. Supp. (N. Y.) 136, 31 Am. Dec. 285.

¹³⁵ *Norman v. Wells*, 17 Wend. 261.

¹³⁶ *Belden v. Union Warehouse Co.* 11 App. Div. 160, 42 N. Y. Supp. 650.

¹³⁷ *Northern Pacific R. Co. v. McClure*, 9 N. D. 73, 81 N. W. 52, 47 L. R. A. 149; *Kennedy Bros. v. Iowa State Ins. Co.*, 119 Iowa, 29, 91 N. W. 831. In the former case reference was made to the fact that the rent reserved was nominal, and that this covenant constituted part of the compensation for the land.

¹³⁸ *Stevens v. Copp*, L. R. 4 Exch. 20.

¹³⁵ *Thomas v. Hayward*, L. R. 4

not incorporated in the instrument of lease, to find tenants for part of the premises has been held not to run,¹³⁹ as has one, likewise existing outside of the instrument of lease, to put the premises in repair.¹⁴⁰ Covenants by the lessee to pay a collateral sum to the lessor or to a stranger do not run,¹⁴¹ and so a covenant for the payment of taxes on other land does not.¹⁴² A covenant by the lessee to erect a structure on other land¹⁴³ will ordinarily not run, but this rule has been held not to apply when the structure was to be used in connection with, that is, "for the support and maintenance of," the land demised,¹⁴⁴ and a covenant to make a street adjoining the premises has been regarded as running.¹⁴⁵ A covenant by the lessee, on a lease of ground for the erection of a mill, not to employ mill hands from other parishes except on certain conditions, was held not to run,¹⁴⁶ and the same view was taken of a covenant by a lessor to make a payment in respect of chattels substituted for chattels on the land at the time of the demise,¹⁴⁷ and of a covenant to give the lessee the preference as to the purchase of other land.¹⁴⁸ A covenant by the lessor to repair adjoining premises so as to avoid a re-entry for breach of condition under a head lease has been regarded as not running.¹⁴⁹

In a number of cases in this country it has been decided that a covenant giving the lessee the option of purchasing the land will run,¹⁵⁰ but in England a different view has been adopted, on

¹³⁹ *Henck v. Barnes*, 84 Hun, 546.
¹⁴⁰ 32 N. Y. Supp. 840. The fact that the purchaser of the premises was ignorant of the existence of the agreement was also referred to as relieving him from liability thereon.

¹⁴¹ *Tobey v. Mattimore*, 54 Misc. 231, 104 N. Y. Supp. 393.

¹⁴² *Spencer's Case*, 5 Coke, 16;
Mayho v. Buckhurst, Cro. Jac. 438;
Chaworth v. Phillips, Moore, 876;
Dolph v. White, 12 N. Y. (2 Kern.) 296.

¹⁴³ *Gower v. Postmaster-General*, 57 Law T. (N. S.) 527.

¹⁴⁴ *Spencer's Case*, 5 Coke, 16.

¹⁴⁵ *Sampson v. Easterby*, 9 Barn. & C. 505, 6 Bing. 644.

¹⁴⁶ *Morris v. Kennedy* [1896] 2 Ir. 247.

¹⁴⁷ *Mayor of Congleton v. Pattison*, 10 East, 130.

¹⁴⁸ *Gorton v. Gregory*, 3 Best. & S. 90. But see *Mansel v. Norton*, 22 Ch. Div. 769.

¹⁴⁹ *Collison v. Lettsom*, 6 Taunt. 224. See *Keppell v. Bailey*, 2 Mylne & K. 517, 544.

¹⁵⁰ *Dewar v. Goodman* [1908] 1 K. B. 94.

¹⁵¹ See ante, note 106.

the theory that the covenant does not concern the land, regarded as the subject-matter of the lease.¹⁵¹

The benefit or burden of a covenant will not pass, it seems, if it is expressed so as to show a clear intention that it shall be purely personal.¹⁵² The benefit of a covenant restricting the character of the use to be made by the lessee of the leased premises does not pass to a transferee of the reversion, if it was evidently intended for the benefit of the adjoining property, also owned by the lessor.¹⁵³

A covenant, made in connection with a sublease of part of the leased premises, that the sublessee shall hold the part subleased free and clear of all rent other than that reserved by the sublease, though it runs with the reversion in the part subleased, does not bind a transferee of that part of the premises included in the original lease which is not included in the sublease.¹⁵⁴

(4) **Necessity of mention of assigns.** A second important qualification imposed by *Spencer's Case* upon the running of covenants is that, even though the covenant touch or concern the land, if it concerns likewise a thing which is not *in esse* at the time of the demise, but which is to be built or created thereafter, the covenant will not bind assigns unless they are expressly mentioned. So, in that case, it was decided that a covenant by the lessee to build a wall on the premises did not bind his assigns because he covenanted only for himself, his executors and administrators, without including assigns. This distinction between covenants as to things *in esse* and those as to things not *in esse*, with its requirement of the mention of assigns in the latter case, has been questioned,¹⁵⁵ and occasionally repudi-

¹⁵¹ *Woodall v. Clifton* [1905] 2 Ch. 257.

¹⁵² *Kemp v. Bird*, 5 Ch. Div. 549, 974; *Myers v. Stone*, 128 Iowa, 10, 102 N. W. 507, 111 Am. St. Rep. 180.

In *Eccles v. Mills* [1898] App. Cas. 360, there is a dictum that a provision that no covenant or stipulation shall be implied showed that a particular covenant was not to run. No reason for such a conclusion is stated.

¹⁵³ *Thruston v. Minke*, 32 Md. 487.

¹⁵⁴ *Wahl v. Barroll*, 8 Gill. (Md.) 288; *Cook v. Arundel*, Hardres, 87.

¹⁵⁵ *Minshull v. Oakes*, 2 Hurl. & N. 793. In this case it was said by Pollock, C. B., that not only was the rule unreasonable, but that *Spencer's Case* decided the contrary, referring to *Anonymous*, Moore, p. 159, pl. 300, as being another report of this case. This case, however, while directly contrary to the resolution in *Spencer's Case*, is evidently a different case, as shown by the

ated,¹⁵⁶ or ignored.¹⁵⁷ Usually, however, it has been adhered to.¹⁵⁸ In two cases it has apparently been regarded as applicable only in so far as an intention did not otherwise appear that assigns should be bound.^{158a}

(5) **Demise of incorporeal thing.** It has been held that under the statute of 32 Hen. 8, c. 34, a covenant may be created on a demise of an incorporeal thing, an action on which may be brought by or against the grantee of the reversion,¹⁵⁹ and whether the covenant is such as to run in such case, that is, in the case of a demise of the mere right to use land for a specific

editor of Smith's Leading Cases 7 Ont. App. 306; McClary v. Jackson, (see 8th Am. Ed., vol. 1, p. 155). 13 Ont. 310; Etowah Min. Co. v. Baran Pollock also cites Smith v. Wills Valley Min. & Mfg. Co., 121 Arnold, 3 Salk. 4, as contrary to Ala. 672, 25 So. 720; Hansen v. Spencer's Case in this regard, but Meyer, 81 Ill. 321, 25 Am. Rep. 282; concludes, without undertaking to Gardner v. Watson, 18 Ill. App. 386; absolutely overrule Spencer's Case, Id., 119 Ill. 312, 10 N. E. 192; Tallman v. Coffin, 4 N. Y. (4 Comst.) 134; Coffin v. Tallman, 8 N. Y. (4 Seld.) 465; Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910; Bream v. Dickerson, 21 Tenn. (2 Humph.) 126; Cronin v. Watkins, 1 Tenn. Ch. 119; Fisher's Ex'rs v. Lewis, 1 Clark (Pa.) 422; Thompson v. Rose, 8 Cow. (N. Y.) 266. See Conover v. Smith, 17 N. J. Eq. (2 C. E. Green) 57, 86 Am. Dec. 247. In Douglaston Realty Co. v. Hess, 124 App. Div. 508, 108 N. Y. Supp. 1036, the expression "legal representatives" was regarded as equivalent to "assigns" for the purpose of the rule.

why not as to all?"
¹⁵⁶ Frederick v. Callahan, 40 Iowa, 311; Masury v. Southworth, 9 Ohio St. 340; Ecke v. Fitzer, 65 Wis. 55, 26 N. W. 266.

¹⁵⁷ Bailie v. Rodway, 27 Wis. 172; Stockett v. Howard, 34 Md. 121; Ambrose v. Fraser, 12 Ont. 459, 14 Ont. 551.

¹⁵⁸ Doughty v. Bowman, 11 Q. B. 444; Grey v. Cuthbertson, 4 Doug. 351, 2 Chit. 482; Emmett v. Quinn

^{158a} Peters v. Stone, 193 Mass. 179, 79 N. E. 336; Masury v. Southworth, 9 Ohio St. 340.

¹⁵⁹ Bally v. Wells, 3 Wils. 25; Hooper v. Clark, L. R. 2 Q. B. 200; Martyn v. Williams, 1 Hurl. & N. 817, 829; Hastings v. North Eastern R. Co. [1898] 2 Ch. 674 [1899] 1 Ch. 656, *affd.*, *sub. nom.*, North Eastern R. Co. v. Hastings [1900] App. Cas. 260.

purpose,¹⁶⁰ is to be determined, it seems, by the same considerations as would apply in the case of a demise of the land itself.¹⁶¹

(6) **Covenants relating to personal chattels.** It was resolved in *Spencer's Case*¹⁶² that covenants relating to personal chattels cannot run with such property, as covenants run with land, "for in the case of a lease of personal goods there is not any privity, or any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors or administrators, who represent him;" and that therefore, "if a man leases sheep, or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver like cattle or goods as good as the things letten were, or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract" and "the same law, if a man demises a house and land for years, with a stock or sum of money rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant, for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only." And so it has been decided that upon a lease of land and goods, with a covenant by the lessee that he will return the same or similar goods at the end of the term, an assignee of the lessee's interest under the lease cannot be held liable for a breach of the covenant,¹⁶³ and the transferee of the reversion cannot recover for such breach.¹⁶⁴ But the fact that personal chattels are included in a lease of land does not prevent the running with the land of the covenant for rent,¹⁶⁵ or presumably of any covenant which concerns the land.

(7) **Leases not under seal.** The statute of 32 Hen. 8, c. 34, applies in terms only to "indentures of lease," and consequently

¹⁶⁰ See ante, § 24 a.

¹⁶⁴ *Allen v. Culver*, 3 Denio (N. Y.)

¹⁶¹ See *Hooper v. Clark*, L. R. 2 284.

Q. B. 200.

¹⁶⁵ *Allen v. Culver*, 3 Denio (N.

¹⁶² 5 Coke, 16, 1 Smith's Leading Cases (11th Ed.) 55. See *Allen v. St.* 186; *Burnett v. Lynch*, 5 Barn. & C. 589.

¹⁶³ *Smith v. Kellogg*, 46 Vt. 560.

does not enable a transferee of the reversion, in the case of a lease not incorporated in an instrument under seal, to sue on the stipulations entered into by the lessee.¹⁶⁶ The English courts have, however, adopted a doctrine in the case of a tenancy from year to year, that if rent is accepted by the transferee of the reversion, and he fails to exercise his right to terminate the tenancy by notice, it may be inferred that the parties have agreed to go on upon the same terms as before, the rights and liabilities arising from the stipulations in the unsealed instrument of lease being thus transferred to the transferee of the reversion.¹⁶⁷ Such a doctrine has apparently never been applied in the case of an ordinary tenancy for years, and it seems to have been regarded as inapplicable thereto, since no right of terminating such a tenancy by notice is recognized.¹⁶⁸ Indeed the doctrine, as applied to the case of a tenancy from year to year, is somewhat difficult to understand, although asserted by eminent judges, since, so long as the tenancy from year to year has not been terminated, there seems no room for an agreement to go on upon the same terms as before. There being a demise from year to year, the reversion on which has passed to another, how can it be inferred, from the fact that the parties have failed to terminate the tenancy by notice, that another tenancy, with a new covenant, has been substituted in place of the former tenancy? There would seem to be more room for the inference of a new demise when the old tenancy has been terminated by notice or otherwise, than when not so terminated. Perhaps it is meant that the former tenancy should be regarded as terminated by a new demise inferred from the acts of the parties on the theory of surrender by operation of law,¹⁶⁹ but the difficulty still remains, it is submitted, of inferring a new demise

¹⁶⁶ See *Bickford v. Parson*, 5 C. P. 334; *Manchester Brewery Co. v. B.* 920, 932; *Standen v. Christmas*, 10 Coombs [1901] 2 Ch. 608.

Q. B. 135; *Elliott v. Johnson*, L. R. 2 Q. B. 120; *Sheets v. Selden's Lessee*, 69 U. S. (2 Wall.) 177; *Kennedy v. Owen*, 136 Mass. 199.

¹⁶⁷ *Buckworth v. Simpson*, 145, and *Elliott v. Johnson*, L. R. 2 Crompt. M. & R. 834, 5 Tyrw. 344, Q. B. 120.

354; *Cornish v. Stubbs*, L. R. 5 C. ¹⁶⁹ See post, § 190 b.

from the mere failure to terminate the former tenancy, and the continued payment of rent thereunder.¹⁷⁰

The local statutes in this country, providing for the passing of the rights and liabilities in connection with the covenants or contracts of the lessor or lessee,¹⁷¹ ordinarily contain no requirement that the lease be under seal. In Mississippi and New Jersey the language of the English statute, making it applicable to "indentures of lease" only, is adopted. An action by the transferee of the reversion upon a stipulation by the lessee, when not maintainable under the statute by reason of the absence of a seal, might be sustained, under some circumstances and in some jurisdictions, as an action by the assignee of a chose in action, by force of the common-law rule allowing such action in the assignor's name, or under a local statute authorizing an action by an assignee in his own name.¹⁷² The rent reserved could always, without reference to the contract to pay rent, be recovered by the transferee of the reversion by reason of privity of estate, that is, an action of debt for rent could be maintained by him.

(8) **Title of lessor.** There are decisions in England at least suggesting the view that, if a lessor has no title at the time of

¹⁷⁰ In *Rising Sun Lodge v. Buck*, 58 Me. 426, the lessor "covenanted" to make repairs, and subsequently, after the lessee had assigned his interest, conveyed the property "subject to all his liability to the" lessee's assignee "with reference to" the leased premises, and it was held that such assignee could sue the lessor's assignee in assumpsit for the expense of repairs on the theory that when one takes a conveyance subject to a stipulation to pay money or perform a duty, a promise will "be implied" in favor of a third person who is to benefit by such payment or performance. It appears that by the use of the word "implied" the court means that the liability is on the theory of quasi contract. But a liability thus arising from express stipulation to assume another person's obligations can not properly be regarded as based on a contract implied by law. (See ante, § 53 b, at note 58 a.) It would rather seem that the liability to the lessee's assignee in such case, conceding such liability to exist, is upon the express contract to pay or perform, the case being then one of a right of action on a contract in favor of one not a party thereto.

¹⁷¹ See ante, notes 79-84.

In *Keeley Inst. v. Shaw*, 149 Mich. 519, 14 Det. Leg. N. 499, 113 N. W. 30, it was held that the benefit of an oral contract to repair would pass upon an assignment of the leasehold if it was so agreed.

¹⁷² See ante, at notes 91-94.

making the lease, he has no reversion in the land with which covenants may run, and that consequently one to whom he undertakes to transfer the reversion cannot sue on the covenants of the lease.¹⁷³ This view, which was suggested in connection with cases of estoppel by deed, that is, cases in which the lessor and lessee were estopped by their seals to deny the existence of the relation of landlord and of tenant, and of the reversion in the former necessary to the existence of this relation,¹⁷⁴ has now been repudiated, as applied at least to cases in which the lessor's lack of title does not appear upon the face of the indenture of lease;¹⁷⁵ and presumably, by inference from recent English decisions which regard a lessor as having a sufficient reversion to support a distress even though the lack of title does appear from the face of the indenture,¹⁷⁶ a right of action, in favor of the transferee of the lessor, upon a covenant of the lease, would be there upheld although defects in the lessor's title do so appear. And so, while there is an English decision apparently to the effect that since, when it appears from the instrument itself that the lessor has no title, no estate is vested thereby in the lessee, with which covenants can run, and that consequently the burden or benefit thereof does not pass on an assignment of the lease,¹⁷⁷ it seems probable that, in view of the later decisions referred to, the lessee would be regarded as hav-

¹⁷³ *Noke v. Awder*, Cro. Eliz. 436; 12 Moore, 34; *Morton v. Woods*, L. Whitton v. Peacock, 2 Bing. N. C. R. 3 Q. B. 658, L. R. 4 Q. B. 293, 303. 411; *Carwick v. Blagrove*, 1 Brod. & See ante, § 78 K (3), at note 399. B. 531.

¹⁷⁴ See ante, § 178 a.

¹⁷⁷ *Portmore v. Bunn*, 1 Barn. & C. 694 (post, § 160, note 505).

¹⁷⁵ *Cuthbertson v. Irving*, 4 Hurl. & N. 742, 6 Hurl. & N. 135. And see *Gouldsworth v. Knights*, 11 Mees. & W. 337; *Palmer v. Ekins*, 2 Ld. Raym. 1550. In *Cuthbertson v. Irving*, supra, approval is expressed of *Pargeter v. Harris*, 7 Q. B. 708, holding that if the lease itself shows that the lessor has no legal title, the benefit of the covenant does not pass to an assignee of the reversion.

In *Saunders v. Merryweather*, 3 Hurl. & C. 902, it was held that the assignee of a lease of mortgaged premises, created by an indenture in which both the mortgagor and mortgagee joined, was, since the true state of the title appeared from recitals in the indenture and in the assignment, not estopped to assert, in ejectment by the mortgagor to enforce a right of re-entry, that the mortgagor had not the legal rever-

¹⁷⁶ *Jolly v. Arbuthnot*, 28 Law J. Ch. 547 (citing *Dancer v. Hastings*, sion.

ing an estate for the purpose of imposing liability upon his assignee under such covenants as ordinarily run with the land.

With reference to this doctrine of the English courts, conceding that it might still be applied by them to the extent of allowing a lessee or assignee of the lessee to defend an action by the lessor's transferee on a covenant, provided the lessor's lack of title appears in the instrument of lease, it might be questioned whether it can frequently occur that the lessor has no title, that is, no estate in the land. Having no paper title, he is not likely to make a lease unless he has at least the possession of the land, and one who is wrongfully in possession has ordinarily an estate in fee simple by wrong,¹⁷⁸ and a transfer of such an estate would seem to be quite as sufficient to carry the covenants as would the transfer of a rightful fee simple.

The statute of 32 Hen. 8, c. 34, has been recognized as being effective for the transfer of rights and liabilities to the transferee of the reversion, irrespective of whether the reversion is in fee simple,¹⁷⁹ for life,¹⁸⁰ or for years.¹⁸¹ But if the covenantor has a limited interest only at the time of the covenant, as for instance an estate for life, one to whom he transfers such limited interest is bound by the covenant as regards such interest only, and not as regards a greater estate, such as one in fee, which he may happen to acquire.¹⁸²

Since, in order that a covenant may pass on a transfer of the reversion, it is necessary that the covenant shall have been made with the reversioner, it has been decided that when a mortgagor and mortgagee join in the making of a lease, the assignee of the mortgagee can not sue on covenants made with the mortgagor only.¹⁸³ But when the covenant was made in connection with a lease by a life tenant under a power, the remainderman was allowed to sue thereon, the lease being in such case in legal effect made by the creator of the power.¹⁸⁴

¹⁷⁸ See ante, § 78 a, at note 174 a. *Dowse v. Cale*, 2 Vent. 126, 3 Lev.

¹⁷⁹ *Hill v. Grange*, 2 Dyer, 130 b. 264. See post, note 209.

¹⁸⁰ *Thursby v. Plant*, 1 Mees. ¹⁸² *Brereton v. Tuohey*, 8 Ir. C. L. 190; *Kent v. Stoney*, 9 Ir. Ch. 249; *Coey v. Pascoe* [1899] 1 Ir. 125; *Muller v. Trafford* [1901] 1 Ch. 54.

¹⁸¹ *Matures v. Westwood*, Cro. Eliz. 617; *Bristow v. Bristowe*, Godb. 161; *Davy v. Matthew*, Cro. Eliz. 649; ¹⁸³ *Webb v. Russell*, 3 Term R. 393; *Russell v. Stokes*, 1 H. Bl. 562. ¹⁸⁴ *Isherwood v. Oldknow*, 3 Maule

(9) **Breaches previous to transfer.** The transferee of the reversion has, ordinarily, no right of action in respect of breaches of covenant which occurred before the making of the transfer.¹⁸⁵ A reason which has been given for this rule is the doctrine that a right of action is not transferable.¹⁸⁶ This reason does not seem sufficient, however, since if the statute of 32 Hen. 8, c. 34, or the corresponding state statute, were construed as covering such right of action, the doctrine referred to would necessarily have yielded thereto, and the right of action for past as well as future breaches would have passed by the transfer of the reversion. The soundness of the reason advanced becomes of importance in view of the numerous statutory provisions making rights of action transferable, and it does not seem that, even where such a provision is in force, the right of action for past breaches would ordinarily pass. The owner at the time of the breach is ordinarily the person injured thereby, and this in itself seems sufficient reason for the view that, *prima facie*, the right of action for a past breach is not intended to pass by a transfer of the reversion. In jurisdictions where rights of action are transferable, however, provided the language of the instrument of transfer can be construed as intended to convey rights of action for past breaches, the transferee will no doubt have the right to sue thereon,¹⁸⁷ and if such intention appears, he would seem to have such right of action in the transferor's name, apart from any statute.¹⁸⁸

Not only is the transferee of the reversion ordinarily unable to recover for a breach of the lessee's covenant occurring before the transfer, but he is as well exempt from liability for a breach of a covenant by the lessor, occurring before the transfer, pro-

& S. 382; *Greenaway v. Hart*, 14 C. B. 340.

¹⁸⁵ *Lewes v. Ridge*, Cro. Eliz. 863; *Johnson v. Parish of St. Peter*, 4 Adol. & E. 520; *Flight v. Bentley*, 7 Sim. 149; *Canham v. Rust*, 8 Taunt. 227; *Cohen v. Tannar* [1900] 2 Q. B. 609; *Gerzebek v. Lord*, 33 N. J. Law, 240; *Mirick v. Bashford*, 38 Barb. (N. Y.) 191; *Coffin v. Talman*, 8 N. Y. (4 Seld.) 465; *Shelby v. Hearne*, 14 Tenn. (6 Yerg.) 512.

¹⁸⁶ *Lewes v. Ridge*, Cro. Eliz. 863; 2 Platt, Leases, 386.

¹⁸⁷ *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134, 6 L. R. A. 706. A transfer of all the lessor's "interest, right and title in the lease," which had at the time of the transfer expired, was held to pass a right of action for a previous breach of covenant. *Indianapolis Natural Gas Co. v. Pierce*, 25 Ind. App. 116, 56 N. E. 137.

¹⁸⁸ See ante, at note 93.

vided the breach is not to be regarded as continuous in its nature.¹⁸⁹ The transferor, not the transferee, violated the covenant, and consequently he is the one to be made liable.

The rule that the transferee cannot sue for a breach which took place in the time of his transferor does not, it has been held, preclude a suit by him on a covenant to repair without notice, although the premises were out of repair before the transfer, provided it is the transferee who gives the notice.¹⁹⁰ And the transferee can sue for breach of a contract to keep the premises in repair, if they are out of repair after the transfer.¹⁹¹ The benefit of or liability under a covenant to make certain improvements on the leased premises within a time named cannot pass upon a transfer made after that time, since the breach took place before the transfer,¹⁹² and the same principle would apply to a covenant to put the premises in repair or make specific improvements, although no time for performance is named, if it is to be construed as calling for a single act of performance prior to the time of the transfer.¹⁹³ In some cases, however, such a covenant has been regarded as passing on a transfer,¹⁹⁴ without any discussion of the point in question, but on the theory, presumably, that the covenant was continuing until actual performance, or that the time for performance had not elapsed at the time of the transfer.

(10) **Mode of transfer.** In the ordinary case the question as to the running of a covenant arises in connection with a voluntary transfer *inter vivos*. But, to the same extent as one claiming under such a transfer, a devisee of the reversion is entitled

¹⁸⁹ Willcox v. Kehoe, 124 Ga. 484, Churchwardens of St. Saviour v. 52 S. E. 896, 4 L. R. A. (N. S.) 466; Smith, 1 Wm. Bl. 351, 3 Burrow Gerzebek v. Lord, 33 N. J. Law, 240; 1272; Morris v. Kennedy [1896] 2 Ir. Mirick v. Bashford, 38 Barb. (N. Y.) 247.

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¹⁹³ Coward v. Gregory, L. R. 2 C.

¹⁹⁰ Mascall's Case, 1 Leon (pt. 1) P. 153; Gerzebek v. Lord, 33 N. J. Law, 240; Mirick v. Bashford, 38

¹⁹¹ Bennett v. Herring, 3 C. B. Barb. (N. Y.) 191.

(N. S.) 370. See, as to the transferee's right to sue under such a Harris v. Goslin, 3 Har. (Del.) 338; covenant on account of a state of Sampson v. Easterby, 9 Barn. & C. disrepair which existed before the 505, 6 Bing. 644. See Spencer's transfer, ante, § 116 l, at note 1003. Case, 5 Coke, 16 a.

¹⁹² Grescot v. Green, 1 Salk. 199;

to the benefit of, and is subject to liabilities under, the covenants contained in the instrument of lease.¹⁹⁵

One to whom the reversion passes by descent, that is, the heir of one having an estate in fee simple in reversion, may sue for breaches, occurring after the ancestor's death, of covenants which run with the land,¹⁹⁶ though for breaches which occurred in the ancestor's lifetime the personal representative is the person to sue.¹⁹⁷ Even though there is a continuing breach in the time of both ancestor and heir, yet if the substantial breach is in the time of the latter, he is the proper party to sue.¹⁹⁸ The fact that the covenant is not in terms with the lessor "and his heirs" does not affect the heir's right of action, if the covenant is otherwise such as to run with the land.¹⁹⁹

One taking by descent the reversion in the land demised is necessarily liable for breaches of covenants which run with the land, committed after the ancestor's death,²⁰⁰ to the same extent as one who obtains the reversion by voluntary transfer *inter vivos*. This liability is independent of any question as to the naming of the heir in the covenant,²⁰¹ which was necessary at common law for the purpose of imposing liability upon the

¹⁹⁵ *Machel v. Dunton*, 1 Leon. (pt. 2) 33, Owen, 54, 91; *Roe d. Bamford* 831.

v. Hayley, 12 East, 464; *Sampson v. Easterby*, 9 Barn. & C. 505, 6 Bing. 644.

As to whether, in view of the peculiar language of the lease, the devisee or the executor was liable as between themselves for breach of a covenant by the lessor, see *Eccles v. Mills* [1898] App. Cas. 360. Compare post, as to liability of executors of lessee, § 158 a (2) (g).

¹⁹⁶ *Lougher v. Williams*, 2 Lev. 92; *Sale v. Kitchingham*, 10 Mod. 158; *King v. Jones*, 5 Taunt. 418; *Jones v. King*, 4 Maule & S. 188. See *Prout v. Roby*, 82 U. S. (15 Wall.) 471.

¹⁹⁷ *Raymond v. Fitch*, 2 Crompt. M. & R. 588, 598; *Ricketts v. Weaver*, 12 Mees. & W. 718; *Lucy v. Leving-*

ton, 2 Lev. 26, 1 Vent. 175, 2 Keb.

¹⁹⁸ *Vivian v. Champion*, 2 Ld. Raym. 1125, 1 Salk. 141, Holt, 178; *Lougher v. Williams*, 2 Lev. 92; *Kingdon v. Nottle*, 1 Maule & S. 355, 4 Maule & S. 53; *Hendrix v. Dickson*, 69 Mo. App. 197.

¹⁹⁹ *Lougher v. Williams*, 2 Lev. 92; *Sacheverell v. Froggatt*, 2 Wms. Saund. 367 a, T. Raym. 213, 1 Vent. 148, 161, 2 Lev. 13; *Anonymous*, 1 Dyer, 45.

²⁰⁰ *Morse v. Aldrich*, 36 Mass. (19 Pick.) 449, 31 Am. Dec. 150; *Chamberlain v. Dunlop*, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807 (semble); *Derisley v. Custance*, 4 Term R. 75; 2 Platt, Leases, 364.

²⁰¹ *Morse v. Aldrich*, 36 Mass. (19 Pick.) 449, 31 Am. Dec. 150.

heir, to the extent of the assets coming to him by descent, in connection with covenants not of such a character as to run with the land.²⁰²

In jurisdictions in which the legal title passes upon the making of a mortgage, covenants run in favor of or against a mortgagee of the reversion,²⁰³ or of the leasehold.²⁰⁴

One to whom an equitable interest merely is transferred cannot avail himself of the covenants of the lease, and so if the lessor makes a mortgage which vests the legal title in the mortgagee, a subsequent grantee of the lessor cannot sue on the covenants.²⁰⁵ Nor would such equitable transferee, it seems, be liable on the lessor's covenants.^{205a}

(11) **Transfer of partial interest.** Covenants run in favor of or against the transferee although the transfer is of merely a part of the premises leased,²⁰⁶ or of an undivided interest therein,²⁰⁷ and also when the transfer, instead of being of all the

²⁰² As to this common-law requirement of the mention of heirs in order to impose liability on the heir of a covenantor, see Rawle, *Covenants for Title* (5th Ed.) 309; 2 Platt, *Leases*, 363; Platt, *Covenants*, 448 et seq.

²⁰³ *Chapman v. Smith* [1907] 2 Ch. 97.

²⁰⁴ See post, § 158 f.

²⁰⁵ *City of Carlisle v. Blamire*, 8 East, 487.

In *McLean v. Spratt*, 19 Fla. 97, it was held in effect that an oral contract of sale made by a landlord, accompanied by a recognition by the tenant, as well as by the parties to the sale, that thereafter he held under the purchaser, was sufficient to give the latter the rights of a landlord, apparently, as vesting in him the legal title. The opinion states that the acts mentioned "were equivalent in law to the delivery of the actual possession by vendor to vendee, and there is nothing in the statute of frauds which prohibits a ven-

dee from acquiring actual possession of lands under a verbal contract of sale involving future payments to his vendor and the acquisition of a complete title." There is, to be sure, nothing in the statute of frauds prohibiting such a course of action, but that does not necessarily make it effective for every purpose. The opinion does not explain how the legal title to the reversion can, in spite of that statute, be transferred orally.

^{205a} Compare post, § 158 a (2) (d).

²⁰⁶ *Ards v. Watkin*, Cro. Eliz. 637, 651; *Twynam v. Pickard*, 2 Barn. & Ald. 105; *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23, 2 L. R. A. 549. And so, if there has been a merger as to part of the premises, the transferee of the reversion in the balance has the benefit of the covenants to the extent of his interest. *Badley v. Vigurs*, 14 El. & Bl. 71.

²⁰⁷ *Roberts v. Holland* [1893] 1 Q. B. 665.

reversionary interest, is by way of a lease, which is concurrent, as before explained, with the existing lease.²⁰⁸ They also run with the interest of a lessee in favor of or against a sublessee, the lessee being, for this purpose, in the same position as if he were a reversioner in fee simple.²⁰⁹

Where a lease is granted by one person, and thereafter the reversion is transferred to two or more as tenants in common, either of them may, independently of the other, sue on a covenant running with the land.²¹⁰

Upon the question whether, when undivided shares in the reversion pass to different persons, they have a joint or several right of action upon the covenants running with the land, the cases are by no means clear. It has been decided that the transferees of undivided interests in the reversion *may* join in suing on the lessee's covenant to repair,²¹¹ and that they *must* join in an action on such a covenant, if the demise was originally made jointly by tenants in common.²¹² On the other hand it has been held, in the same jurisdiction, that if the demise is made by one person, persons claiming undivided interests in the reversion by devise from the lessor need not join in an action on a covenant made by the lessee.²¹³

(12) **Release by transferor.** It would seem that, so long as a lessor retains the reversion, he may make a release of covenants

²⁰⁸ Co. Litt. 215 a; *Attoe v. Hemmings*, 2 Bulst. 281; *Dowse v. Cole*, 2 Vent. 126; *Burton v. Barclay*, 7 Bing. 745.

²⁰⁹ *Pyot v. St. John*, Cro. Jac. 4 Q. B. 197, and *Thompson v. Hake*, 329; *Vernon v. Smith*, 5 Barn. & Ald. 1; *Porter v. Merrill*, 124 Mass. 534; *Patten v. Deshon*, 67 Mass. (1 Gray) 325. See ante, note 181.

²¹⁰ *Roberts v. Holland* [1893] 1 Q. B. 665, quoting *Platt*, *Covenants*, 130, to the effect that "where there is no express contract with all, and their legal interest is several, the covenantees must sue separately; yet, where the contract is entered into with the covenantees jointly, and the estate taken by them is several, they may, at their option, sue

jointly or severally; jointly in respect of the joint contract; severally in respect of the interest;" and distinguishing *Foley v. Addenbrooke*, 4 Q. B. 197, and *Thompson v. Hake*, 19 C. B. (N. S.) 713, where the tenancy in common existed at the time of the demise and was not created thereafter by transfer of undivided interests in the reversion. The authorities for the statement of Mr. Platt are to be found in 1 Wms. Saund. 154, note (1) to *Eccleston v. Clipsham*.

²¹¹ *Kitchen v. Buckley*, 1 Lev. 109.

²¹² *Thompson v. Hakewill*, 19 C. B. (N. S.) 713.

²¹³ *Roberts v. Holland* [1893] 1 Q. B. 665.

given by the lessee, which will be effective as against a subsequent transferee of the reversion,²¹⁴ though he cannot, it appears, after parting with the reversion, thus affect his transferee's right of action on the covenant.²¹⁵ The question of the effect of a release of a covenant running with the land, as against one to whom the land is thereafter transferred, has arisen almost exclusively in connection with covenants for title accompanying conveyances in fee, but it seems that the same principles would be properly applicable in the case of covenants contained in leases.

In one case a release of a covenant for title has been regarded as a subject for record²¹⁶ so as, apparently, to be ineffective as against a subsequent transferee if not recorded, but it does not seem that ordinarily the recording laws are broad enough to cover such an instrument.²¹⁷

²¹⁴ See *Middlemore v. Goodale*, effective as against a transferee if *Cro. Car.* 503; *Martin v. Gordon*, 24 made before action begun by the *Ga.* 535; *Clark v. Johnson*, 5 *Day* latter. But in *Harper v. Bird*, T. (Conn.) 373; *Littlefield v. Getchell*, Jones 102; s. c., sub. nom., *Harper v. Burgh*, 2 *Lev.* 206, a later case, 32 *Me.* 390; *Brown v. Staples*, 28 *Me.* 497, 503, 48 *Am. Dec.* 504; *Cunningham v. Knight*, 1 *Barb.* (N. Y.) 399, 405; *Rhines v. Baird*, 41 *Pa.* 256; after having transferred the reversion, was nugatory. In 17 *Harv. Quick*, 61 *Pa.* 328. And see *Rawle*, *Law Rev.* p. 184, Prof. J. B. Ames *Covenants for Title* (5th Ed.) § 223; says that the dictum in *Middlemore v. Goodale*, supra, may be disregarded. p. 265.

²¹⁵ *Brown v. Staples*, 28 *Me.* 497, 503, 48 *Am. Dec.* 504; *Crooker v. Jewell*, 29 *Me.* 527; *Chase v. Weston*, 12 *N. H.* 413. In *Middlemore v. Goodale*, *Cro. Car.* 503, it is said that a release made by the covenantor is

²¹⁶ *Susquehanna & W. V. R. & C. Co. v. Quick*, 61 *Pa.* 339. See *Field v. Snell*, 58 *Mass.* (4 *Cush.*) 504.

²¹⁷ See *Brown v. Staples*, 28 *Me.* 497, 48 *Am. Dec.* 504; *Littlefield v. Getchell*, 32 *Me.* 390.

CHAPTER XV.

TRANSFER OF THE LEASEHOLD.

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b. To sublessee.

162. Liabilities of sublessee.

163. Rights of sublessor.

164. Rights of sublessee.

§ 150. Voluntary transfer and transfer by operation of law.

The leasehold interest, like that in reversion, may be transferred either by voluntary act or by operation of law. The mode of transfer which we have chiefly to consider is that by voluntary act *inter vivos*, that is, by an "assignment" or "sublease," the specific nature of which classes of conveyance we will hereafter consider.¹ The most ordinary instance of the transfer of the leasehold estate by operation of law, as distinguished from voluntary act, occurs upon the death of the tenant, whether the original lessee or his assignee, whereupon such estate, if of a chattel character, passes, with the rest of the decedent's personal property, to his executor or administrator, for the purpose of the payment of debts or other disposition in accordance with his last will or with the laws of the state. The

¹ See post, § 151.

leasehold interest may also pass by operation of law by reason of a sale under execution² or foreclosure,³ of the bankruptcy of the tenant,⁴ of condemnation under eminent domain proceedings,⁵ or in any of the various other ways in which the owner of an interest in land may be divested thereof without his consent.⁶

§ 151. Assignment and sublease distinguished.

One holding under a lease may dispose of his interest or of a part of his interest by voluntary conveyance *inter vivos* in either of two ways: (1) He may make an assignment or (2) he may make a sublease. The distinction between an assignment and sublease is of great importance, but the courts have not always been entirely in unison as regards the line between the two species of transfer. The circumstances may vary as follows: (1) The tenant may transfer to another an estate in the whole premises of a *quantum* less than his own estate, leaving a reversion in himself, as for instance when, having an estate which has still five years to run, he transfers an estate for four years. (2) He may transfer an estate in the whole premises equal to his own estate, leaving no reversion in himself, as when, having an estate which has five years yet to run, he transfers to another an estate for five years, or, which is the same thing, undertakes to transfer a greater estate than he has. (3) He may transfer an estate less than his own in a part of the premises. (4) He may transfer an estate equal to his own in a part of the premises.

As regards the first class of transfer by the tenant, that is,

² See e. g., *Willison v. Watkins*, see *v. Blackmore*, 13 Tenn. (5 28 U. S. (3 Pet.) 50, 7 Law. Ed. Yerg.) 113.

599; *McLean v. Rockey*, 3 McLean, 3 State *v. Martin*, 82 Tenn. (14 235, Fed. Cas. No. 8,891; *Barr v. Lea*) 92, 52 Am. Rep. 167; *Wittman v. Milwaukee, L. S. & W. R. Co.*, 51 Dec. 146; *McNeil v. Ames*, 120 Mass. Wis. 89, 8 N. W. 6; *Ozark v. Adams*, 481; *Buhl v. Kenyon*, 11 Mich. 249, 73 Ark. 227, 83 S. W. 920.

83 Am. Dec. 738; *Smith v. Brinker*, 4 See ante, § 12 g (7).

17 Mo. 148, 57 Am. Dec. 265; *North- 5 See Lewis, Eminent Domain, § 326.*

Am. Dec. 444; Joslin v. Ervien, 50 6 The various modes of involuntary transfer are discussed in 2 Tif- N. J. Law, 39, 12 Atl. 136; *Sowers v. Vie*, 14 Pa. 99; *Kille v. Giebner*, fany, Real Prop. cc. 21-30.

114 Pa. 381, 7 Atl. 154; *Thomas' Les-*

of an estate in the whole premises less than that which he has himself, leaving a reversion in him, the courts are in unison in considering it not an assignment but a sublease, making the transferee tenant of the transferor.⁷ The fact that the interest transferred is of a duration but slightly less than the interest of the tenant is immaterial,⁸ and so the fact that there is a difference of a day or of a fraction of a day is sufficient to constitute the transfer a sublease and not an assignment.⁹

A transfer of the second class, that is, of the tenant's entire interest in the whole premises, leaving no reversion in him, has almost invariably been regarded, not as a sublease but as an assignment, substituting the transferee as tenant of the landlord in place of the transferor.¹⁰ And the fact that the transfer is in form a sublease, or reserves rights as against the transferee similar to such as are ordinarily reserved on a lease, has ordinarily

⁷ *Derby v. Taylor*, 1 East, 502; tenant to another to hold from year *Woodhull v. Rosenthal*, 61 N. Y. 382; to year (*Curtis v. Wheeler*, 1 Moody *Stewart v. Long Island R. Co.*, 102 & M. 493; *Pike v. Eyre*, 9 Barn. & N. Y. 601, 8 N. E. 200, 55 Am. Rep. C. 909).

844; *Doty v. Heth*, 52 Miss. 530; May-⁸ See *Crusoe v. Bugby*, 3 Wils. 234; *hew v. Hardesty*, 8 Md. 479; St. Van Rensselaer v. Gallup, 5 Denio *Joseph & St. L. R. Co. v. St. Louis*, (N. Y.) 454; *Sexton v. Chicago Stor- I. M. & S. R. Co.*, 135 Mo. 173, 36 S. age Co., 129 Ill. 318, 21 N. E. 920, W. 602, 33 L. R. A. 607; *Wheeler v. 16 Am. St. Rep. 274.*

Hill, 16 Me. 329; *Schenkel v. Lisch- 9 2 *Preston, Conveyancing*, 124; *insky*, 45 Misc. 423, 90 N. Y. Supp. *Davis v. Morris*, 36 N. Y. 569.*

300. Consequently, if a tenant for That a conveyance of the whole years lets premises to another to residue of the term, excepting one hold at will, the latter is his sub- day thereof, does not take effect by tenant and not his assignee. Aus- way of sublease if the last day is tin v. Thomas, 45 N. H. 113; Cross not named as the one excepted, see v. Upson, 17 Wis. 618. And so if a 2 *Preston, Conveyancing*, 125, quoted in *Jameson v. London & Canadian Loan & Agency Co.*, 27 Can. Sup. Ct. Austin v. Thompson, 45 N. H. 113; 435.

Peirse v. Sharr, 2 Man. & R. 418. ¹⁰ *Hogg v. Reynolds*, 61 Neb. 758, And as before stated (see ante, § 14 86 N. W. 479, 87 Am. St. Rep. 522; d, note 525), a tenant from year to *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; *Doty v. Heth*, 52 Miss. 530; *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Forrest v. Dur- W. 209*), as is a lease by such a nell, 86 Tex. 647, 26 S. W. 481.

been considered immaterial.¹¹ There are, however, *dicta* and decisions to the contrary, that though the entire term is transferred, particular provisions in the instrument of lease may have the effect of rendering the transferee a tenant of the transferor and not of the head landlord. There are, for instance, occasional *dicta*¹² and perhaps two decisions,¹³ to the effect that the insertion, in the instrument of transfer, of covenants different from those in the original lease, or the reservation therein of a different rent, will render the transfer a sublease and not an assignment. And there are also apparent *dicta*,¹⁴ and

¹¹ *Palmer v. Edwards*, 1 Doug. 187. ¹³ In *Drake v. Lacoe*, 157 Pa. 17, note; *Langford v. Selmes*, 3 Kay & 27 Atl. 538, 25 L. R. A. 349, it is J. 220; *Beardman v. Wilson*, L. R. said, without discussion, that an assignment for an increased consideration with wholly new stipulations, with right of re-entry for conditions broken, with an express assumption of continuing liability of the assignors to the owners under the original lease, and a manifest intention to sublet, not only is not evidence of intention to end the privity of estate between the lessor and lessee, but is a positive reaffirmance of it. This apparently overrules *Lloyd v. Cozens*, 2 Ashm. (Pa.) 131. In *McClaren v. Citizens' Oil & Gas Co.*, 14 Pa. Super. Ct. 167, the reservation of a larger rent upon a subsequent transfer is regarded as making the transfer a sublease.

¹² *United States v. Hickey*, 84 U. S. (17 Wall.) 9, 21 Law. Ed. 559; *Collamer v. Kelley*, 12 Iowa, 319. See *Weander v. Claussen* Brew. Ass'n, 42 Wash. 226, 84 Pac. 735, 114 Am. St. Rep. 110.

¹⁴ *Fratcher v. Smith*, 104 Mich. 537, 62 N. W. 832, 29 L. R. A. 92; *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407; *Ganson v. Tift*, 71 N. Y. 48. In *Koppel v. Tilyou*, 31 N. Y. Civ. Proc. R. 185, 70 N. Y. Supp. 910, it was decided, in accordance with previous *dicta* in that state, that the transfer constituted a sublease when it contained such a proviso for re-entry and also a provision for surrender at the end of the term.

at least one decision,¹⁵ to the effect that this will be the result of the insertion, in such transfer of the leasehold estate, of a proviso for re-entry on breach of condition, a view which seems to be based on the erroneous theory that such a right of re-entry is a reversionary interest,¹⁶ and which is opposed by other well considered decisions,¹⁷ as well as by statements in the older books.¹⁸ In one state it has been intimated,¹⁹ and indeed de-

¹⁵ *Dunlap v. Bullard*, 131 Mass. 161, which is based, apparently, on the idea that when a right of re-entry is reserved, the transferee has a less estate than the transferor, in other words, that a term for (say) twenty years subject to a right of re-entry for breach of condition is a less estate than one for the same time not subject to such right. This view has no common-law authority to support it, but the court cites the decisions in that state to the effect that a right of re-entry for breach of a condition is a devisable interest (*Austin v. Cambridgeport Parish*, 38 Mass. [21 Pick.] 215; *Brattle Square Church v. Grant*, 69 Mass. [3 Gray] 142, 63 Am. Dec. 725), a view entirely at variance with that adopted in other jurisdictions (see 2 Washburn, Real Prop. 451, 1 Tiffany, Real Prop. § 75). The view in that state then seems to be that since a right of re-entry is devisable, it constitutes an estate, and consequently the fact that such an estate is outstanding in another person necessarily diminishes the interest of the owner of the estate which is subject to it. It may be remarked that the fact that rights of entry are by statute made assignable, as they are in England, does not make them estates. *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 507, 57 Am. Dec. 470.

¹⁶ That it is not a reversionary interest, see Litt. § 325; Co. Litt. 202; Gray, Perpetuities, § 30; *Doe d. Freeman v. Bateman*, 2 Barn. & Ald. 168; *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274, and cases there cited; *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 507, 57 Am. Dec. 470.

¹⁷ *Palmer v. Edwards*, 1 Doug. 187, note; *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; *Herzig v. Blumenkrohn*, 122 App. Div. 756, 107 N. Y. Supp. 570; *Lloyd v. Cozens*, 2 Ashm. (Pa.) 131; *Weander v. Claussen Brew. Ass'n*, 42 Wash. 226, 84 Pac. 735, 114 Am. St. Rep. 110. See 2 Preston, Conveyancing, 124.

¹⁸ In Co. Litt. 316a, it is said that "if lessee for life assigneth over his estate upon condition, he, having nothing in him but a condition, shall not attorn, but the assignee may attorn because he is tenant of the land;" citing 5 Hen. 5, which is presumably intended for 8 Hen. 5, fol. 10, pl. 16, where it is said that Cockaine (a counselor) demanded: "If I lease land to a man for term of life, who, by deed indented, leases over his estate to another, reserving to himself a rent and an entry for default of payment, then I grant the reversion, and the first lessee attorns; by this attornment the rever-

cided by an intermediate court,²⁰ that the insertion of a clause in the transfer, providing for the "surrender" of the premises to the lessor, that is, for the redelivery to him of the possession at the end of the term, has the effect of making it a sublease for all purposes, on the theory that "by reason of this covenant to surrender, some fragment of the term remains in the original lessee."²¹ How such a covenant, purporting to create an obligation *in personam* merely, can affect the operation of what purports to be a transfer of the lessee's whole interest, so as to render it inoperative to transfer some fragment of that interest, is not explained. Nor is it clear that such an effect should be given even to a covenant to surrender or relinquish possession "on the last day of the term," as has been done in one state,²² since if the transfer purports to be for the whole remaining term, a covenant to relinquish possession before the end of the term, though it may give a right *in personam* against the transferee for breach of such covenant, cannot well divest the property right otherwise vested in him for the whole term. Conceding that such a covenant indicates an intention that possession shall be relinquished before midnight of the last day of the term, it might perhaps be regarded as qualifying the other language in the instrument of transfer, the whole instrument thus showing an intention that the transferee's interest shall come to an end before the termination of the interest of the transferor. The difficulty would seem to be, however, that a covenant to relinquish the possession on the last day requires a relinquish-

sion passes," to which Hull, J., replied: "No; for when he leased over his estate no reversion was reserved to him, but only an entry for the condition, and his lessee was tenant to him in reversion." Rep. 844. The last word of this quotation, as reported, is "lessor." This must be a misprint for "lessee."

¹⁹ *Ganson v. Tiff*, 71 N. Y. 48; *Martin v. O'Conner*, 43 Barb. (N. Y.) 514; *Koppel v. Tilyou*, 31 N. Y. Civ. Proc. R. 185, 70 N. Y. Supp. 910, ante note 14. ²² It is so decided in *Piggot v. Mason*, 1 Paige (N. Y.) 412; *Post v. Kearney*, 2 N. Y. (2 Comst.) 394, 51 Am. Dec. 303. See *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844. But there is an assignment and not a sublease, it has been decided, if

²⁰ *Shumer v. Hurwitz*, 49 Misc. 121, 96 N. Y. Supp. 1026. there is a covenant to surrender, not to the sublessor, but to the original

²¹ *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. App. Div. 756, 107 N. Y. Supp. 570. lessor. *Herzig v. Blumenkrohn*, 122

ment only at the last instant of that day, and that is the time at which the transferor's interest comes to an end.

It has been said in one case,²³ that although, as regards the landlord, a transfer of the whole term constitutes an assignment, yet, "as between the original lessee and his lessee or transferee, even though the original lessee demises his whole term, if the parties intend a lease, the relation of landlord and tenant, as to all but strict reversionary rights, will arise between them." But, as has been in effect judicially remarked,²⁴ so far as the decisions go, any rights arising as between the parties, other than "strict reversionary rights," even though rights of a character which ordinarily exist in connection with the relation of tenancy, are merely the result of contract, and the fact that such rights have been created by contract at the time of making a transfer does not show such transfer to be a lease, even as between the parties thereto. The question may be raised, however, whether "strict reversionary rights" may not exist on the theory of estoppel, even though there is a transfer of the lessee's whole interest. This question is hereafter discussed.²⁵

There are several English cases which tend, by the language of the opinions, to support the view that, apart from any theory of estoppel, a transfer of the whole term will take effect as a sublease, if an intention to that effect appears. The decisions actually rendered in most of these cases may, however, be supported independently of such a doctrine. In some of these cases it was decided or asserted that sums reserved as rent upon a transfer of the whole term could be recovered by a subsequent transferee of the right to such sums, by an action in his own name against a subsequent transferee of the term,²⁶ which could

²³ *Stewart v. Long Island R. Co.*, 67 Mass. (1 Gray) 325, it was decided that when a lessee "let" to another for the whole of his term, and

²⁴ *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236. The opinion speaks of the transfer for the whole term as a sublease,

²⁵ See post, at notes 40-46.

²⁶ *Clarke v. Coughlan*, 3 Ir. Law R. 427; *Williams v. Hayward*, 1 El. & El. 1040. In *Patten v. Deshon*, but the decision is, it seems, merely that the rent reserved thereon may be assigned. The opinion, although

not have been done had the right to such sums been, not rent, but a mere chose in action, and the right to recover such stipulated sums in an action of debt for rent has invariably been recognized.²⁷ It has, moreover, been stated that the defense of eviction would be allowed in such case as in other cases of rent reserved.²⁸ The recognition, however, of sums so reserved as properly constituting rent, does not necessarily involve the view that a relation of tenancy is created between the parties, it being possible to reserve rent upon the transfer of a term leaving no reversion, as it is upon the transfer of an estate in fee simple leaving no reversion.²⁹ In others of these cases it was decided that an oral transfer of the balance of the term, which was in terms a lease, would be supported as such, under the exception in the second section of the English statute of frauds,³⁰ though it would not, under that statute, be valid as an assignment. This view has been criticized,³¹ but these decisions appear to be in conformity to principle, in so far as they can be regarded as deciding merely that one taking possession under an invalid assignment is a tenant of the assignor, so that the attempted assignment operates as a lease.³²

written by Shaw, C. J., is singularly and recoverable by the name of a obscure. rent upon the contract."

²⁷ Com. Dig., Dett (C); Newcomb v. Harvey, Carth. 161; Williams v. Hayward, 1 El. & El. 1040; Patten v. Deshon, 67 Mass. (1 Gray) 325; Adams v. Beach, 1 Phila. (Pa.) 99, 7 Leg. Int. 178.

²⁸ Baker v. Gostling, 1 Bing. N. C. 19.

²⁹ In Newcomb v. Harvey, Carth. 161, which was an action of debt for rent reserved on an assignment of the whole term, it was contended that the action should not be debt for rent, but for a sum in gross upon the contract, and it was resolved by the court that "this is a rent, though the plaintiff had no reversion; for if a rent is reserved upon a feoffment in fee, there is no reversion in the feoffor, but yet this is a rent,

and recoverable by the name of a rent upon the contract."

³⁰ Poultney v. Holmes, 1 Strange, 405; Pollock v. Stacy, 9 Q. B. 1033. In Palmer v. Edwards, 1 Doug. 187, v. Holmes, supra, "only determined that what cannot be supported as an assignment shall be good as an underlease against the party granting it."

³¹ Barrett v. Rolph, 14 Mees. & W. 348, per Parke, B.

³² But in Preece v. Corrie, 5 Bing. 24, it was held that while the oral transfer of the whole term, under the circumstances, constituted a lease, and was consequently valid, there was no right to distrain. It might be suggested that there was a mere tenancy at will, and that

the feoffor, but yet this is a rent,

The view that the relation of landlord and tenant does not exist as between the parties to what purports to be a sublease for the whole term has been clearly asserted in decisions that one who has transferred the entire term, reserving a rent, is not entitled to distrain for such rent, it being said that a reversion is necessary to support a distress,³³ and likewise in decisions that such transferor is not entitled, even though a right of distress be expressly given, to the benefit of a statute authorizing the making of a general avowry upon a distress for rent,³⁴ and that he has no right of action against the transferee as for waste.³⁵ The view that the transferor has no reversion which will support a distress has, on the other hand, been questioned by a learned student of the common law,³⁶ who says that "as the statute of *Quia Emptores* does not affect chattel interests, it seems to be not unreasonable to contend that a termor may create a subtenancy equal, in duration, to his own term, and that, as in the case of a subtenure in fee, the sublessor has such a reversion as will enable him to distrain for the rent or other services reserved upon the creation of the subtenure." The case of a subtenure so attempted to be created may, however, it seems, be distinguished from a subtenure created before the statute of *Quia Emptores* upon a conveyance in fee simple, since, in the latter case, the grantor had rights of fealty and escheat, the latter of which rights is, in its operation, not dissimilar to a right to have the land return to one upon the expiration of a lesser estate, and was at the time of the statute referred to not

consequently there was a right to distrain. exchequer chamber by a majority of six judges to four. See post, note 45.

³³ Langford v. Selmes, 3 Kay & J. 220; Parmenter v. Webber, 8 Taunt. 593; Preece v. Corrie, 5 Bing. 24; Pollock v. Stacy, 9 Q. B. 1033; Lewis v. Baker [1905] 1 Ch. 46; Prescott v. DeForest, 16 Johns. (N. Y.) 159; Ragsdale v. Estis, 8 Rich. Law (S. C.) 429. ³⁵ Hicks v. Downing, 1 Ld. Raym. 99, 1 Salk. 13; Wheeler v. Baker, 3 Salk. 10; McLaughlin v. Long, 5 Har. & J. (Md.) 113.

³⁴ Pluck v. Digges, 5 Bligh (N. S.) 31, decided in the house of lords by Lord Tenterden and Lord Wynford, and reversing 2 Huds. & B. 1, where the contrary was decided in the Irish ³⁶ Sergeant Manning, in a note to King v. Wilson, 5 Man. & R. 157, where he traces back the modern decisions, adverse to the right of distress in such case, to a misstatement by Brooke (Bro. Abr. Dette, pl. 39) of a dictum, or rather a *quiaere*, of Finchden, C. J., in Y. B. 45 Edw. 3, 8 pl. 10.

infrequently, it appears, assimilated thereto,³⁷ while in the case of a transfer, by one having an estate for life or years, of his entire interest, no interest remains in him which bears the slightest resemblance to a reversionary right, he having at most, by express provision, a right to re-enter for breach of condition.³⁸

There seems some ground, on principle, for the view, asserted in a *dictum* previously quoted,³⁹ that while a transfer of the lessee's whole interest, though purporting to be a sublease, is necessarily an assignment as regards third persons, it may be regarded as a sublease between the parties themselves. The doctrine of "estoppel by deed"⁴⁰ might, it appears, be applied as against the transferor, so as to preclude him from asserting, as against the transferee, that the transfer, though so phrased as to show an intention that it should operate as a lease and not as an assignment, cannot, owing to the limited *quantum* of his estate, take effect as intended. The transferor may, by the form of the instrument of transfer, in effect affirm that he has an estate sufficient to support the transfer as a lease, and he should not, it seems, be permitted thereafter to assert the contrary.⁴¹ Such a theory would, however, in many jurisdictions, be inapplicable unless the instrument were under seal,⁴² nor could it be applied when the *quantum* of the lessee's estate appears on the face of the transfer, the rule being that there is no estoppel by deed when the truth appears.⁴³ Cases in which the transferor would seek to assert that an instrument thus in form a lease is legally an assignment can but seldom occur, and

³⁷ 2 Pollock & Maitland, Hist. Eng. Law, 22. where one having a lease for three years assigned over for three years

³⁸ See note to *Fawcett v. Hall, Alc. & N. 259*, containing a learned discussion of the subject by Mr. Justice Burton, who cites *Jenison v. Lexington*, 1 P. Wms. 555, to the effect that if a tenant for three lives conveys for these three lives, reserving a rent, he has no reversion, and the rent is not a rent service. by parol, and, the house having been burnt, brought an action for damages against the lessee, it was decided that he could not maintain the action, having no reversion, but it was said that "it had been otherwise if the lease had been by indenture or estoppel." And see the remarks of Lord Chelmsford in *Jolly v. Arbuthnot*, 4 De Gex & J. 240.

³⁹ See ante, at note 23.

⁴⁰ See Bigelow, *Estoppel* (5th Ed.) pt. 2.

⁴¹ In *Wheeler v. Baker*, 3 Salk. 10,

⁴² Bigelow, *Estoppel*, p. 331.

⁴³ Bigelow, *Estoppel*, p. 361.

a question of greater interest is whether the transferee may be estopped, as against the transferor, to assert that the transfer is an assignment and not a lease. As regards this question, it seems that the transferee, if the transfer is by indenture, might be precluded, on the same theory of "estoppel by deed,"⁴⁴ from asserting that the instrument of transfer, though purporting to be a lease, is in reality an assignment.⁴⁵ But apart from any question of estoppel by deed, the question may be suggested whether, if the transferee obtains possession on the understanding that in so doing he becomes tenant of the lessor, he should not be precluded, as against the lessor or the lessor's transferee, from asserting that the lessor had no estate at the time of the lease sufficient to support the relation of landlord and tenant. As we have before seen,⁴⁶ one who has taken possession under a lease is precluded, for certain purposes at least, from asserting, as against the lessor or one claiming under the lessor, that the lessor had no estate at the time of the lease, and the same considerations might perhaps apply, it would seem, to preclude him from asserting that the lessor had an estate no greater than the term for which the lease was made.

It has been suggested that the view that a transfer of the whole term, although reserving a rent, constitutes an assignment, bringing the transferee into privity with the chief landlord, so as to render him liable to the latter for the rent reserved on the original lease, may have the effect of exposing him to a double liability, that is, for the rent so reserved, and also for the rent reserved upon the transfer.^{46a} But it is conceived

⁴⁴ Bigelow, Estoppel, p. 356.

⁴⁵ "If an indenture declares one of the parties to be a tenant, and there is nothing in it to the contrary, I do not know with what rule of law it would consist to allow the party to dispute that fact." Per Smith, B., in *Pluck v. Digges*, 2 Huds. & B. 1, 65. Treport's Case, 6 Coke, 15, cited in argument in that case as adverse to the theory of estoppel, is well distinguished in the opinion of Plunket, C. J., therein. And see, also, the opinion of Bushe,

C. J., in that case. The two latter opinions are given in a note to 5 Bligh (N. S.) 44. All the opinions rendered in the Irish exchequer chamber, as reported in 2 Hudson & B. 1, 65, are well worth reading, and those of the majority are rather insufficiently answered by the opinion of Lord Tenterden on reversal (5 Bligh [N. S.] 31, ante, note 34).

⁴⁶ See ante, § 78.

^{46a} See an able article by Charles R. Darling in 16 Am. Law Rev. at p. 20.

that a transfer thus in terms reserving a new rent, if regarded as an assignment, would ordinarily be construed as imposing an obligation upon the transferor to hold the transferee harmless as against the rent reserved on the head lease,⁴⁷ in which case the transferee, paying the latter rent under compulsion, would be entitled to recover the amount thereof from the transferor, the person primarily liable.⁴⁸ As in the ordinary case of an assignment, the assignee becomes primarily liable, as between himself and the lessee, and the latter can recover from the assignee any rent which he, the lessee, has been compelled to pay,⁴⁹ so the assignor, in effect agreeing to pay the head rent by his reservation of a rent upon the assignment of the term, would be liable over to the assignee in case the latter is compelled to pay the head rent.

A transfer of the third class, of a less estate in a part of the premises, is no doubt similar in its operation to a transfer of a less estate in the whole, as constituting a sublease and not an assignment.

As regards the fourth class of transfer, that is, a transfer by the tenant of his entire interest in a part of the leased premises, the great weight of authority is to the effect that this is an assignment *pro tanto* and not a sublease,⁵⁰ apart from any question which may arise from the fact that the transfer is in the form of a sublease, in which case its character would be determined by the same considerations as in the case of a similar transfer of the whole premises. In two jurisdictions, however, it has been decided, without any discussion of the question, that

⁴⁷ In *Clarke v. Coughlan*, 3 Ir. Law R. 427, where one having a lease subject to a rent of twenty-eight pounds assigned his rights in the land for a considerable sum to another, "subject to the payment of the yearly rent of forty-four pounds, and to the performance of the covenants" in the original lease, it was assumed by all the parties, as well as by the court, that the assignor could recover only the difference between the rents, that is, sixteen pounds.

⁴⁸ See Keener, *Quasi Contracts*, 395 et seq.; 1 *Smith's Leading Cases* (11th Ed.) 141, notes to *Lampleigh v. Brathwait*.

⁴⁹ See post, § 153 b.

⁵⁰ *Congham v. King*, *Cro. Car.* 221; *Wollaston v. Hakewill*, 3 *Man. & G.* 297; *Palmer v. Edwards*, 1 *Doug.* 187; *Cox v. Fenwick*, 7 *Ky.* (4 Bibb) 538; *Cook v. Jones*, 96 *Ky.* 283, 28 *S. W.* 960; *Hollywood v. First Parish in Brockton*, 192 *Mass.* 269, 78 *N. E.* 124, 7 *L. R. A.* (N. S.) 621; *Hogg v. Reynolds*, 61 *Neb.* 758, 86

a transfer by the tenant of his whole interest in part of the premises leased is necessarily a sublease.⁵¹

§ 152. Restrictions on assignment and subletting.

a. **Freedom of alienation in absence of restriction.** A lessee, other than one at will, ordinarily has the right, in the absence of a statutory prohibition, or of a provision of the lease to the contrary, to make an assignment of the leasehold,⁵² and this though the lease makes no mention of assigns.⁵³ Also, in the absence of express prohibition, he may ordinarily himself make a lease, this being known as a "sublease" or "underlease."⁵⁴

N. W. 479, 87 Am. St. Rep. 522; *Lee v. Payne*, 4 Mich. 106; *Harris v. Frank*, 52 Miss. 155; *Stover v. Chasse*, 6 Misc. 394, 26 N. Y. Supp. 740; *Dartmouth College v. Clough*, 8 N. H. 22; *Den d. Lunsford v. Alexander*, 20 N. C. (3 Dev. & B. Law) 166; *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228; *Pin-grey v. Watkins*, 15 Vt. 479; *Ellis v. Bradbury*, 75 Cal. 234, 17 Pac. 3; *Babcock v. Scoville*, 56 Ill. 461.

⁵¹ *Fulton v. Stuart*, 2 Ohio, 215, 15 Am. Dec. 542; *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123, and there is a dictum to that effect in *Fratcher v. Smith*, 104 Mich. 537, 62 N. W. 832, 29 L. R. A. 92.

In *McNeil v. Kendall*, 128 Mass. 245, 35 Am. Rep. 373, it was decided that because the lessee, in transferring his leasehold estate in part of the premises for the residue of the term, by an instrument in the form of a sublease, also granted easements in the part retained by him, he transferred "a portion of the entire estate, and not his whole estate in a portion of the same." This is a most extraordinary decision, it being in effect, as has been stated elsewhere (see 16 Am. Law Rev. at p. 35), that because, on the convey-

ance of one parcel, as appurtenant thereto, easements in another parcel are granted, the whole interest in the premises conveyed is not disposed of. The case of *Patten v. Deshon*, 67 Mass. (1 Gray) 325, on which this purports to be based, is obscure and contradictory. See 7 Am. Law Rev. at p. 247; 16 Am. Law Rev. at p. 32. Compare *Hollywood v. First Parish in Brockton*, 192 Mass. 269, 78 N. E. 124, 7 L. R. A. (N. S.) 621.

⁵² *McBee v. Sampson*, 66 Fed. 416; *Nave v. Berry*, 22 Ala. 382; *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455; *Martin v. Sexton*, 112 Ill. App. 199 (verbal lease); *Gould v. Eagle Creek School Dist.*, 8 Minn. 427 (Gil. 382); *Kew v. Trainor*, 150 Ill. 150, 37 N. E. 223; *Culbreth v. Smith*, 69 Md. 450, 16 Atl. 112, 1 L. R. A. (N. S.) 538; *Crowe v. Riley*, 63 Ohio St. 1, 57 N. E. 956; *Schenkel v. Lischinsky*, 45 Misc. 423, 90 N. Y. Supp. 300.

⁵³ *Church v. Brown*, 15 Ves. Jr. 264; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391; *Rickard v. Dana*, 74 Vt. 74, 52 Atl. 113.

⁵⁴ *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Goldsmith v. Wilson*, 68 Iowa, 685, 28 N. W. 16; *Weatherley v. Baker*, 25 La. Ann.

And one to whom a sublease is made has in turn, no doubt, the right himself to make a sublease to another,⁵⁵ as has an assignee the right to assign to another.

There are in two states decisions to the effect that a lease reserving a share of the crop as rent is not assignable by the lessee, on the ground that, since the amount of the rent depends to a considerable extent on the character of the tenant, an intention not to assign may be presumed,⁵⁶ and it was even decided that an attempt to assign such a lease was a cause of forfeiture.⁵⁷ These cases lay some stress on the fact that the lessor's implements were included in the lease, but the language of the opinions would seem broad enough to apply to a lease of the land alone. The soundness of the view that such a lease is not assignable may be questioned. If the lessor desires to prevent a change of tenants, it is open to him to insist on a stipulation to that effect, and there seems no reason for the interposition of the courts to protect him from the consequence of his negligence in this regard. Even in the case of a lease for a money rent, the character of the tenant is ordinarily of more or less importance, and any difference in this respect between such a lease and one for a share of the crops is, at most, one of degree only. The fact that it would be for the advantage of the lessor thus to restrict the right of the lessee to transfer his interest in the land seems but a slight basis for the implication of a mutual intention to that effect. That it would not be for the advantage of the lessee is clear, and to impose upon him such a restriction which, if suggested at the time of the

229; *Gould v. Eagle Creek School Dist.*, 8 Minn. 427 (Gil. 382); *Shumway v. Collins*, 72 Mass. (6 Gray) 227; *Fleisch v. Schnaier*, 119 App. Div. 815, 104 N. Y. Supp. 921; *Krider v. Ramsay*, 79 N. C. 354; *Ray v. Johnson*, 98 Mich. 34, 56 N. W. 1048.

In *Rowbotham v. Pearce*, 5 Houst. (Del.) 135, it was held that the lessor was liable in an action on the case to his lessee if by posting notices and by informing intending sublessees that they could not have possession he prevented the lessee from subletting.

⁵⁵ See *Phelps v. Erhardt*, 24 N. Y. St. Rep. 380, 5 N. Y. Supp. 540.

⁵⁶ *Randall v. Chubb*, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165; *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269; *Meyer v. Livesley*, 45 Or. 487, 78 Pac. 670, 106 Am. St. Rep. 667.

⁵⁷ *Randall v. Chubb*, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165; *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269; *Myer v. Roberts*, 50 Or. 81, 89 Pac. 1051.

lease, he might have refused to accept, seems to approach dangerously near to the making of a contract for the parties. The decisions referred to seem adverse to the whole course of legislative enactment and judicial decision, which has been to render property more freely alienable and not less so,⁵⁸ and they are unquestionably adverse to the spirit of the rule that restrictions upon alienation shall be strictly construed.^{58a} Even conceding that a stipulation against assignment could be extracted from the language of such a lease, why the attempt to make such an assignment should be regarded as a cause of forfeiture is not apparent, nor do the two cases asserting such a rule advance any reason therefor.⁵⁹ A lease of this character which, like any other lease, creates property rights, rights *in rem*, in the lessee, is to be distinguished, in this respect as in others, from a "cropping contract"⁶⁰ creating mere contractual rights, rights purely *in personam*, which, as in the case of those arising under any other contract of employment, are not the subject of transfer.

The fact that personal chattels, whether farming implements, furniture, or live stock, are included in a lease of land cannot, it seems, affect the right which the lessee otherwise has to assign or sublease the land. This would be so, it is conceived, even though he had no right to transfer the use of the personal chattels, but it seems that one to whom chattels are hired for a term has the right to transfer his interest therein in the absence of any restriction or limitation from which a personal confidence can be inferred.⁶¹ And so the lessee of land together with personal chattels, may, it is conceived, transfer his

⁵⁸ See Gray, Restraints on Alienation, § 4. the right to repledge. See the case above cited and references therein;

^{58a} See post, § 152 b. and also remarks of Blackburn, J.,

⁵⁹ Compare *Farnum v. Hefner*, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174, which is adverse to the idea of a forfeiture in such a case. in *Donald v. Suckling*, L. R. 1 Q. B. 585. In *Pollock, Torts* (4th Ed.) 333, the learned author says:

⁶⁰ See ante, § 10. "It may happen that a bailee delivers lawful possession to a third per-

⁶¹ See *Bailey v. Colby*, 34 N. H. 29, 66 Am. Dec. 752, and note. The case is analogous to that of a pledge, which is held to give to the pledgee son, to hold as under bailee from himself, or else as immediate bailee from the true owner."

interest in both the land and the chattels,⁶² in the land alone, or in the chattels alone.⁶³

b. **Restrictions strictly construed.** Upon the making of a lease there is frequently an express stipulation against assignment, or against subletting, or against both, and the validity of such a stipulation has been recognized from an early time.⁶⁴ An assignee or sublessee is chargeable with notice of any such stipulation, in so far as it may affect the validity of his title.⁶⁵

Restrictions of this character, upon alienation by the lessee, are not favored and are, it is said, to be construed strictly,⁶⁶ and a particular mode of alienation is, it has been stated in a leading case on the subject, not to be regarded as prohibited unless it is "by words which admit of no other meaning."⁶⁷

⁶² "A party may lease his farm for fine upon every transfer is a re- years, with the stock and tools on strain on alienation within this it. The whole lease, it can hardly principle. *Livingston v. Stickles*, 7 be doubted, may be assigned. * * * Hill (N. Y.) 253.

So a party who should lease his liv- When there is a condition for for- erty stable with his stock of horses feiture upon alienation, the above and carriages could hardly complain principle is obviously reinforced by if the lessee should assign his in- the principle that such a condition terest, unless some restriction was is to be construed strictly. See introduced in the lease." Per Bell, *Smith v. St. Philip's Church*, 107 N. J., in *Bailey v. Colby*, 34 N. H. 29, 66 Y. 610, 14 N. E. 835, and post, § 194 a. Am. Dec. 752. at notes 58.

⁶³ In *Gordon v. Harper*, 7 Term R. ⁶⁷ *Crusoe v. Bugby*, 3 Wils. 234, 2 9, the validity of a sale under exe- W. Bl. 766. But *Upton v. Hos-* cution of the lessee's interest in mer, 70 N. H. 493, 49 Atl. 96, hardly furniture leased together with a accords with this view. There the house seems to be conceded. lease granted all the rights there-

⁶⁴ Gray, *Restraints on Alienation*, under in terms to the lessee and his § 101. See *Anonymous*, 1 Dyer, 6 "heirs," without mention of his "as- a, pl. 1; *Wilkinson v. Wilkinson*, 3 signs," while it mentioned "assigns" in connection with the lessor in two of its clauses. It contained a cove-

⁶⁵ *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123; *Indianapolis Mfg. & Carpenters' Union v. Cleveland, C. C. & I. R. Co.*, 45 Ind. 281. And see post, § 194 e (4), h. nant against subletting, and also pro- vided that the lessee or his heirs might remove, at any time, his cot-

⁶⁶ *Church v. Brown*, 15 Ves. Jr. 264; *Riggs v. Pursell*, 66 N. Y. 193; *Randol v. Scott*, 110 Cal. 590, 42 Pac. 976. A provision for payment of a lease as a whole prohibited the les-

Accordingly, a covenant or condition not to assign is not broken by the making of a sublease,^{67a} and, in spite of a *dictum* to the contrary,⁶⁸ the weight both of reason and authority is to the effect that a covenant not to sublet is not broken by an assignment.⁶⁹

A covenant not to "demise for the whole or any part of the term" has been regarded as precluding an assignment as well as a sublease.⁷⁰ A sublease has been decided to be a breach of a stipulation not to "set, let or assign over the demised premises, or any part thereof,"⁷¹ and also of one "not to assign or otherwise part with the demised premises or any part thereof."⁷²

see from assigning without the consent of the lessor, his heirs or assigns.

^{67a} *Crusoe v. Bugby*, 3 Wils. 234, 2 W. Bl. 766 (condition "not to assign, transfer or set over, or otherwise do or put away this indenture or the premises demised, or any part thereof"); *Jackson v. Silvernail*, 15 Johns. (N. Y.) 278 (condition not to "sell and dispose of or assign their estate in the demised premises"); *Jackson v. Harrison*, 17 Johns. (N. Y.) 66 (condition not to "assign over, or otherwise part with, this indenture, or the premises thereby leased, or any part thereof"). And, to the same effect, see *Church v. Brown*, 15 Ves. Jr. 264; *Moore v. Guardian Trust Co.*, 173 Mo. 218, 73 S. W. 143; *Hargrave v. King*, 40 N. C. (5 Ired. Eq.) 430; *Den d. Bockover v. Post*, 25 N. J. Law (1 Dutch.) 285; *Granite Bldg. Corp. v. Greene*, 25 R. I. 586, 57 Atl. 649.

⁶⁸ *Greenaway v. Adams*, 12 Ves. Jr. 395.

⁶⁹ *Field v. Mills*, 33 N. J. Law, 254; *Lynde v. Hough*, 27 Barb. (N. Y.) 415; *In re Doyle* [1899] 1 Ir. 113. See, also, 7 Am. Law Rev. 248. It is clear, as stated by these various authorities, that a landlord may wish to restrain underletting with

out desiring to restrain assigning, since a sublessee occupies without any direct liability to the landlord, while on an assignment the landlord acquires a right of recourse against both the assignor and the assignee for breach of covenants (see post, § 158). And there is no reason why such an intention, plainly expressed, should not be carried into effect.

In *Austin v. Harris*,⁷⁶ Mass. (10 Gray) 296, it was held that a condition not to "lease or underlet, nor permit any other person or persons to occupy," was broken by the assignment of the balance of the term, and the relinquishment of possession accordingly. The court does not distinguish between assignment and subletting, and the decision may be rested on the provision against another's occupancy. And see *Shattuck v. Lovejoy*, 74 Mass. (8 Gray) 204. In this state, however, as previously stated (ante, note 15), a "lease" for the whole term is not always regarded as an assignment.

⁷⁰ *Greenaway v. Adams*, 12 Ves. Jr. 395.

⁷¹ *Roe d. Gregson v. Harrison*, 2 Term R. 425.

⁷² *Doe d. Holland v. Worsley*, 1 Camp. 20.

An oral letting by the year has been regarded as constituting a breach of a covenant against subletting,⁷³ most properly so, it would seem.

There is a *dictum* by a distinguished judge that the lessee may, without breach of a covenant against subletting, put another into possession of the premises.⁷⁴ But a person put into possession by the lessee for a period less than the term of the lessee's estate, must, it seems, be a tenant under a sublease since he is not in by assignment, and the statement would seem to be properly applicable only to one who is given a mere license to enter and who has not, technically speaking, possession of the premises.⁷⁵ A late English decision⁷⁶ likewise, that the act of the lessee in putting into possession one to whom he has sold the leasehold is not a breach of a covenant against subletting, is somewhat difficult to harmonize with the view adopted in England that a purchaser so going into possession becomes the tenant of the vendor.⁷⁷

There is one decision,⁷⁸ and there are occasional *dicta*,⁷⁹ to the effect that a transfer of the leasehold by a bequest thereof is not within a condition or covenant against assignment, and this accords with the general rule that such restrictions upon alienation should be strictly construed. A different view is, however, expressed in some early cases.⁸⁰

c. Restrictions applicable only to transfer of legal title. In

⁷³ *Timms v. Baker*, 49 Law T. (N. S.) 106. of their own will, turn the vendee out."

⁷⁴ Lord Eldon in *Church v. Brown*, 15 Ves. Jr. 256.

⁷⁵ See ante, § 7.

⁷⁶ *Horsey Estate v. Steiger* [1899] 2 Q. B. 79. Here the court says that the vendee "pays no rent and has undertaken no obligation such as those of tenancy," and goes on: "But it is said the proper implication from these facts is that a tenancy at will has been created. Whether this may be technically so or not, the practical answer to this contention seems to be that the defendants could not, by the exercise

⁷⁷ See ante, § 43 a, notes 5, 6.

⁷⁸ *Squire v. Learned*, 196 Mass. 134, 81 N. E. 880, 124 Am. St. Rep. 525.

⁷⁹ *Fox v. Swann*, Style, 482; *Doe d. Goodbehere v. Bevan*, 3 Maule & S. 353, 361; *Crusoe v. Bugby*, 3 Wils. 234.

⁸⁰ See *Berry v. Haunton*, Cro. Eliz. 331; s. c. sub. nom., *Taunton v. Barrey*, Poph. 106; *Knight v. Mory*, Cro. Eliz. 60; *Parry v. Harbert*, 1 Dyer, 45b; *Windsor v. Burry*, 1 Dyer, 45b, note; *Horton v. Horton*, Cro. Jac. 74.

order that there be a breach of a covenant or condition against an assignment, there must be, it has occasionally been decided, a transfer of the legal title, and, accordingly, a contract for the sale of the leasehold, though this vests an equitable interest in the vendee, was regarded as not within the prohibition,⁸¹ and a covenant by the lessee to stand possessed of the premises for another person, who enters into possession, has been regarded in the same way.⁸² It has been said, on the other hand, that the transaction is within the stipulation, when it appears that the legal title is withheld merely to avoid the effect of the prohibition,⁸³ or even, it seems, without any showing to that effect, when there is a transfer of rights of enjoyment merely, this being regarded as in effect an assignment.⁸⁴ But the mere

In *Windsor v. Burry*, as stated in assignment of the future gross earnings of the road with a contract by 1 Dyer, 45 b, note, it was decided that such company to use and operate it if the bequest is to the executor, the condition against assignment is not broken. But the reference to what is apparently the same case, sub. *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 65 N. H. 393, 23 Atl. 529. nom., *Boroughs v. Windsor*, in Moore, 351, is to the effect that even in such case, if the legatee enters generally, And where the owner of a factory was lessee of ground adjoining, that is, without stating that he does which he used as a lumber yard, so as executor, he will be regarded and "sold out" his business to one as entering as "devisee," and a whom he put in possession of the breach will occur. The distinction ground as well as of the factory, based on the fact that the bequest agreeing that the vendee might use is to the executor appears to be unsound, for the reason stated in 21 the ground so long as he, the vendor, Harv. Law Rev., at p. 60, that "the could have used it, it was decided executor as devisee (legatee) is as that there was a substantial breach of a covenant against assignment. Indianapolis Mfg. & Carpenters' Union v. Cleveland, C., C. & I. R. Co., 45 Ind. 281.

⁸¹ *West v. Dobb*, L. R. 5 Q. B. 460; In *Munkwitz v. Uhlig*, 64 Wis. 380, *Horsey Estate v. Steiger* [1899] 2 Q. 25 N. W. 424, it was held that a covenant not to assign or underlet was not broken because the lessee's

⁸² *Gentle v. Faulkner* [1900] 2 Q. business passed into the control of B. 267. others who had purchased his stock,

⁸³ See *Livingston v. Stickles*, 7 he carrying on the business on the Hill (N. Y.) 253. premises for such purchasers, since

⁸⁴ So it was held that a covenant he still held the lease "unassigned by a railroad company not to assign and unimpaired." a road leased to it was broken by an

making of an instrument of assignment, without delivery, is not a breach.⁸⁵ In one case it was decided that an assignment, which was invalid as being in violation of the bankrupt act, was not within the covenant.⁸⁶

A mortgage is regarded as within a prohibition of an assignment, in jurisdictions in which the legal title is vested in the mortgagee,⁸⁷ but not when a mortgage creates merely a lien,⁸⁸ as it does in a large number of the states. Even in the former class of states an "equitable mortgage" which does not transfer the legal title, is not within the prohibition.⁸⁹

d. Application of restrictions to alienation of part interest. Upon the question whether a stipulation against an assignment or sublease of the premises precludes an assignment or sublease of part of the premises, or an assignment of an undivided interest therein, the cases, though few in number, are not in harmony. That such a partial transfer is within the stipulation is apparently assumed in an English case, where, two partners being joint lessees, an assignment by one to the other of all his interest, upon a dissolution of the partnership, was held to be within a covenant against assignment,⁹⁰ a decision clearly distinguishable from another in the same jurisdiction to the effect that the act of one partner in giving up possession to the other, in pursuance of a written agreement, but without any actual assignment, was not a breach of an agreement not to assign or "part with the possession of the premises to another person or persons."⁹¹ To the same effect, that such a prohibition applies to the transfer of a part of the premises, are English decisions that a contract for lodging is a breach of a covenant against sub-

⁸⁵ *Farnum v. Hefner*, 92 Cal. 542, 28 Pac. 602, where the lessee gave the instrument to the lessor in order that the latter might indorse on it his assent to the assignment and he refused his assent. ⁸⁸ *Riggs v. Pursell*, 66 N. Y. 193; *Crouse v. Michell*, 130 Mich. 347, 90 N. W. 32; *West Shore R. Co. v. Werner*, 70 N. J. Law, 233, 57 Atl. 408; *Id.*, 71 N. J. Law, 682, 60 Atl. 1134.

⁸⁶ *Doe d. Lloyd v. Powell*, 5 Barn. & C. 308. ⁸⁹ *Doe d. Pitt v. Hogg*, 4 Dowl. & R. 226.

⁹⁰ *Varley v. Coppard*, L. R. 7 C. P. 505, followed in *Langton v. Hen-*

See Foa, Landl. & Ten. (2d Ed.) 209; *Davidson, Prec. Conv.* (4th Ed.) vol. 2, pt. 2, p. 436. ⁹¹ *Bristol Corp. v. Westcott*, 12 Ch. Div. 461.

letting when the exclusive possession and control are given.⁹² In one state in this country a like view, that such a partial transfer of the rights in the leasehold is within the stipulation is clearly taken.⁹³ In other states, however, a different view seems to have been adopted, to the effect that a stipulation against an assignment or sublease of the premises does not prevent the assignment of a part of the premises,⁹⁴ or of an undivided interest therein,⁹⁵ or the sublease of a part.⁹⁶

⁹² *Greenslade v. Tapscott*, 1 Crompton new partnership their interest in M. & R. 55; *Roe d. Dingley v. Sales*, the lease, the transaction would 1 Maule & S. 297. have been an assignment of 'the

⁹³ In New Hampshire, where there are the following statements in this regard: "A lessee of one hundred acres, on condition that he shall not assign, can no more convey one acre without breaking the condition than he can ninety-nine or one hundred acres. His grant of ninety-nine and ninety-nine one hundredth acres is no more a breach than his grant of one hundredth of an acre." Boston, C. & M. R. Co. v. Boston & L. R. Co., 65 N. H. 452, 23 Atl. 529. "If the plaintiffs could assign a hundredth part of their interest as lessees, they could assign ninety-nine one hundredth of it. It is one of those cases in which no line can be drawn between a great and a small violation of the contract." *Emery v. Hill*, 67 N. H. 330, 39 Atl. 266.

The latter case involved the question whether a condition, in a lease to a firm, against leasing or underletting the premises or any portion thereof, or assigning "the lease," was violated by the formation of a corporation and the transfer of the premises to it, and it was held that it was violated. And the court says: "If, instead of adopting a corporate form of doing business, they had admitted new members into the firm and transferred to the

lease,' or an 'interest therein' (citing *Varley v. Coppard*, L. R. 7 C. P. 505, supra). The retention by the plaintiffs of a nominal interest in the firm would not enable them to violate the contract with impunity, or to deprive the defendants of their right to enforce it." The opinion questions *Roosevelt v. Hopkins*, 33 N. Y. 81, infra, note 94.

⁹⁴ *Roosevelt v. Hopkins*, 33 N. Y. 81. In *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53, it was held that a covenant by the lessee "not to sublet the whole of said premises nor to assign this lease without (the lessor's) written consent" did not preclude a sublease of part, it appearing that at the time of the lease the lessee was in possession of the premises and "was then subletting parts thereof."

⁹⁵ In *Hargrave v. King*, 40 N. C. (5 Ired. Eq.) 430, it is said that the lessee may, without breach of the condition, associate others with himself by transferring part interests to them. But there the lease was in terms to him and those whom he might associate with him, and so the condition was evidently directed merely at a total alienation by him. In *Randol v. Scott*, 110 Cal. 590, 42 Pac. 976, it was decided that a cov-

e. Restrictions not applicable to license or lodging agreement.

The mere grant of a license to enter on or use the premises for a particular purpose is not within the prohibition of an assignment or sublease,⁹⁷ this not transferring any exclusive rights.⁹⁸ So a servant or caretaker placed in charge of the premises is not a tenant, and occupancy by him involves no violation of a provi-

enant not to assign "the lease" was not broken by an assignment of his undivided interest by one of two joint lessees. *Roosevelt v. Hopkins*, 33 N. Y. 81, seems to intimate that an assignment of a part interest by a change in the lessee firm is not a breach of a covenant against assignment.

⁹⁶ *Roosevelt v. Hopkins*, 33 N. Y. 81. In *Leduke v. Barnett*, 47 Mich. 158, 10 N. W. 182, it is held, without discussion, that the letting by the lessee of a single room in the building leased to him is not a breach of a condition not to assign or sublet. In *Boyd v. Fraternity Hall Ass'n*, 16 Ill. App. (16 Bradw.) 574, it is held that the fact that the tenant takes another into partnership and lets him into joint possession does not involve a breach of a contract against subletting. This case also decides that a covenant against subletting the whole or a part of the premises is not broken by an arrangement by which each of two joint lessees occupies a separate portion of the premises.

⁹⁷ *Lowell v. Strahan*, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422 (license to place sign on wall of premises); *Daly v. Edwardes*, 83 Law T. (N. S.) 548, and *Edwardes v. Barrington*, 85 Law T. (N. S.) 650 (license to use part of the premises, a theatre, for supplying refreshments); *Pence v. St. Paul, M. & M. R. Co.*, 28 Minn. 488, 11 N. W. 80

(license to railway company to lay tracks); *Sommers v. Reynolds*, 103 Mich. 307, 61 N. W. 501 (holding of dance by members of lessee beneficial society). To the same effect, see *Leduke v. Barnett*, 47 Mich. 158, 10 N. W. 182.

But in *Aveline v. Ridenbaugh*, 2 Idaho, 154, 9 Pac. 601, it was decided that there was a breach of a condition against subletting if the lessee, on selling wood which had been stored on the premises by the owner's permission before he made the lease, agreed that the purchaser should have till the end of the term of the lease for removing the wood. This seems to have been a license rather than a sublease, since right to leave the wood on the premises does not necessarily involve a right of possession. In *O. J. Gude Co. v. Farley*, 28 Misc. 184, 58 N. Y. Supp. 1036, it was decided that a lessee of a building, who was by his lease restricted to subletting the two upper floors only, had no right to sublet the roof.

Presumably it is on the ground that there was a license only that *Sanders v. Bryer*, 152 Mass. 141, 25 N. E. 86, 9 L. R. A. 255, is to be explained. There the court, without any discussion, decided that the fact that the lessee allowed the family with whom he lived to occupy the premises rent free was not a breach of a covenant not to underlet.

⁹⁸ See ante, § 7.

sion against subletting.⁹⁹ And there is no breach of a covenant against assignment because the lessee sells the leasehold and the business conducted thereon to a corporation, and permits the corporation to use the premises, no legal assignment being made, and he retaining possession of the premises.¹⁰⁰ Likewise, it has been held that a grant, by the lessee of a theatre, to a firm of contractors, of the exclusive license and right to use all the refreshment rooms and bars in the theatre for a term of years, did not involve a breach of a covenant not "to assign, demise, or otherwise part with this indenture, or any estate or interest therein."¹⁰¹ A stipulation against subletting obviously does not prevent a purchaser of the crop from entering to remove it.^{101a}

As before explained, a mere "letting of lodgings," the control of the rooms being retained by the owner, does not create the relation of landlord and tenant, nor is such a letting, technically speaking, a lease.¹⁰² Consequently, such a letting by a lessee does not involve the breach of a provision against subletting.¹⁰³ If, however, the exclusive possession and control of an apartment is given, the rule is different,¹⁰⁴ except in jurisdictions where the view is adopted that a subletting of part is not a breach of a stipulation against subletting.¹⁰⁵ In one case it was held that a covenant against underletting without the

⁹⁹ Vincent v. Crane, 134 Mich. 700, consideration of his sharing com-
97 N. W. 34; Presby v. Benjamin, missions.
169 N. Y. 377, 62 N. E. 430, 57 L.
R. A. 317.

¹⁰⁰ Peebles v. Crosthwaite, 13
Times Law R. 37, 198.

But in Levey v. Hockwald, 6 Cal.
App. 417, 92 Pac. 872, a covenant
against subletting was held to be
violated by the action of the lessee,
a corporation, in allowing one of
its officers to transact his private
business on the premises in consid-
eration of his payment of part of
the expenses for janitor service, gas
and telephone, and also by allowing
another person to sell steamship
tickets on part of the premises in

¹⁰¹ Edwardes v. Barrington, 85 Law
T. (N. S.) 650, afg. Daly v. Edwardes,
83 Law T. (N. S.) 548.

^{101a} Kirkpatrick v. Fonner (Neb.)
116 N. W. 779.

¹⁰² See ante, § 8.

¹⁰³ See Smith v. St. Philips'
Church, 107 N. Y. 610, 14 N. E. 825;
Leduc v. Barnett, 47 Mich. 158, 10
N. W. 182; Sanders v. Bryer, 152
Mass. 141, 25 N. E. 86, 9 L. R. A. 255;
Peaks v. Cobb, 197 Mass. 554, 83 N.
E. 1106.

¹⁰⁴ Greenslade v. Tapscott, 1
Crompt. M. & R. 55; Roe d. Dingley
v. Sales, 1 Maule & S. 297.

¹⁰⁵ See ante, notes 90-96.

special license of the lessor was not broken by the fact that a lodger was given exclusive possession of a room on the premises, it being said that "the covenant can only extend to such underletting as a license might be expected to be applied for; and whoever heard of a license from a landlord to take in a lodger."¹⁰⁶ This seems to be equivalent to saying that a license was not required by the covenant, because covenants were not usually inserted imposing such a requirement, and the decision is, it is submitted, erroneous, if the lodger was given exclusive possession as distinguished from the mere right to use the room for lodging purposes.

Receiving a boarder in the family has been held not to involve the violation of an agreement not to permit any other person to occupy the premises or a part thereof.¹⁰⁷

f. **Restrictions not applicable to transfer by operation of law.** A transfer by operation of law is not, in the absence of an express stipulation in that regard, within a provision against assignment, unless it is procured by the tenant merely for the purpose of avoiding the restriction.¹⁰⁸ Accordingly, there is no breach of the covenant or condition in the case of a sale under execution.¹⁰⁹ And it has been decided that a sale under execution is not a breach thereof, even though the execution was issued on a judgment confessed by the lessee, unless the confession was for the purpose of effecting an assignment.¹¹⁰

¹⁰⁶ Doe d. Pitt v. Laming, 4 Camp. Johns. (N. Y.) 531; Smith v. Putnam, 20 Mass. (3 Pick.) 221; Charles

¹⁰⁷ Stanton v. Allen, 32 S. C. 587, v. Byrd, 29 S. C. 544, 8 S. E. 1, 2 10 S. E. 878; Peaks v. Cobb, 197 L. R. A. 212.

Mass. 554, 83 N. E. 1106. In the ¹⁰⁹ Doe d. Mitchinson v. Carter, latter case it is said that these 8 Term R. 57, 300; Farnum v. Hefner, 79 Cal. 575, 21 Pac. 955, 12 Am. covenant not to sublet, are intended St. Rep. 174; Jackson v. Silvernail, 15 Johns. (N. Y.) 278.

to prevent the tenant from suffering or permitting a tenancy, as well ¹¹⁰ Doe d. Mitchinson v. Carter, as from actively creating it. What 8 Term R. 57, 300; Jackson v. Corliss, 7 Johns. (N. Y.) 531. So in this means is not clear.

¹⁰⁸ See Doe d. Mitchinson v. Carter, 8 Term R. 300; Farnum v. Hefner, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174; Croft v. Lumley, 6 H. L. Cas. 672; Jackson v. Corliss, 7 lessee in giving warrants of attorney

Likewise, there is no assignment within the prohibition, when the leasehold passes, with the lessee's other assets, to his assignee or trustee in bankruptcy or insolvency,¹¹¹ even though the proceedings were begun on the lessee's own petition.¹¹² That the trustee or assignee, after having thus acquired the leasehold, may sell and assign it to another, without any breach of the covenant or condition against assignment, has been occasionally decided,¹¹³ and is assumed without discussion in one case.^{114, 115}

It has in one state been decided that a transfer of the leasehold by the lessee's receiver is not within the prohibition,¹¹⁶ and this accords with the decisions, above referred to, with reference to a transfer by the trustee or assignee in bankruptcy. A decision to the contrary, however, has also been rendered.¹¹⁷

Although the mere making of a mortgage, which does not vest the legal title in the mortgagee, does not constitute an assignment within such a provision,¹¹⁸ it has been decided that, if the mortgagor's legal title is divested by foreclosure, this is to be regarded as the voluntary act of the lessee and so within such a provision.¹¹⁹

to confess judgment for debts incurred and to be incurred, though judgment was afterwards entered so as to be a charge on the leasehold, the warrants not being given with any intention of producing this result.

¹¹¹ *Crusoe v. Bugby*, 3 Wils. 234; *Doe d. Goodbehere v. Bevan*, 13 Maule & S. 353; *Weatherall v. Geering*, 12 Ves. Jr. 504; *Doe d. Cheere v. Smith*, 5 Taunt. 795; *Allen v. Bennett*, 6 Am. Law Rev. 755, 1 Fed. Cas. No. 214; *Bemis v. Wilder*, 100 Mass. 446; *Gazlay v. Williams*, 77 C. C. A. 662, 147 Fed. 678, 7 L. R. A. (N. S.) 471; *In re Bush*, 126 Fed. 878; *In re Gose*, 3 Nat. Bankr. News & Rep. 840. Contra, *In re Breck*, 8 Ben. 93, Fed. Cas. No. 1,822 (dictum).

¹¹² *In re Riggs* [1901] 2 K. B. 16; *Bemis v. Wilder*, 100 Mass. 446.

¹¹³ *Gazlay v. Williams*, 210 U. S. 41, 52 Law Ed. 950; *afg. Id.* 77 C. C. A. 662, 147 Fed. 678, 7 L. R. A. (N. S.) 471; *Doe d. Goodbehere v. Bevan*, 3 Maule & S. 353; *Ex parte Sherman*, 1 Buck, 462. See *Doe d. Cheere v. Smith*, 5 Taunt. 795; *Winter v. Dumergue*, 14 Wkly. Rep. 281, 699.

^{114, 115} *Bemis v. Wilder*, 100 Mass. 446.

¹¹⁶ *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 715, 61 Atl. 157.

¹¹⁷ *Spencer v. Darlington*, 74 Pa. 286.

¹¹⁸ See ante, at note 88.

¹¹⁹ *West Shore R. Co. v. Wenner*, 70 N. J. Law, 233, 57 Atl. 408; *Id.*, 71 N. J. Law, 682, 60 Atl. 1134, disapproving a contrary dictum in *Riggs v. Pursell*, 66 N. Y. 193. In the New York case the breach was asserted by the purchasers in an attempt to be relieved of their pur-

An assignment for the benefit of creditors is not a transfer by operation of law and is within a stipulation against assignment.¹²⁰ But it is otherwise if the assignment is adjudged invalid under the bankrupt law.¹²¹

The taking of a leasehold, together with the reversionary interest, in the exercise of the right of eminent domain, necessarily involves a transfer by operation of law and is not within the restriction.¹²²

Though an assignment by operation of law is not otherwise within a restriction upon alienation, it may be so by express provision, as when the term is to be forfeited on the bankruptcy of the lessee or upon its sale under execution.¹²³ But a provision that the leasehold shall remain in the lessee, without being subject to sale on execution or otherwise for the payment of his debts, is apparently merely invalid.¹²⁴

It has been decided that a provision against a sale under execution or other legal process does not apply to a sale by a trustee in bankruptcy.¹²⁵

g. Effect of restriction as against executor or administrator. While the passing of the leasehold to the executor or administrator of the lessee is conceded to be by operation of law, and so not within the ordinary condition or covenant against assignment,¹²⁶ the question whether the executor or administrator is himself bound by such a provision is not clearly settled. That

chase, the lessor himself having apparently waived any rights in this regard. This case is, in *Dunlop v. Mulry*, 85 App. Div. 498, 83 N. Y. Supp. 477, 1104, regarded as establishing the rule that there is no breach of the covenant even though the mortgage is foreclosed by sale.

¹²⁰ *Holland v. Cole*, 1 Hurl. & C. 67; *Magee v. Rankin*, 29 U. C. Q. B. 257; *Medinah Temple Co. v. Curry*, 162 Ill. 441, 44 N. E. 839, 53 Am. St. Rep. 320.

¹²¹ *Doe d. Lloyd v. Powell*, 5 Barn. & C. 308; *In re Bush*, 126 Fed. 878.

¹²² *Slipper v. Tottenham & H. J. R. Co.*, L. R. 4 Eq. 112; *Baily v. De Crespigny*, L. R. Q. B. 180.

¹²³ *Roe d. Hunter v. Galliers*, 2 Term R. 133; *Doe d. Gatehouse v. Rees*, 4 Bing. N. C. 384; *Dyke v. Taylor*, 3 De Gex, F. & J. 467; *Rex v. Topping*, McClel. & Y. 544; *Platt v. Johnson*, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877.

¹²⁴ *Gray*, *Restraint on Alienation of Prop.* § 278; *Hobbs v. Smith*, 15 Ohio St. 419.

¹²⁵ *Gazlay v. Williams*, 210 U. S. 41, 52 Law. Ed. 950.

¹²⁶ *Parry v. Harbert*, 1 Dyer, 45 b; *Crusoe v. Bugby*, 3 Wils. 234, 237; *Charles v. Byrd*, 29 S. C. 544, 8 S. E. 1, 2 L. R. A. 212; 2 *Platt*, *Leases*, 251; 1 *Williams*, *Executors* (9th Ed.) 809.

he is so bound appears to be recognized in one state.¹²⁷ In England, while the executors or administrators, if named in the covenant or condition, are no doubt bound thereby,¹²⁸ it has been held that if not expressly named they may assign,¹²⁹ though there is a later *dictum* to the effect that the words "lessee" and "lessees," in this connection, include executors and administrators.¹³⁰ There are also cases to the effect that if the word "assigns" is used, executors and administrators are included, so as to prevent them from making any further assignment.¹³¹

h. Lessor's consent to alienation. Even though there is a covenant against an assignment or sublease, the lessor cannot, it would seem, after expressing his consent thereto, assert a liability or forfeiture as against the lessee for making an assignment or sublease in accordance with such consent.¹³² He would be estopped to assert a liability on account of an act which he has himself induced.

¹²⁷ See *Walker v. Wadley*, 124 Ga. 275, 52 S. E. 904.

¹²⁸ *Roe d. Gregson v. Harrison*, 2 Term R. 425; *Lloyd v. Crispe*, 5 Taunt. 249. See, also, *Doe d. Goodbehere v. Bevan*, 3 Maule & S. 357.

¹²⁹ *Anonymous*, 1 Dyer, 66 a, pl. 8; *Anonymous*, Moore, 21; *Seers v. Knoepker v. Redel*, 116 Mo. App. 62, Hind, 1 Ves. Jr. 294. See *Lee v. Lorsch*, 37 U. C. Q. B. 262.

¹³⁰ *Williamson v. Williamson*, 9 Ch. App. 729, 732, per James, L. J.

¹³¹ *More's Case*, Cro. Eliz. 26; *Thornhil v. King*, Cro. Eliz. 757; *Smalpiece v. Evans*, And. 123. See *Williams, Executors* (9th Ed.) 811. But in *Moore v. Farrand*, 1 Leon. (pt. 1) 3, there is a contrary dictum.

In *West Shore R. Co. v. Wenner*, 70 N. J. Law, 233, 57 Atl. 408, 103 Am. St. Rep. 801 (ante, note 119), it was contended that a foreclosure sale after the lessee's death under a mortgage given by the lessee was not covered by a condition of forfeiture in case the lessee or his "successors" failed to comply with a cov-

enant against assignment. The court said that the word "successors" in the covenant included executors, but that the transfer must be regarded as by the lessee himself.

¹³² *Moses v. Loomis*, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194; *Knopker v. Redel*, 116 Mo. App. 62, 92 S. W. 171; *Doe d. Henniker v. Watt*, 8 Barn. & C. 308.

In *Smith v. St. Philips' Church*, 107 N. Y. 610, 14 N. E. 825, it was decided that where, for a number of years, the lessor had received rent from the lessee, who had erected on the premises an apartment house, apartments in which were leased by him, this involved a license to him to continue making such leases in spite of a covenant in the lease not to sublet the whole or any part of the premises. The court says that the conduct of the lessor was equivalent to a consent to construe the lease as not applying to such a subleasing. But the ordinary rule is that if the language of an instru-

It is sometimes provided by the instrument of lease that the lessee shall not assign or sublet without the consent or license of the lessor,¹³³ and in such a case the lessor may arbitrarily refuse his consent without giving any reason.¹³⁴ In England there is quite frequently a modified provision of this character, as, for instance, that consent shall be necessary, but that it shall not be withheld arbitrarily. A withholding of consent from a desire to compel the lessee to sell to the lessor has been regarded as being within such a prohibition of an arbitrary withholding of consent,¹³⁵ and a like decision was rendered when consent was not to be "unreasonably withheld in the case of any respectable and responsible person."¹³⁶ But a provision of the last mentioned character was held to justify a refusal of consent to an assignment to a corporation, when its object was to obtain the premises, not for the use of the premises as contemplated by the lease, but merely as part of a transaction by which the lessees withdrew their opposition to certain legislation.¹³⁷ A stipulation that consent shall not be withheld arbitrarily or without good or sufficient reason does not preclude a withholding of consent to an assignment to one whose purpose is to use the premises in a way which might affect adversely neighboring

ment is unambiguous, and here it appeared to be so, the parties cannot give it another meaning by construction. The references in the opinion in this case to the distinction between a contract for lodgings and an ordinary lease appear to be inapplicable, since a lease of an apartment, exclusive possession of which is taken, is a technical lease. Ante, § 8.

¹³³ The consent of a superintendent of a railroad, appointed by the receiver of the lessor railroad company, was held to be a compliance with a requirement of the consent of the superintendent of the company. *Kansas City Elevator Co. v. Union Pac. R. Co.*, 3 McCrary, 463, 17 Fed. 200.

Where the lease contained a cov-

enant not to sublet without written consent, and also provided that the lessee should not use the premises for the sale of certain articles, except by written consent, a written consent to use the premises for the sale of certain other articles was held not to involve a consent to a sublease. *Farr v. Kenyon*, 20 R. I. 376, 39 Atl. 241, 39 L. R. A. 773.

¹³⁴ *Weatherall v. Geering*, 12 Ves. Jr. 504; *Hill v. Rudd*, 99 Ky. 178, 35 S. W. 270.

¹³⁵ *Lehmann v. McArthur*, L. R. 3 Eq. 746. But this was questioned in the opinion on appeal, 3 Ch. App. 496.

¹³⁶ *Bates v. Donaldson* [1896] 2 Q. B. 241.

¹³⁷ *Harrison v. Barrow-in-Furness Corp.*, 63 Law T. (N. S.) 834.

property belonging to the lessor,¹³⁸ and in such a case the lessor has been regarded as acting within his rights when, as a prerequisite to giving his consent to a sublease, he inquired the purpose for which the property was to be used by the subtenant, and stipulated for a similar covenant on the part of the sublessee requiring his, the head lessor's, consent to any assignment or sublease by the subtenant.¹³⁹ It has even been said that a refusal of consent "upon advice," without stating the grounds of the refusal, was not arbitrary.¹⁴⁰ If the consent of the lessor is, in case of such provisions as are referred to above, improperly withheld, the lessee may make the transfer without incurring any liability in damages or risk of forfeiture,¹⁴¹ but he must ask for consent, and, though consent could not properly be withheld, yet, if he makes the transfer without asking for it, the lease may be forfeited under a condition of forfeiture in the lease.¹⁴²

Where there was a condition against assigning, underletting, or otherwise parting with possession, without the lessor's consent, a consent to an assignment by the lessee was held to authorize a transfer of possession to the proposed assignee, previous to the making of the assignment.¹⁴³

When the lease provides that a consent or license to assign shall be in writing, a verbal license, it has been decided in England, is not sufficient.¹⁴⁴ In this country, however, a different view has been taken in the case of the requirement of a written consent to a subletting, presumably on the theory that the requirement of a writing is waived by the verbal license,¹⁴⁵ and it

¹³⁸ *Bridewell Hospital v. Fawkner*, 8 Times Law R. 637.

¹³⁹ *In re Spark's Lease* [1905] 1 Ch. 456.

¹⁴⁰ *Treloar v. Bigge*, L. R. 9 Exch. 151.

¹⁴¹ *Treloar v. Bigge*, L. R. 9 Exch. 151; *Hyde v. Warden*, 3 Exch. Div. 72; *Sear v. House Prop. & Inv. Soc.*, 16 Ch. Div. 387; *Goodwin v. Saturday*, 16 Times Law R. 437.

¹⁴² *Barrow v. Isaacs* [1891] 1 Q. B. 417; *Eastern Tel. Co. v. Dent* [1899] 1 Q. B. 835.

¹⁴³ *West v. Dobb*, L. R. 4 Q. B. 634, L. R. 5 Q. B. 460.

¹⁴⁴ *Roe d. Gregson v. Harrison*, 2 Term R. 425; *Richardson v. Evans*, 3 Madd. 218. See, also, *Willmott v. Barber*, 15 Ch. Div. 96, 105.

¹⁴⁵ *Livingston County Tel. Co. v. Herzberg*, 118 Ill. App. 599; *Welsbrod v. Dembosky*, 25 Misc. 485, 55 N. Y. Supp. 1; *Chesapeake Brew. Co. v. Mt. Vernon Brew. Co.*, 107 Md. 528, 68 Atl. 1046 (semble). But see an implication to the contrary in *Indianapolis Mfg. & Carpenters' Union v. Cleveland, C. C. & I. R. Co.*, 45 Ind. 281. In *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N. W. 47, 10 L. R. A. 80, it is said that "if the lease

has also been held that a waiver occurs if the lessor acquiesces in the assignment and fails "seasonably to object thereto."¹⁴⁶ Even in England it is recognized that if the lessor, by his consent to an assignment or sublease, induces the assignee or sublessee, in ignorance of the requirement of a written consent, to make expenditures, he is estopped to deny the validity of his consent.¹⁴⁷ Apart from circumstances involving an estoppel, it would seem that a waiver of the contract requirement of a written license, being in effect itself a contract, would be valid only if supported by a consideration.¹⁴⁸ It has in one case been said, without discussion, that an assent to an assignment of a lease under seal is valid, "as between the parties," although not itself under seal.¹⁴⁹ Such a consent would, it is conceived, be sufficient for every purpose, in the absence of a specific requirement of a seal. That the lease is under seal is immaterial.

It has been held that a landlord, asserting that an assignment was without his consent, has the burden of showing the lack of consent.¹⁵⁰ On the other hand, it has been decided that when the lease provided that the premises should not be assigned or sublet without the lessor's consent, expressed in writing on the back of the instrument of lease, the production of the instrument without such indorsement constituted *prima facie* evidence of the lack of consent.¹⁵¹

provides that the license shall be in writing, an oral license is not good," but that the requirement of written consent "may be orally waived." Such a distinction between an oral license and an oral waiver of a requirement of a written license is in its nature a fine one. In *Benson v. Suarez*, 43 Barb. (N. Y.) 408, 19 Abb. Pr. 61, 28 How. Pr. 511, it was decided that one to whom premises were leased by a lessee with the landlord's oral consent, though the lease required a written consent, was not, on entering, a wrongdoer, so as to be unable to recover for injury to his property on the premises by the fall of an unsafe building on adjoining premises belonging to the landlord. But this might be based on the theory that the person so entering was in as a licensee rather than as a sublessee.

¹⁴⁶ *Warner v. Cochrane* (C. C. A.) 128 Fed. 553, citing *Kansas City Elevator Co. v. Union Pac. R. Co.*, 3 McCrary, 463, 17 Fed. 200.

¹⁴⁷ See *Richardson v. Evans*, 3 Madd. 218; *Willmott v. Barber*, 15 Ch. Div. 96, 105.

¹⁴⁸ See *Spota v. Hayes*, 36 Misc. 532, 73 N. Y. Supp. 959.

¹⁴⁹ *Stillman v. Harvey*, 47 Conn. 26.

¹⁵⁰ *Leduke v. Barnett*, 47 Mich. 158, 10 N. W. 182.

¹⁵¹ *Berryhill v. Healey*, 89 Minn. 444, 95 N. W. 314.

i. **Restriction as covenant running with the land.** The question how far covenants not to assign or sublet are covenants running with the land, so as to bind assignees of the lessee, is apparently not entirely settled. In England it has been clearly decided that a covenant not to assign without license, assigns being named in the covenant, is binding on an assignee of the lessee, as being a covenant which touches or concerns the land.¹⁵² But a question has been made whether it would so operate in the absence of the word "assigns" in the covenant.¹⁵³ It being conceded that it passes when "assigns" are named, it is not clear why it should not do so when they are not named.¹⁵⁴ It has been well said in a modern English textbook¹⁵⁵ that "the covenant not to assign without license is assuredly not one relating to a thing not *in esse* at the time of the demise, so as to come within the latter portion of the first resolution in *Spencer's Case*.¹⁵⁶ It is either a covenant which touches and concerns the land, so as to bind assigns, whether named or not, or it is a covenant not touching and concerning the land at all, so as, apart from the doctrine of notice, not to bind assigns, even though named." There are to be found suggestions to the effect that the covenant itself, without mention of assigns, shows an intention that the cov-

¹⁵² *Williams v. Earle*, L. R. 3 Q. B. 739; *Varley v. Coppard*, L. R. 7 Q. B. 505; *McEacharn v. Colton*, [1902] App. Cas. 104. See 7 Am. Law Rev. 261.

In *West v. Dobb*, 38 Law J. Q. B. 291, L. R. 4 Q. B. 637, note, Lord Blackburn is reported to have said

¹⁵³ In *Philpot v. Hoare*, 2 Atk. 219, Lord Hardwicke said that "the covenant in this lease not to assign does not run with the land to the assignee, because assignees are not bound by name in the covenant."

But according to another report of the same case (2 Amb. 480), there was no reference to the failure to mention assigns. In *Lynde v. Hough*, 27 Barb. (N. Y.) 415, it is said that a covenant not to underlet does not bind the lessee's assignee in the absence of the word "assigns."

The statement, however, seems to be based on a misunderstanding of the rule in *Dumfries v. B. 739*; *Varley v. Coppard*, L. R. 7 Q. B. 505; *McEacharn v. Colton*, [1902] App. Cas. 104. See 7 Am. Law Rev. 261.

¹⁵⁴ In *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79, it is broadly stated, *obiter*, by Lord Russell of Killowen, that a covenant or condition not to assign runs with the land.

¹⁵⁵ 1 Smith's Leading Cases (11th Ed.) at p. 73, notes to *Spencer's Case*.

¹⁵⁶ See § 149 b (4), ante.

enant shall not run as against assigns.¹⁵⁷ But as to this it may be said that, while a stipulation against assignment, without words expressly making it binding upon assigns, may show that the covenantee did not anticipate any necessity of its application to an assignment by an assignee, it surely does not show an intention that, if it should be violated by the lessee, the assignee should have thereafter the unrestricted right to assign as he chose.

A covenant against assignment, even though in terms extending to assigns, does not apply to the act of a sublessee in parting with his interest, since he is not an assign.¹⁵⁸

It has been decided in one state that, even in spite of a covenant not to assign without the lessor's consent, expressly made binding on assigns, an assignment may be made by an assignee, to the original lessee, without obtaining consent, since the covenant was evidently not intended to apply to such a case.¹⁵⁹ But this view has been expressly disapproved in an English case, on the ground that the fact that the lessee was at one time satisfactory as tenant to the lessor does not show him to be so satisfactory at the time of the reassignment, when his financial circumstances may have entirely changed.¹⁶⁰

A condition not to assign, although in a lease to a man "and his assigns," is, it has been decided, not void for repugnancy, the word "assigns" applying to such assigns as there may lawfully be by license or by operation of law.^{161,162}

¹⁵⁷ In *Bally v. Wells*, 3 Wils. 25, Mass. 431; *Donaldson v. Strong*, 195 Mass. 429, 81 N. E. 267.

not to assign generally must be personal and collateral, and can only bind the lessee himself. There ¹⁶⁰ *McEacharn v. Colton* [1902] App. Cas. 104.

never can be any assignee"; and in ^{161, 162} *Weatherall v. Geering*, 12 Ves. Jr. 504, 511. See *Dennis v. Smith, Landl. & Ten.* (3d Ed.) p. 16, *Loving, Hardres*, 427.

note, it is said that "a general covenant not to assign in which assigns are not mentioned does not run with the land, for it obviously contemplates that the land shall not pass into the possession of the assignee."

¹⁵⁸ *Villiers v. Oldcorn*, 20 Times Law R. 11.

¹⁵⁹ *McCormick v. Stowell*, 138

In *Shields v. Russell*, 66 Hun, 226, 20 N. Y. Supp. 909, *afid.* 142 N. Y. 290, 36 N. E. 1061, a lease, which in connection with a previous conveyance constituted in effect a mortgage from the lessee to the lessor, provided for a conveyance of the property upon the payment of a certain sum (the sum secured) to the lessee, "his heirs, administra-

j. **Effect of breach of stipulation against alienation—(1) Covenants and conditions.** The effect of a breach of a stipulation against assignment or subletting will differ accordingly as there is merely a covenant to that effect, or there is a provision for re-entry or forfeiture in case of such prohibited transfer. Considering first the case of a covenant to this effect, it is evident that, in view of the nature of a covenant, its breach can give the landlord merely a right to recover damages, and that it gives him no right to terminate the lease.¹⁶³ In order to create a condition, that is, a right of re-entry or forfeiture, as distinct from a covenant, a mere stipulation is not sufficient, but an intention to create a condition must plainly appear.¹⁶⁴

If the lease contains a condition against assignment and not merely a covenant to that effect, the lessor has, in case of breach, the right to enforce it, as any other condition, by re-entry and termination of the lessee's interest.¹⁶⁵ But though the landlord may terminate the leasehold interest upon a breach of a condition against assignment or subletting, the mere breach of the condition, like the breach of any other condition, does not have such effect in the absence of any action by the landlord.¹⁶⁶

tors and assigns," and also contained a covenant against an assignment of the lease, and it was held that the assignee could enforce the provision for a conveyance. *Dutch.*) 285; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391.

This decision, however, was based on the ground that otherwise the right of redemption would be lost, rather than on the ground that the presence of the word "assigns" nullified the covenant against assignment. ¹⁶⁴ *Shaw v. Coffin*, 14 C. B. (N. S.) 372; *Crawley v. Price*, L. R. 10 Q. B. 302; *Hague v. Ahrens* (C. C. A.) 53 Fed. 58. See post, § 194 b.

Though a condition against alienation is valid if imposed upon the lessee, a lessee cannot, on assigning, impose a condition subjecting the leasehold to forfeiture in case of an assignment by the assignee, this being an attempt to create a condition against alienation upon the transfer of the entire interest in personalty, which is as invalid as if sought to be imposed on the conveyance of a fee simple interest.

¹⁶³ *Paul v. Nurse*, 8 Barn. & C. 486; *In re Pennewell*, 55 C. C. A. 571, 119 Fed. 139; *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433; *Shumway v. Collins*, 72 Mass. (6 Gray) 227; *Chautauqua Assembly v. Alling*, 46 Hun (N. Y.) 582; *Kew v. Trainor*, 150 Ill. 150, 37 N. E. 223; *Eldredge v. Bell*, 64 Iowa, 125, 19 N. W. 879; *Den d. Bockover v. Post*, 25 N. J. Law (1 See Co. Litt. 223 a; *Gray, Restraints on Alienation*, § 27.

¹⁶⁵ See post, § 194 e (4).

¹⁶⁶ *Adams v. Shirk*, 43 C. C. A.

(2) **Validity of alienation.** In view of the cases cited in the course of the foregoing remarks, as to the remedy for breach of a covenant or condition not to assign or sublet, and of the fact that even the breach of a condition to this effect does not *ipso facto* terminate the leasehold interest, it would necessarily seem that one to whom the lessee has assigned or sublet, in violation of the stipulation in the lease, should stand in the same position as if the assignment or sublease had not been prohibited. Accordingly, it is generally assumed that a prohibited assignment, if not objected to by the landlord, vests the leasehold in the assignee.¹⁶⁷ It has been decided that the assignor cannot assert such violation of a stipulation against assignment as a defense to an action by the assignee for possession,¹⁶⁸ and the assignment has been regarded as valid for the purpose of ejectment against a third person.¹⁶⁹ It has also been decided that the assignee cannot repudiate liability to the landlord on a covenant for rent or on other covenants running with the land, because the assignment was thus wrongfully made,¹⁷⁰ though in one state a different view appears to have been taken as to the assignee's liability on a covenant in such case.¹⁷¹ So the fact that the making of a sublease involves the breach of a covenant is no defense to an action by the sublessor for use and occupa-

407, 104 Fed. 54; *Smith v. Goodman*, *Blake v. Sanderson*, 67 Mass. (1 149 Ill. 75, 36 N. E. 621; *Shattuck Gray*) 332; *Sayles v. Kerr*, 4 App. v. *Lovejoy*, 74 Mass. (8 Gray) 204; Div. 150, 38 N. Y. Supp. 880; *Oil Meyer Bros.' Assignee v. Gaertner*, *Creek & C. B. Petroleum Co. v.* 106 Ky. 481, 50 S. W. 971, 45 L. R. *Stanton Oil Co.*, 23 Pa. Co. Ct. R. A. 513. 153.

¹⁶⁷ See cases cited ante, note 163.

¹⁶⁸ *Bemis v. Wilder*, 100 Mass. 446; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391.

¹⁶⁹ *Betts v. Dick*, 1 Pen. (Del.) 268; *Hague v. Ahrens*, 3 C. C. A. 426, 53 Fed. 58. Also for the purpose of a condemnation proceeding. *Putney Bros. Co. v. Milwaukee Light, Heat & Trac. Co.*, 134 Wis. 379, 114 N. W. 809.

¹⁷⁰ *Sexton v. Chicago Storage Co.*, 74 Mo. App. 543).
129 Ill. 318, 16 Am. St. Rep. 274;

¹⁷¹ In Missouri it has been decided by the intermediate appellate court that the assignee might defend against a claim for rent or taxes, and presumably against any other claim by the landlord, on the ground that the assignment was prohibited (*Hynes v. Ecker*, 34 Mo. App. 650), unless the assignment was in some way ratified by the landlord (*Tylers' Estate v. Giesler*,

tion,¹⁷² nor does it entitle the sublessor to turn the sublessee out of possession.¹⁷³

On the same principle the assignee would, it seems, be entitled to the benefit of a covenant by the lessor, although the assignment to him was prohibited by the lease, and that this is so has been assumed in one state.¹⁷⁴ In that same state, however, as well as in another, an assignee has been, under such circumstances, denied the benefit of a covenant by the lessor to renew the lease.¹⁷⁵ These latter cases do not discuss the question, and, conceding the validity of an assignment made contrary to a covenant or condition of the lease, these cases can, it would appear, be based only on the theory that the covenant for renewal is to be construed with reference to the covenant against assignment, and as consequently providing for renewal only in behalf of the lessee himself, or in behalf of an assignee who has become such in accordance with the terms of the lease.

In one state it has been decided that one to whom an assignment is made in violation of a stipulation of the lease has no interest which a court of equity will protect,¹⁷⁶ and in another that, under certain circumstances, the lessor may obtain a cancellation of the assignment.¹⁷⁷ There are also occasional judicial intimations that an assignment in violation of a covenant is not effective as an assignment, without any direct adjudication to that effect.¹⁷⁸ Such a view is not in accord with the cases gener-

¹⁷² *Fordyce v. Young*, 39 Ark. 135. see instead of to the assignee to

¹⁷³ *Broadway Bldg. Co. v. Myers*, avoid such result.

49 Misc. 531, 97 N. Y. Supp. 977.

¹⁷⁶ *Rees v. Andrews*, 169 Mo. 177,

¹⁷⁴ *Dierig v. Callahan*, 35 Misc. 30, 69 S. W. 4.

70 N. Y. Supp. 210.

¹⁷⁷ It was decided that if the prop-

¹⁷⁵ *Drummond v. Fisher*, 43 N. Y. St. Rep. 135, 16 N. Y. Supp. 867; in a receiver, the lessor could not Id., 45 N. Y. St. Rep. 283, 18 N. Y. Supp. 142; *Emery v. Hill*, 67 N. H. 330, 39 Atl. 266; *Upton v. Hosmer*, 70 N. H. 493, 49 Atl. 96. That this is so seems to be assumed in *Warner v. Cochrane*, 63 C. C. A. 207, 128 Fed. 553. In *Emery v. Hill*, supra, it is said that the assignee is

erty of the lessee had become vested in a receiver, the lessor could not maintain a summary proceeding for breach of the condition not to alien, but that he could intervene in the receivership proceeding to obtain a cancellation of the conveyance. *Gunning v. Sorg*, 113 Ill. App. 332; Id., 214 Ill. 616, 73 N. E. 870. ¹⁷⁸ See *Springer v. Chicago Real Estate, Loan & Trust Co.*, 202 Ill. 17, 66 N. E. 850; *Reid v. John F. Weissner Brew. Co.*, 88 Md. 234, 40 Atl.

ally, and is, it is submitted, erroneous on principle, as giving to a mere contract the effect of divesting a right of an essentially proprietary character, that is, the power of alienation. Furthermore, if an assignment in violation of a covenant not to assign is invalid, the introduction of a proviso for forfeiture on breach of the covenant is absolutely unnecessary for the protection of the lessor, and it might perhaps be questioned whether the courts would ordinarily enforce a forfeiture for the doing of an absolutely nugatory act.

(3) **Waiver of breach.** As stated in another place,¹⁷⁹ the right to take advantage of the breach of a condition is waived by a course of action on the part of the landlord which recognizes the relation of landlord and tenant as still existing, and this principle applies in full force in the case of a breach of condition against assignment or subletting. Accordingly, if the landlord, knowing of the breach, accepts rent accruing after the breach, he thereby loses the right to enforce a forfeiture.¹⁸⁰

377. So in *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684, while it is properly said that breach of such a condition does not render the assignment void but merely voidable at the lessor's option, the statement therein that, if consent is subsequently obtained, the title passes to the assignee as of the time of the assignment, suggests that title would not pass in the absence of consent. And in *Porter v. Merrill*, 124 Mass. 534, the court seems to assume that the right of the assignee of a lease containing a covenant not to assign to sue for rent one to whom his assignor had sublet arose from the fact that the original lessor afterwards recognized the assignee as tenant.

In *Adams v. Shirk*, 43 C. C. A. 407, 104 Fed. 54; *Id.*, 55 C. C. A. 25, 117 Fed. 801, it appears to be thought that the assignment would have been invalid had the landlord not waived all objection thereto. But there

the question was merely whether one who took an assignment with the landlord's consent, expressly assuming the covenants on the part of the lessee, could divest himself of liability under such assumption by an assignment to another without consent. He could not so divest himself of liability, it is submitted, even by an assignment with consent (post, § 158 n [b b]). In *Shirk v. Adams* (C. C. A.) 130 Fed. 441, it was held that an assignment in violation of a covenant was sufficient to invalidate insurance subsequently obtained by the assignor, conditioned upon his having good title.

¹⁷⁹ See post, § 194 i (1).

¹⁸⁰ *Goodright v. Davids*, Cowp. 803; *Webster v. Nichols*, 104 Ill. 160; *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433; *Crouch v. Wabash, St. L. & P. R. Co.*, 22 Mo. App. 315; *Murray v. Harway*, 56 N. Y. 337; *Clark v. Greenfield*, 13 Misc. 124, 34

It has in England been decided that, when there is a covenant against assigning or demising the premises or permitting any person other than the lessee to occupy them, with a right of forfeiture on breach, and the lessee subleases, the action of the landlord in permitting the sublessee to remain is not a continuing breach of the covenant not to sublet,¹⁸¹ nor of that as to occupancy,¹⁸² and that, consequently, after an act involving a waiver of the original breach, a forfeiture cannot be asserted on account of the sublessee's continued occupancy. But there is a case in this country which seems to involve an assertion that a single assignment constitutes a continuing breach, so that the subsequent acceptance of rent does not involve a waiver of the right to enforce a forfeiture of the balance of the term.¹⁸³

In one state the waiver of the breach of a condition against assignment, that is, the failure to enforce a forfeiture on account of such breach, has been regarded as precluding the enforcement of a forfeiture on account of a subsequent breach.¹⁸⁴

(4) **Damages for breach.** The measure of damages for the breach of a covenant not to assign or sublet is, it seems, generally speaking, the amount of loss to which the landlord is subjected by the assignment.¹⁸⁵ And one who sublet in violation of a covenant, knowing at the time of subletting that the sublessee in-

N. Y. Supp. 1; *Id.*, 67 N. Y. St. Rep. 857, 34 N. Y. Supp. 1; *Porter v. Merrill*, 124 Mass. 534; *Ireland v. Nichols*, 46 N. Y. 413; *Smith v. Edgewood Casino Club*, 19 R. I. 628, 35 Atl. 884, 36 Atl. 128, 35 L. R. A. 790.

the effect of the restriction in the consent given. *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407.

¹⁸¹ *Goodright v. Davids*, Cowp. 803.

The record of the assignment does not charge the lessor with notice thereof so as to render his subsequent acceptance of rent a waiver of the breach. *Upton v. Hosmer*, 70 N. H. 493, 49 Atl. 96.

¹⁸² *Walrond v. Hawkins*, L. R. 10 C. P. 342.

¹⁸³ *Walker v. Wadley*, 124 Ga. 275, 52 S. E. 904.

¹⁸⁴ See post, note 201.

¹⁸⁵ *Williams v. Earle*, L. R. 3 Q. B. 739.

Acceptance of rent from the subtenants was held to have the effect named, although the breach of condition consisted in the fact that the lessee, after receiving the landlord's consent to a sublease for a certain period, inserted a covenant for renewal in the sublease so as to avoid the lessor's right to sue the lessee for breach of covenant not to assign is not affected by the fact that he has himself accepted an assignment from the assignee. *Hazlehurst v. Kendrick*, 6 Serg. & R. (Pa.) 446.

tended to conduct a dangerous trade on the premises, was held liable, under the covenant, for the injury caused by a fire resulting from such dangerous trade.¹⁸⁶ And the sublessor has been held liable for extra insurance which the head landlord was compelled to pay on account of the purpose for which the sublease was made.¹⁸⁷ On the same principle, the landlord could presumably recover from the assignor or sublessor for any loss resulting from acts of waste on the part of the assignee or sublessee, though he could also recover directly for such acts from the latter, if pecuniarily responsible. Whether the landlord could recover, under the covenant, for any loss resulting from the insufficiency of the chattels of the assignee or sublessee, as compared with those of the lessee, to satisfy his claim for rent on a distress or by the enforcement of a landlord's lien, seems questionable, such loss being somewhat speculative in its nature.

Usually, since the original lessee remains, even after assignment, liable on the express stipulations of the lease,¹⁸⁸ an assignment or subletting by him in violation of the covenant will not support a claim for substantial damages, however disagreeable and unsatisfactory to the landlord the occupancy by the transferee may be. But the case is different if the breach is by an assignee of the original lessee, since such assignee is no longer liable,¹⁸⁹ and in assessing the damages in such case, it has been held, the court will consider in how much worse a position the landlord will be, both in respect of breaches which have already occurred, and future breaches, than he would have been in if the covenant had not been broken.¹⁹⁰

¹⁸⁶ *Lepla v. Rogers* [1893] 1 Q. B. 31. the landlord could recover as against him the rent which his assignee was unable to pay, and also the cost of repairs which such second assignee was unable to pay.

¹⁸⁷ *Rouiaine v. Simpson*, 84 N. Y. Supp. 875.

¹⁸⁸ See post, § 157 a (2).

¹⁸⁹ See post, § 158 a (2) n.

¹⁹⁰ *Williams v. Earle*, L. R. 3 Q. B. 739. In *Munro v. Waller*, 28 Ont. 574, it was held that while the lessor could recover the amount of his loss by reason of the pecuniary irresponsibility of the second assignee, any lack of such responsibility upon the part of the first assignee must be considered in fixing the amount.

In *Langton v. Henson*, 92 Law T. (N. S.) 805, it was held that upon an assignment by an assignee in violation of the covenant, this relieving such assignee from liability for rent and on a covenant for repairs, In *Patching v. Smith*, 28 Ont. 201,

k. **Injunction against breach.** It has been decided that equity will interpose by injunction to prevent an assignment in violation of a covenant or condition,¹⁹¹ and an injunction has been issued, even after the making of a prohibited sublease, to prevent the continuance of the sublessee's enjoyment of the premises.¹⁹² An injunction to restrain the continuance of the occupation of the sublessee has, on the other hand, been refused, when the lessor had, by the acceptance of rent, waived the right of forfeiture, thus relinquishing his remedy at law.¹⁹³

1. **The rule in *Dumpor's case*.** By "the rule in *Dumpor's case*,"¹⁹⁴ if the landlord gives a license to the tenant for the breach of a condition against assignment, or if the condition be not to assign without license, and a license is once given to assign, the condition is wholly destroyed. This rule, based as it is on the technical theory of the entirety and unapportionability of a condition, though frequently the subject of criticism,¹⁹⁵ has been

it was decided that the lessor could Casino Club, 19 R. I. 628, 35 Atl. 884, recover as damages the amount of 36 Atl. 128, 35 L. R. A. 790. an installment of rent which he had 194 4 Coke, 119 b, 1 Smith's Lead- lost by reason of an assignment to ing Cases (11th Ed.) 32. a man of straw.

191 *McEacharn v. Cotton* [1902] in *Brummell v. Macpherson*, 14 Ves. App. Cas. 104. And that an injunc- Jr. 173, as "extraordinary." And tion might issue for this purpose is see, to the same effect, *Doe d. Bos-* suggested in *Knoepker v. Redel*, 116 cawen v. Bliss, 4 Taunt. 736; *Dakin* Mo. App. 62, 92 S. W. 171. v. Williams, 17 Wend. (N. Y.) 447.

192 *Godfrey v. Black*, 39 Kan. 193, 22 Wend. 201; *Kew v. Trainor*, 150 17 Pac. 849, 7 Am. St. Rep. 544, Ill. 150, 37 N. E. 223. So it is where the decision was based partly spoken of by Mr. Joshua Williams on the fact that the sublease was (Real Prop. [4th Am. Ed.] p. 262) of a portion of a hotel office for use as one of those "artificial and tech- nical rules" founded "on the mis- for a real estate business, and that chievous scholastic logic then rife a continuance of such use was cal- in the courts of law," and owing culated to affect the reputation and value of the hotel property. But their origin to an "antiquated sys- tem of endless distinctions without solid differences." The unsound- ness of the decision in *Dumpor's* the decision was also based on the Case, both on reason and authority, ground that presumably a continu- is stated at length, with great co- ance of the lease is to the advantage gency and learning, by Mr. Joseph of the lessor, and that consequently Willard in an article in 7 Am. Law a re-entry would not give adequate redress. Rev. 617.

193 *Gillian v. Norton*, 33 How. Pr. Willard in an article in 7 Am. Law (N. Y.) 373; *Smith v. Edgewood* Rev. 617.

followed in several cases.¹⁹⁶ In England it has now been abolished by statute.¹⁹⁷

The only method of avoiding the effect of the rule is, it is said, for the lessor, on giving the license to assign, to create a fresh provision for re-entry on any future breach,¹⁹⁸ and the mere insertion in such license of a provision that the assignee shall hold subject to the performance of the covenants and conditions contained in the original lease is not, it appears, sufficient for this purpose.¹⁹⁹

There are *dicta* to the effect that the rule applies only to the case of a license before breach, and that the mere waiver of the breach, after it has occurred, does not destroy the condition.²⁰⁰ In one state, however, the rule has been applied though there was merely a waiver of a preceding breach by the acceptance of rent.²⁰¹ There are also decisions to the effect that the waiver of a previous breach of a condition against subletting does not destroy the condition,²⁰² but some of these decisions are based

¹⁹⁶ *Brummell v. Macpherson*, 14 Ves. Jr. 173; *Pennock v. Lyons*, 118 Mass. 92; *Murray v. Harway*, 56 N. Y. 337. It has been suggested that the American cases might be sustained, without reference to the rule of *Dumpor's case*, on the ground that the condition did not, in them, expressly bind the lessee's assigns. See 1 *Smith's Leading Cases* (9th Am. Ed. Boston) 138. But in neither of these cases is any such distinction suggested.

¹⁹⁷ St. 22 & 23 Vict. c. 35; 23 & 24 Vict. c. 28.

¹⁹⁸ *Williams, Real Prop.* (4th Am. Ed.) 381.

¹⁹⁹ 2 *Preston, Conveyancing*, 198. But in *Kew v. Trainor*, 150 Ill. 150, 37 N. E. 223; *Springer v. Chicago Real Estate Loan & Trust Co.*, 202 Ill. 17, 66 N. E. 850, such a provision is regarded as sufficient. The first case questions the rule itself.

²⁰⁰ In *Doe d. Boscawen v. Bliss*, 4 Taunt. 735, it is said by Gibbs, J.,

that a mere "tolerance" of a breach, that is, a failure to re-enter therefor, is not "tantamount to a license," and Sir James Mansfield seemed to be of the same opinion. This was, however, a case of underletting and not of assignment. In *Doe d. Griffith v. Pritchard*, 5 Barn. & Adol. 765, Taunton, J., says that "there is a difference between waiving the condition, as in *Dumpor's Case*, and waiving the particular breach. The courts in modern times have been inclined to consider the breach overlooked rather than the condition as waived." See, also, *Farr v. Kenyon*, 20 R. I. 376, 39 Atl. 241, 39 L. R. A. 773; *Seaver v. Coburn*, 64 Mass. (10 Cush.) 324.

²⁰¹ *Murray v. Harway*, 56 N. Y. 337; *Koehler v. Brady*, 22 App. Div. 624, 47 N. Y. Supp. 984.

²⁰² *Doe d. Boscawen v. Bliss*, 4 Taunt. 735; *Fidelity Trust Co. v. Kohn*, 27 Pa. Super. Ct. 374; *McKillop's Ex'r v. Darracott*, 13 Grat.

not so much on the distinction between a license and a waiver as upon the theory that the rule never applies to a condition against subletting because this, unlike one against assignment, permits of a "recurrent breach," that is, the fact that the lessee has been guilty of one breach of a condition against subletting does not necessarily preclude him from being guilty of another.²⁰³ But, similarly, the fact that the lessee has been guilty of one breach of a condition against assignment does not, in the nature of things, prevent a subsequent breach by his assignee, and the point of the distinction asserted, between conditions against subletting and those against assignment, is, to say the least, somewhat obscure.²⁰⁴

Though, under the rule, the landlord's consent to one assignment precludes a forfeiture for the making of another assignment, it does not, it has been held, preclude a forfeiture for the making of a subsequent sublease.²⁰⁵

The reasons, such as they are, on which the rule in *Dumpor's* case is based, seem to have no application to covenants, as distinct from conditions, so as to nullify a covenant not to assign merely because there has been an assignment with consent, since a covenant is apportionable, and this view has occasionally been asserted.²⁰⁶ In at least one case, however, the rule has been applied in the case of a covenant.²⁰⁷

(Va.) 278; *Bleecker v. Smith*, 13 205 *West Shore R. Co. v. Werner*,
Wend. (N. Y.) 530; *Farr v. Kenyon*, 70 N. J. Law, 233, 57 Atl. 408, 103
20 R. I. 376, 39 Atl. 241, 39 L. R. A. Am. St. Rep. 801.

773; *Seaver v. Coburn*, 64 Mass. (10 206 *Dakin v. Williams*, 17 Wend.
Cush.) 324. And see per *Patteson*, (N. Y.) 447, 22 Wend. 201; *Gannett*
J., in *Doe d. Griffith v. Pritchard*, 5 v. *Albree*, 103 Mass. 372 (semble);
Barn. & Adol. 765. *Paul v. Nurse*, 8 Barn. & C. 486, per

²⁰³ See American notes to 1 *Bayley, J.* See to the same effect
Smith's Leading Cases (8th Ed.) 2 *Platt on Leases*, 270 et seq., which
108, 110. refers to and discusses *Thornhill*

In *Farr v. Kenyon*, 20 R. I. 376, 39 v. *King*, Cro. Eliz. 757; *Philpot v.*
Atl. 241, 39 L. R. A. 773, it was held *Hoare*, 2 Atk. 219, 2 Amb. 480; *Stow-*
that the lessor was not estopped to *ell v. Robinson*, 3 Bing. N. C. 928;
assert a breach of a condition *Macher v. Foundling Hospital*, 1
against subletting by the fact that *Ves. & B.* 191, as tending to support
he was estopped to assert the inva- this view.
lidity of a previous breach of the
condition.

²⁰⁴ See 7 Am. Law Rev. at p. 639. ²⁰⁷ *Reid v. John F. Weissner Brew.*
Co., 88 Md. 234, 40 Atl. 877. *Siefke*
v. Koch, 31 How. Pr. (N. Y.) 333,

m. Stipulation against parting with possession. The instrument of lease occasionally contains a covenant or condition, not only against assignment or subletting, but also against "parting with the possession" or "permitting another to occupy," or similar expressions are used. Such a stipulation has, perhaps, a somewhat more extended meaning than one against subletting.

In one case, where the covenant was not to suffer any part of the land to be occupied by any other person, the act of the lessee in allowing other persons to occupy parts of the land for the purpose of raising a certain crop, although this was in accordance with the custom of the country, was regarded as a breach of such a covenant.²⁰⁸ It has been held that, where there was a covenant against subletting and also one against parting with the possession, and there was a breach of the covenant against subletting, the action of the lessee in allowing the sublessee to remain in possession did not involve a continuing breach of the covenant against parting with the possession.²⁰⁹

n. Statutory restrictions. In some of the states there are statutory restrictions upon the right of a lessee to assign or sublet. Sometimes such a restriction takes the form of an absolute prohibition to assign or sublet without the lessor's assent,²¹⁰ and

seems to be to the same effect. **And** as entire." There appears to have been no language in the lease calculated to create a condition. The court, however, seemed to think that the rule was not applicable, partly because the lease required a written assent and the actual assent was oral, and partly because the assent was to a subletting to a single person only, a "restrictive waiver of the condition." If this means that the rule in *Dumpor's Case* does not apply when the license is in terms given to assign to a party named, it is contrary to *Brummell v. Macpherson*, 14 Ves. Jr. 173.

In *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N. W. 47, 10 L. R. A. 80, the court, after referring to a "covenant" not to assign or underlet, says that "a license once given removes the restriction forever, as the condition is treated

²⁰⁸ *Greenslade v. Tapscott*, 1 Crompt. M. & R. 55.

²⁰⁹ *Walrond v. Hawkins*, L. R. 10 C. P. 342.

²¹⁰ Ga. Code 1895, § 3115 (The tenant has only a usufruct which he

sometimes the statute prohibits only lessees for a short time, such as for one or two years, from disposing of their interests.²¹¹ A statutory prohibition of subletting has been construed as prohibiting an assignment.²¹² On the other hand, a statutory prohibition of an assignment has been said not to apply to a subletting,²¹³ though it does prohibit a sale of the leasehold under execution.²¹⁴

The effect of an assignment or sublease in violation of the statute differs in different states. In some it is expressly provided that it shall be a cause for forfeiture of the rights under the original lease,²¹⁵ though even in such a state the transfer has been held to be valid as between the parties thereto.²¹⁶ In another jurisdiction the assignment or sublease is, it appears, merely inoperative as against the landlord, who may oust the assignee or sublessee at pleasure,²¹⁷ though the landlord has the right to elect to treat the sublessee as his own tenant.²¹⁸

cannot convey except by the landlord's consent and which is not subject to levy and sale). *Tex. Rev. St.* 1895, art. 3250 (Persons "renting" lands or tenements shall not "rent" or lease said lands or tenements during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney). See *Sealy v. Kuttner*, 41 *Ga.* 594; *Forrest v. Durnell*, 86 *Tex.* 647, 26 *S. W.* 481.

²¹¹ See *Kansas Gen. St.* 1905, § 4061; *Kentucky St.* 1903, § 2292; *Missouri Rev. St.* 1899, §§ 4107, 4108.

In *Louisville Gunning System v. Parks*, 31 *Ky. Law Rep.* 917, 104 *S. W.* 331, a "lease" of a wall "for advertising purposes" was regarded as within the statute prohibiting any "transfer" by the tenant "of his term or interest in the premises or any portion thereof." The question may be suggested whether this was not a license rather than a lease, and whether a license would be within the statute. Ante, § 152 e.

²¹² *Gulf, C. & S. F. R. Co. v. Setlegast*, 79 *Tex.* 256, 15 *S. W.* 228.

²¹³ *Moore v. Guardian Trust Co.*, 173 *Mo.* 218, 73 *S. W.* 143.

²¹⁴ *Moser v. Tucker*, 87 *Tex.* 94, 26 *S. W.* 1044, 47 *Am. St. Rep.* 72; *Holiday v. Aehle*, 99 *Mo.* 273, 12 *S. W.* 797; *Mexican National Coal, Timber & Iron Co. v. Frank*, 154 *Fed.* 217.

²¹⁵ *Kansas Gen. St.* 1905, § 4062; *Kentucky St.* 1903, § 2292; *Missouri Rev. St.* 1899, §§ 4107, 4108. See *Johnson v. Douglass*, 73 *Mo.* 168.

²¹⁶ *Hundley v. Moore*, 6 *Ky. Law Rep.* 519; *Thompson v. Gray*, 15 *Ky. Law Rep.* 783. And see *Mabry v. Harp*, 53 *Kan.* 398, 36 *Pac.* 743.

²¹⁷ *Bass v. West*, 110 *Ga.* 698, 36 *S. E.* 244; *McBurney v. McIntyre*, 38 *Ga.* 261, 95 *Am. Dec.* 388.

²¹⁸ *McBurney v. McIntyre*, 38 *Ga.* 261; *McConnell v. East Point Land Co.*, 100 *Ga.* 129, 28 *S. E.* 80. In *Hudson v. Stewart*, 110 *Ga.* 37, 35 *S. E.* 178, it was decided that the original landlord, if he failed to take some affirmative action showing his

A permission given by the lessor to the lessee to lease, within the exception in the statute, has been held to authorize an assignment, this by inference from a previous decision, above referred to, that a statute prohibiting subletting prohibits an assignment.²¹⁹ But a permission to sublet to any responsible party in the same line of business agreeable to the lessor does not confer a general power to sublet.²²⁰ The consent or permission may, it seems, be given after the making of the assignment or sublease.²²¹ Where the lessee was permitted to sublet, provided this did not "affect the property," the right to

election to regard the sublessee as his tenant, could not recover against him for use and occupation, since such an election involves a release of the original lessee's liability for rent, which could not be presumed.

In Texas it is somewhat difficult to harmonize the various statements as to the effect of such a prohibited assignment or sublease. In *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481, it is said that "if the consent of the landlord be not given, such assignees or subtenants, in so far as the landlord and his rights are concerned, must be treated simply as employes of the lessee." In *Gartrell v. State* (Tex. Cr. App.) 61 S. W. 487, it is said that the legal status of the tenant is the same as if he had made no attempt to sublet. But in *Brown v. Pope*, 27 Tex. Civ. App. 225, 65 S. W. 42; *Markowitz v. Greenwall Theatrical Circuit Co.* (Tex. Civ. App.) 75 S. W. 74; *Scott v. Slaughter*, 35 Tex. Civ. App. 524, 80 S. W. 643, it is said that an assignment is ground for forfeiture. The case first cited in turn cites *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228, in which, however, the court refused to decide the question. In *Morrow v. Camp* (Tex. Civ. App.) 18 Tex. Ct. Rep. 153, 101 S. W. 819, it was de-

cided that the assignment did not give any rights to the lessor and the lessee *inter sese*. It has also been decided that the sublessor may recover the stipulated rent from the subtenant although it is in terms made payable to the original lessor, the latter having refused to recognize the subtenant, and having collected the rent reserved in the headlease from the sublessor, and the rents named in the two leases being the same. *Heard v. Lockett*, 20 Tex. 162.

²¹⁹ *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853. In *Morrow v. Camp* (Tex. Civ. App.) 18 Tex. Ct. Rep. 153, 101 S. W. 819, a directly contrary decision is made without any reference to the earlier decision of the supreme court.

²²⁰ *Boone v. First Nat. Bank*, 17 Tex. Civ. App. 365, 43 S. W. 594.

²²¹ *Louisville Gunning System v. Knighton*, 31 Ky. Law Rep. 923, 104 S. W. 332; *Mabry v. Harp*, 53 Kan. 398, 36 Pac. 743; *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530, 67 S. W. 967; *Wright v. Henderson* (Tex. Civ. App.) 86 S. W. 799; *Moore v. Graham*, 29 Tex. Civ. App. 235, 69 S. W. 200; *Wildev Lodge No. 21 v. Paris*, 31 Tex. Civ. App. 632, 73 S. W. 69.

sublet was held to be unaffected by the fact that the rate of insurance was increased as a result of the sublease.²²²

A statutory prohibition of an assignment without consent by one having a term of less than two years has been held not to apply if the term was originally for two years or more, though it has less than two years yet to run at the time of the assignment.²²³ A lease for one year, with a right of renewal for five years, has likewise been held not to be within such a statute.²²⁴ A lease from year to year is presumably within such a statute.²²⁵

§ 153. Assignment presumed from possession.

If, during the continuance of the term created by the lease, a person other than the lessee is found in possession of the premises, such person is presumed to be in as the assignee of the leasehold. This presumption finds its most important application in connection with the doctrine, hereafter stated, that an assignee, but not a subtenant, is liable upon the covenants on the part of the lessee, including that for rent, and consequently the person so in possession, when sued on a covenant, has the burden of showing that he is not an assignee,²²⁶ or that he is an assignee of a partial interest only.²²⁷ The same principle has been applied to sustain the sufficiency of a notice to quit served on the person so in possession,²²⁸ to sustain a sale of the leasehold under execution against him,²²⁹ to sustain an action of use

²²² *Dodd v. Ozburn*, 128 Ga. 380, 57 Co., 8 Mo. App. 223; *Armstrong v. Wheeler*, 9 Cow. (N. Y.) 88; *Provost S. E.* 70.

²²³ *Grizzle v. Pennington*, 77 Ky. v. *Calder*, 2 Wend. (N. Y.) 517; *Lansing v. Van Alstyne*, 2 Wend. (N. (14 Bush) 115.

²²⁴ *Jones v. Hamm* (Mo. App.) 74 Y.) 561; *Bedford v. Terhune*, 30 N. S. W. 150; *Jones v. Kansas City Board of Trade*, 99 Mo. App. 433, 78 Y. 453, 86 Am. Dec. 394; *Foster v. S. W.* 843. And see *Moore v. Guardian Trust Co.*, 173 Mo. 218, 73 S. Oldham, 8 Misc. 331, 59 N. Y. St. Rep. 239, 28 N. Y. Supp. 559; *Frank v. New York, L. E. & W. R. Co.*, 122 N. Y. 197, 25 N. E. 332, 10 L. R. A. 381; *Washington Real Estate Co. v. Roger Williams Silver Co.*, 25 R. I. 483, 56 Atl. 686, 64 L. R. A. 158.

²²⁵ See *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530, 67 S. W. 967.

²²⁶ *Dickinson Co. v. Fitterling*, 69 Minn. 162, 71 N. W. 1030; *Weide v. St. Paul Boom Co.*, 92 Minn. 76, 99 N. W. 421; *Adams v. French*, 2 N. H. 387; *Ecker v. Chicago, B. & Q. R.*

²²⁷ *Shee v. Gray*, 15 Ir. C. L. 296.

²²⁸ *Doe d. Morris v. Williams, 6 Barn. & C.* 41.

²²⁹ *Doe d. Batten v. Murless*, 6 Maule & S. 110.

and occupation by the original lessor against such person,²³⁰ to sustain a summary proceeding (forcible detainer) against him,²³¹ and to rebut a claim of adverse possession by him.²³² Whether the presumption would be applied in order to show a breach of a covenant or condition against assignment appears never to have been directly decided, and the inferences to be drawn from the decisions in this regard are not harmonious.²³³

The presumption of an assignment, as established by the cases, is not conclusive, and it may be shown that a person is in possession as subtenant and not as assignee,²³⁴ or that he is on the premises as a licensee only.²³⁵ And it seems that the presumption may be rebutted by showing merely that there was no actual assignment of the lease.²³⁶ There are, however, occasional decisions to the effect that the relinquishment of possession by the

²³⁰ *Coit v. Planer*, 51 N. Y. 647; 412; *Bedford v. Terhune*, 30 N. Y. Bedford v. Terhune, 30 N. Y. 453, 86 453, 86 Am. Dec. 394 (semble); Am. Dec. 394; *Page v. McGlinch*, 63 Cross v. Upson, 17 Wis. 638, 86 Am. Me. 472. Dec. 730. In *Frank v. New York*, L.

²³¹ *Thompson v. Ackerman*, 21 E. & W. R. Co., 122 N. Y. 197, 25 N. Ohio Cir. Ct. R. 740; *Weinhandler v. Eastern Brew. Co.*, 89 N. Y. Supp. 16. E. 332, 10 L. R. A. 381, the court says: "It is claimed that the sup-

²³² *Wittman v. Milwaukee, L. S. & W. R. Co.*, 51 Wis. 89, 8 N. W. 6. Here, however, it appeared that the person in possession originally entered as purchaser at foreclosure sale of the lessee's property. posed assignee may rebut this presumption by proving that he never had any assignment, and there is authority for that position. This, we think, is open to question, provided proof of that fact involves

²³³ See post, at notes 238, 239.

²³⁴ *Cross v. Upson*, 17 Wis. 638, 86 Am. Dec. 730; *Dey v. Greenebaum*, 82 Hun, 533, 64 N. Y. St. Rep. 335, 31 N. Y. Supp. 610; *Kain v. Hoxie*, 2 Hilt. (N. Y.) 311; *Durando v. Wyman*, 4 N. Y. Super Ct. (2 Sandf.) 597. proof of entry without right or as a trespasser." But this last limitation upon the right to show the absence of an assignment is obviously not applicable when it appears that the possession is by permission of the original lessee. See *Dey v. Greenebaum*, 82 Hun, 533, 64 N. Y. St. Rep. 335, 31 N. Y. Supp. 610, 21 Am. Rep. 606.

²³⁵ *Dey v. Greenebaum*, 82 Hun, 533, 64 N. Y. St. Rep. 335, 31 N. Y. Supp. 610, 21 Am. Rep. 606; *Washington Real Estate Co. v. Roger Williams Silver Co.*, 25 R. I. 483, 56 Atl. 686, 64 L. R. A. 158. In *Ecker v. Chicago, B. & Q. R. Co.*, 8 Mo. App. 223, it is apparently held that the absence of an assignment cannot be shown, but that there must be explicit proof of a sub-

²³⁶ It is so decided in *Quackenboss v. Clarke*, 12 Wend. (N. Y.) 555; *Welsh v. Schuyler*, 6 Daly (N. Y.) lease.

lessee to another, who assumes it, makes the latter an assignee for the purpose of imposing liability upon him under the covenants of the lease.²³⁷

The fact that an assignment is prohibited by the terms of the lease has in one state been regarded as sufficient to rebut the presumption of an assignment, on the theory that the possession is to be presumed to be lawful.²³⁸ But a different view has been taken elsewhere, it being said that the possibility of forfeiture on account of an assignment strengthens the presumption thereof, since it makes it more desirable to conceal it.²³⁹ In an English *nisi prius* case it was held that the fact that a stranger was in possession, and that he had declared that he took possession from another stranger, did not prove that the lessee had either assigned or sublet, so as to subject him to forfeiture under a condition of re-entry in the lease,²⁴⁰ though in another *nisi prius* case the possession of a stranger was regarded as raising a presumption of subletting, so as to be within such a condition.²⁴¹

§ 154. Requisites of assignment and of sublease.

The English statute of frauds²⁴² provides that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, in lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering, or by his agent lawfully authorized by writing, or by act and operation of law. This provision is probably in force in several states in this country.²⁴³ In others, approximately similar provisions are in force.²⁴⁴ In New York it is provided

²³⁷ See post, at note 355.

²⁴² It is in force in Maryland.

²³⁸ *Dey v. Greenebaum*, 82 Hun, 533, 64 N. Y. St. Rep. 335, 31 N. Y. Supp. 610; *Kernochan v. Whiting*, 42 N. Y. Super. Ct. (10 Jones & S.) 490.

²³⁹ *Dickinson Co. v. Fitterling*, 69 Minn. 162, 71 N. W. 1030.

²⁴⁰ *Doe v. Payne*, 1 Starkie, 86, per Lord Ellenborough.

²⁴¹ *Doe d. Hindly v. Rickarby*, 5 Esp. 4, per Lord Alvanley.

²⁴² 29 Car. 2, c. 3, § 3.

See Alexander's British Statutes.

²⁴⁴ Kirby's Dig. St. *Arkansas* 1904, § 3665; *Florida* Gen. St. 1906, § 2448 (Signing, sealing and attestation necessary if over two years); *Missouri* Rev. St. 1899, § 3415; 2 *New Jersey* Gen. St. p. 1602, § 2; Bates' Ann. St. *Ohio* § 4198; *Pennsylvania* Act March 21, 1772; *South Carolina*, Civ. Code 1902, § 2651.

that no estate or interest in land, other than a lease for a term not exceeding one year, shall be created, granted, assigned or surrendered, unless by act or operation of law, or by deed or conveyance in writing;²⁴⁵ and this language has been adopted in a number of other states.²⁴⁶ In Maine it is provided that no estate or interest in land can be granted, assigned or surrendered, unless by writing signed by the grantor or his attorney,²⁴⁷ and in other New England states a similar provision is found, with the addition of an exception in favor of an assignment or surrender "by operation of law."²⁴⁸ In some states, although the local statute does not in terms require any writing in the case of an assignment, there are express provisions that any interest in land, or any interest greater than a leasehold for a term named, can be transferred only by writing,²⁴⁹ and these, it would seem, are clearly applicable to the transfer of a leasehold interest. The words of exception, contained in a number of the statutes named, as to an assignment, grant or surrender, "by act or operation of law," though of great importance in connection with surrender,^{249a} have never received any judicial application in connection with an assignment.

The above recited provision of the English statute of frauds, requiring an assignment to be in writing, does not contain an exception in favor of short leases, as does the provision of the same statute requiring a lease to be in writing,²⁵⁰ and it has accordingly been decided in England that, though a leasehold is of such limited duration that it might have been created without writing, it can nevertheless not be assigned without writing.²⁵¹

²⁴⁵ New York Real Prop. Law, § 1901, c. 137, § 12; Vermont Pub. St. 207.

²⁴⁶ Kansas Gen. St. 1905, § 3255; ^{249a} See e. g., California Civ. Code. Michigan Comp. Laws 1897, § 1091; Connecticut Gen. St. 1902, § 9509; Minnesota Rev. Laws 1905, 4029; Burns' Ann. St. Indiana 1901, § 3487; Montana Rev. Codes 1907, § 6650; Kentucky St. 1903, § 490; 7967; Nebraska Comp. St. 1905, § North Dakota Rev. Codes 1905, § 3636; Nevada Comp. Laws 1900, 4968; Rhode Island Gen. Laws 1896, § 2694; Utah Comp. Laws 1907, § c. 202, § 2. 1974; Wisconsin Rev. St. 1898, § ²⁵⁰ See ante, § 25 d. 2302.

²⁴⁷ Rev. St. 1903, c. 75, § 13.

²⁵¹ Botting v. Martin, 1 Camp. 317;

²⁴⁸ Massachusetts Rev. Laws, c. Poultney v. Holmes, 1 Strange, 405 127, § 3; New Hampshire Pub. St. (semble); Pollock v. Stacy, 9 Q. B.

In this country, while the same view has been asserted in one state,²⁵² in another a different view has been taken, upon the ground that the legislature could not have intended to prescribe a greater formality for the transfer of an interest than for the creation thereof.²⁵³

In one state it has been decided that an assignment of a term must, even apart from any express provision in that regard, necessarily be in writing, if the statute requires a lease for a term of that duration to be in writing, since otherwise a lessee could assign his whole term without writing, but could not so sublet for a part of his term, a result which could not have been intended.²⁵⁴

It has been decided in one state that a statute providing that no action shall be brought on a contract for the sale of lands, tenements or hereditaments, in or concerning a longer term than one year, unless in writing, requires an assignment of a term of over a year to be in writing.²⁵⁵ This may have been what was intended by the legislature, but, if so, the intention was most obscurely expressed. A "contract for the sale of" an interest in lands is entirely different from a transfer of such interest.²⁵⁶ The decision suggests the question whether an assignment not made for any pecuniary consideration, and which consequently lacks the slightest element of a "sale," would be within the statute. Even if there is a consideration for the assignment, so that this in effect represents the consummation of a sale of the leasehold, an action by or against the assignee is not an action on the contract of sale, but is, if by or against the landlord, ordinarily an action on a covenant of the lease, or an action of

1033 (semble); Browne. Stat. of 423, and Overman v. Sanborn, 27 Frauds (5th Ed.) § 45.

²⁵² Logan v. Barr, 4 Har. (Del.) in question, being by parol, the assignment might well be by parol. This case and the Pennsylvania cases cited in the next following note involved the validity of an oral surrender, not of an assignment, but the same principles would apply to each.

²⁵⁴ Briles v. Pace, 35 N. C. (13 Ired. Law) 279.

²⁵⁵ McKinney v. Reader, 7 Watts Davis Sewing Mach. Co., 142 Ill. 171, (Pa.) 123; Greider's Appeal, 5 Pa. 31 N. E. 438, 15 L. R. A. 754.

422; Kiestler v. Miller, 25 Pa. 481. ²⁵⁶ See ante, §§ 16, 25 b.

And in Ross v. Schneider, 30 Ind.

ejectionment, while if by or against a third person, either an action of the latter class or an action of tort.

It would seem that since, as just suggested, an assignment is an actual transfer of proprietary rights, and not a mere contract for their transfer, the doctrine of part performance, has no application to an oral assignment. The view, however, sometimes asserted or indicated,²⁵⁷ that such doctrine is applicable to an oral assignment, is in accordance with the numerous decisions, elsewhere referred to,²⁵⁸ that a lease, though not in writing as required by the statute, is effectual if followed by what the courts speak of as "part performance," by which is meant a course of action based on the theory that the lease is valid. It would seem that, on principle, if one claiming under an assignment which is invalid, because oral, enters into possession, he is a subtenant at will, or from period to period, since he is in by permission, but without a right to retain possession for any fixed period. He would be, that is, in the same position as one who enters under an invalid conveyance in fee or a lease not in conformity to the statute of frauds.

The statute requiring an assignment of the leasehold interest to be in writing, a purchaser thereof at execution sale does not acquire title thereto until a written assignment is made by the

²⁵⁷ In *Edwards v. Spalding*, 20 *lord*. In *re Wiley's Estate*, 12 *Phila. Mont.* 54, 49 *Pac.* 443, it was held (Pa.) 152. And see *Geneva Mineral* that where the assignee accepted the *Spring Co. v. Coursey*, 45 *App. Div.* assignment, agreed to pay the rent 268, 61 *N. Y. Supp.* 98. On the other reserved, and took possession, the hand it has been decided that pos- "contract" was taken out of the session, if discontinued before the statute of frauds, and he was liable end of the term, did not validate to the landlord for rent. And so the assignment (*Johnson v. Read-* there was decided to be a part per- ing, 36 *Mo. App.* 306), and that the formance taking the case out of the taking of possession had no effect, statute and rendering the assignee at least at law (*Chicago Attach-* liable for rent when he took posses- ment *Co. v. Davis Sewing Mach. Co.*, sion and paid some installments of 142 *Ill.* 171, 31 *N. E.* 438, 15 *L. R.* rent. *Dewey v. Payne*, 19 *Neb.* 540, A. 754; *Hunt v. Coe*, 15 *Iowa*, 197; 26 *N. W.* 248. And it was decided *Nally v. Reading*, 107 *Mo.* 350, 17 that the taking of possession and S. W. 978). But as to Illinois, see payment of consideration by an as- *Cleveland, C., C. & St. L. R. Co. v.* signee made the assignment effec- *Wood*, 189 *Ill.* 352, 59 *N. E.* 619.
²⁵⁸ See ante, § 25 g (5).

sheriff.^{259, 260} But it has been held that the purchaser may so act towards the landlord as to become liable to him for rent,²⁶¹ on the theory apparently of an attornment to him.²⁶²

Occasionally the statute requires an assignment to be under seal, at least if the estate assigned is of a certain *quantum*,^{263, 264} and it seems that a statute requiring conveyances generally to be under seal would apply to a conveyance of a leasehold interest as well as to any other conveyance.²⁶⁵ Apart from an express statutory provision, however, there is ordinarily no necessity that an assignment be under seal, and the fact that the instrument of lease itself is under seal is immaterial in this regard.²⁶⁶ Even accepting the rule that an instrument under seal can be transferred only by an instrument under seal, such rule would have no application in this connection, since the transfer is not of the instrument of lease, but of the leasehold estate created by the demise embodied in the instrument.²⁶⁷

There are in some jurisdictions statutes requiring an assignment of a lease, at least when over a certain *quantum* in duration, to be recorded.²⁶⁸ And it seems that the ordinary provi-

^{259, 260} *Doe d. Hughes v. Jones*, 9 Mees. & W. 372; *Joslin v. Ervien*, 50 N. J. Law, 39, 12 Atl. 136. See *Thomas v. Connell*, 5 Pa. 13. and the assumption (of liability under the lease by the assignee), all in writing, are effective without seal or acknowledgment." There was no

²⁶¹ *Joslin v. Ervien*, 50 N. J. Law, 39, 12 Atl. 136. reference to the statute in question.

²⁶² See ante, § 19. ²⁶⁶ *Barrett v. Trainor*, 50 Ill. App. 420; *Bordereaux v. Walker*, 85 Ill.

^{263, 264} *Florida* Gen. St. 1906, § 2448; *Maryland* Code Pub. Gen. Laws 1904, art. 21, §§ 1, 10; *Vermont* Pub. St. 1906, § 2584; *Peter v. Johns*. (N. Y.) 211; *Warren v. Le-*

Schley's Lessee, 3 Har. & J. (Md.) 211; *Mayhew v. Hardesty*, 8 Md. 479. ²⁶⁷ *Sanders v. Partridge*, 108 Mass. 556. As to this case, see post, notes 362, 470.

²⁶⁵ But though the Connecticut statute (Gen. St. 1902, § 4029) provides that all conveyances of lands shall be sealed by the grantor, in *Stillman v. Harvey*, 47 Conn. 26, it was held, in an action to recover rent against persons who had entered under an unsealed assignment, that "as between the parties, the permission to assign, the assignment

²⁶⁸ See e. g., *California* Civ. Code, §§ 1214, 1215; *Maryland* Code Pub. Gen. Laws 1904, art. 21, § 1; *Massachusetts* Rev. Laws 1902, art. 127, § 4; *Michigan* Comp. Laws 1897, § 8994; 2 Gen. St. *New Jersey*, p. 1936, § 2; *New York* Real Prop. Law, §§ 240, 241; *West Virginia* Code 1906, § 3103.

sions as to recording "conveyances" of land would be applicable to a conveyance of an estate for years as well as to one of an estate in fee, unless expressly excepted therefrom.²⁶⁹ The recording laws, however, as applied to assignments of leasehold interests, as in other cases, are ordinarily for the protection only of subsequent innocent purchasers, so that a failure to record the assignment does not affect its validity as between the parties thereto.²⁷⁰

It has been decided that a statutory requirement that an assignment of a lease, if the lease is for a longer term than one year, shall be acknowledged, did not apply to a lease for "so long as the lessors shall continue owners,"²⁷¹ since their ownership might expire in less than a year.²⁷¹

The assignment, like any other conveyance, must be delivered in order to be effective,²⁷² but there is no necessity that possession be taken thereunder.²⁷³

Apart from any requirements such as those above referred to, as to the execution of the assignment, no particular form is required, it being necessary only that the intention appear to transfer the tenant's entire interest in the whole or in a part of the premises.²⁷⁴ A conveyance which purports to be in fee

²⁶⁹ But a contrary construction was placed upon a New Jersey statute in *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. 873. In *Missouri* an assignment of a leasehold was held to be within a statute requiring the record of all instruments by which real estate may be affected. *Jennings v. Sparkman*, 39 Mo. App. 663.

In *Joseph Speidel Grocery Co. v. M. E. Stark & Co.*, 62 W. Va. 512, 59 S. E. 498, it is held that when the statute requires the record only of conveyances for a term more than five years, an assignment of a term of two years need not be recorded.

²⁷⁰ See *Bemis v. Wilder*, 100 Mass. 446; *Williams v. Downing*, 18 Pa. 60. But in Maryland the assignment is, it appears, nugatory unless

recorded. *Nickel v. Brown*, 75 Md. 172, 23 Atl. 736.

²⁷¹ *Rickard v. Dana*, 74 Vt. 74, 52 Atl. 113.

²⁷² *Canale v. Copeilo*, 137 Cal. 22, 69 Pac. 698.

²⁷³ *Williams v. Bosanquet*, 1 Brod. & B. 238; *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 65 N. H. 393, 451, 23 Atl. 529; *Williams v. Downing*, 18 Pa. 60. See post, § 158 a (2) (e).

But failure to transfer the possession has been regarded as raising a presumption of fraud as against the assignor's creditors. *Joseph Speidel Grocery Co. v. M. E. Stark & Co.*, 62 W. Va. 512, 59 S. E. 498.

²⁷⁴ See *Ross v. Schneider*, 30 Ind. 423; *Overman v. Sanborn*, 27 Vt. 54.

simple is effective for this purpose,²⁷⁵ and, as before stated, if there is a transfer of the whole term it is, in most jurisdictions, an assignment, though purporting to be a sublease.²⁷⁶

The formal requisites of a sublease are the same as those of an original lease, a matter which has been previously considered.²⁷⁷

§ 155. Assignment by way of mortgage.

A leasehold interest in land, like any other interest therein, may be made the subject of a mortgage by the owner of such interest.²⁷⁸ As to whether such a mortgage is to be regarded as a "chattel" mortgage, or as a mortgage of land, the view differs in different states and under different statutes.²⁷⁹

An assignment, in terms, of the "lease," is an assignment of the leasehold. *Patten v. Deshon*, 67 Mass. (1 Gray) 325; *McNeil v. Kendall*, 128 Mass. 245, 35 Am. Rep. 373; *Potts v. Trenton Water Power Co.*, 9 N. J. Eq. (1 Stockt.) 592; *Trabue v. McAdams*, 71 Ky. (8 Bush) 77.

A bequest of all of one's interest in certain property in which he has a leasehold interest is in effect an assignment of that interest. *Martin v. Tobin*, 123 Mass. 85.

An agreement by which the lessee sold to another the right to use and possess the land as long as he himself could have done so was held to be in effect an assignment. *Indianapolis Mfg. & Carpenters' Union v. Cleveland, C. & I. R. Co.*, 45 Ind. 281.

A transfer by a lessee of a storehouse, of all his property "of every nature and description, consisting of goods, wares, merchandises, etc., contained in the storehouse occupied" by him, was held to be an assignment of the leasehold interest in the storehouse. *Boyce v. Bakewell*, 37 Mo. 492.

²⁷⁵ *Worthington v. Lee*, 61 Md. 530; *De Pere Co. v. Reynen*, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155; *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682.

²⁷⁶ See ante, § 151.

²⁷⁷ See ante, §§ 25-33.

²⁷⁸ See *Commercial Bank v. Pritchard*, 126 Cal. 600, 59 Pac. 130.

²⁷⁹ It has been decided that a provision for the record of mortgages of lands, tenements and hereditaments applies to a mortgage of a leasehold (*Johnson v. Stagg*, 2 Johns. [N. Y.] 510), and that such a mortgage is within a provision as to the execution and recording of "any deed, mortgage or other instrument of writing by which any land, tenement or hereditament shall be conveyed, or otherwise affected" (*Paine, Kendall & Co. v. Mason*, 7 Ohio St. 198). But in New Jersey it has been held that an act requiring deeds or conveyances of lands, tenements and hereditaments to be recorded does not apply to the mortgage of a leasehold. *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. 873, apparently overruling *Decker v.*

In jurisdictions in which a mortgage transfers the legal title, the mortgage of a leasehold interest is properly an assignment,²⁸⁰ placing the mortgagee, as we shall see later, in privity of estate with the landlord. The case is different in jurisdictions in which the mortgage does not pass the legal title.²⁸¹ The mortgagee, if he takes possession, is responsible to the mortgagor, like any other mortgagee, for the rents and profits of the land.²⁸²

§ 156. Contract to assign.

An executory contract to assign does not have the effect of an assignment, as transferring the legal title and right to possession, but gives merely an equitable interest,²⁸³ though the right to a legal assignment may be enforced,²⁸⁴ unless the lease requires the lessor's assent and this he refuses to give,²⁸⁵ or other circumstances exist to preclude such relief.

Clarke, 26 N. J. Eq. (11 C. E. Green) 163. But as to the last case, 163; Spielmann v. Kliest, 36 N. J. compare Hutchinson v. Bramhall, 42 Eq. (9 Stew.) 199. And it has been N. J. Eq. 372, 7 Atl. 873. so decided in Pennsylvania as to a In State Trust Co. v. Casino Co., 5 statute applying to mortgages of App. Div. 381, 39 N. Y. Supp. 258, "real estate." Bismark Bldg. & and Westchester Trust Co. v. Hobby Bottling Co., 102 App. Div. 464, 92 Loan Ass'n v. Bolster, 92 Pa. 123. N. Y. Supp. 482, it was decided that

In New York, where by statute the term "real property" includes chattels real except leases for a term not exceeding three years, a mortgage of a leasehold for over three years is, it has been held, within a statute requiring mortgages of real property to be recorded. Westchester Trust Co. v. Hobby Bottling Co., 102 App. Div. 464, 92 N. Y. Supp. 482; Id., 185 N. Y. 577, 78 N. E. 1114. a statute in reference to filing "any mortgage creating a lien upon real and personal property" did not apply to a mortgage which covered only a leasehold and certain personal chattels.

²⁸⁰ Stockett v. Howard, 34 Md. 121; Willison v. Watkins, 28 U. S. (3 Pet.) 43, 7 Law. Ed. 596.

²⁸¹ See post, § 158 a (2) (f).

²⁸² North Chicago St. R. Co. v. Le Grand Co., 95 Ill. App. 435.

²⁸³ Boston El. R. Co. v. Grace & Hyde Co., 50 C. C. A. 239, 112 Fed. 279.

²⁸⁴ Hyde v. Warden, 3 Exch. Div. 72; Winter v. Dumerque, 12 Jur. (N. S.) 726.

²⁸⁵ Willmott v. Barber, 15 Ch. Div. 96.

That provisions requiring chattel mortgages to be recorded do not apply to a leasehold mortgage, see Booth v. Kehoe, 71 N. Y. 341; State Trust Co. v. Casino Co., 19 App. Div. 344, 46 N. Y. Supp. 492; Gaylord v. Cincinnati German Bldg. Ass'n, 2 Civ. R. (Ohio) 163; Jennings v. Sparkman, 39 Mo. App. 663; Decker v. Clarke, 26 N. J. Eq. (11 C. E.

It has been decided to be the duty of the vendor of a leasehold interest, and not of the vendee, to procure the lessor's consent to the transfer, if this is required by the lease,²⁸⁶ and the vendor is liable in damages if he fails to use his best endeavors so to do.²⁸⁷ A lessee who had contracted to assign subject to the lessor's approval was held to be relieved from liability if he did all that he could to obtain such approval, though the lessor acted unreasonably and vexatiously in refusing to give it.²⁸⁸

A contract to assign is a contract for the sale of an interest in land within the fourth section of the English statute of frauds, or its local equivalent.²⁸⁹

§ 157. Liabilities of assignor.

a. **To landlord**—(1) **Based on privity of estate.** The liabilities of the lessee, based upon the relation of landlord and tenant, as distinguished from those based on contractual stipulations, that is, as it is technically expressed, those based on "privity of estate" as distinguished from those based on "privity of contract," necessarily continue only so long as that relation continues, and consequently come to an end upon the lessee's assignment of the leasehold interest, the assignee then becoming tenant in the lessee's stead.²⁹⁰ But it is necessary, in order that the lessee be thus relieved from his liabilities based on privity of estate, that the assignee be accepted by the landlord as tenant, either by express assent to the assignment, or by an act indicating assent, such as the receipt of rent from the assignee, since the tenant has no right to destroy the tenancy, into which he has entered, without the landlord's assent.²⁹¹ So it has been

²⁸⁶ *Lloyd v. Crispe*, 5 Taunt. 249; *Johnson v. Reading*, 36 Mo. App. 306. *Mason v. Corder*, 7 Taunt. 9; *Austin v. Harris*, 76 Mass. (10 Gray) 296; *Marsh v. Brace*, Cro. Jac. 334; *Mills Roberts v. Geis*, 2 Daly (N. Y.) 535.

²⁸⁷ *Day v. Singleton* [1899] 2 Ch. 320.

²⁸⁸ *Lehmann v. McArthur*, 3 Ch. App. 496.

²⁸⁹ *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; *Peers*, 166 Ill. 361, 46 N. E. 1105; *Bernheimer v. Verdon*, 63 N. J. Eq. 312, 49 Atl. 732; *Smith v. Perkins*, 15 Ky. Law Rep. 627, 24 S. W. 722;

²⁹⁰ *Walker's Case*, 3 Coke, 22 a; *Auriol*, 1 H. Bl. 433; *Auriol v. Mills*, 4 Term R. 94; *Wadham v. Marlowe*, 8 East, 314, note; *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; *McBee v. Sampson*, 66

Fed. 416; *Consolidated Coal Co. v. Bliss v. Gardner*, 2 Ill. App. (2 Bradw.) 422.

²⁹¹ *Auriol v. Mills*, 4 Term R. 94;

held that an action for use and occupation, which is based on the relation of tenancy, that is, on privity of estate, as well as on contract,²⁹² will lie against the lessee although he has assigned his interest, provided the assignee has not been accepted as tenant.²⁹³

The principle that liabilities based on privity of estate cease to burden the lessee after an assignment by him finds an application in the rule that an action of debt for rent, being based, not on a contract to pay rent, but rather on the theory that the tenant has taken the profits due by the land, will not lie against the lessee after an assignment by him, and the acceptance by the lessor, either express or implied, of the assignee as his tenant.²⁹⁴ And other liabilities from which the lessee is relieved by an assignment, assented to by the landlord, may be suggested, such as that for waste.

Consumers' Ice Co. v. Bixler, 84 Md. 437, 35 Atl. 1086; Wadham v. Marlowe, 8 East, 315, note; Harmony Lodge v. White, 30 Ohio St. 569, 27 Am. Rep. 492; Montgomery v. Spence, 23 U. C. Q. B. 39.

²⁹² See post, § 302.

²⁹³ Shine v. Dillon, 1 Ir. R. C. L. 277.

²⁹⁴ See cases cited ante, notes 290, 291.

In Walker's Case, 3 Coke, 22 a, it is stated that there is privity of contract between the lessor and lessee for the purpose of an action of debt. But it is also said in the same case that upon eviction the lessor shall not have an action of debt in respect of the contract because it is a "real contract," and the person is not the debtor "but in respect of the land." And so in Kidwelly v. Brand, 1 Plowd. 70, it is said by Mountague, C. J., that in the case of a lease for life or years, rendering rent, the land is the principal debtor, and the person of the lessee is "no debtor but in respect of the land."

By such statements is meant, it is conceived, that the lessee is liable for the rent by reason merely of his enjoyment of the land, that is, his receipt of the profits, this constituting the *quid pro quo* necessary to support an action of debt. (See Prof. Ames' article in 8 Harv. Law Rev. 252). So Lord Mansfield says that the action of debt is founded not merely on the terms of the demise but on the enjoyment of the tenant. Wadham v. Marlowe, 8 East, 314, note, 1 H. Bl. 438, note. Apparently, in the time of Coke, as was the case in the time of the Year Books, the word "contract" was used in a sense different from that in which it is used at the present day, as referring only to transactions in which the duty arose from the receipt of a *quid pro quo*, that is, such as would give rise to an action of debt. See note by Prof. Ames in 8 Harv. Law Rev. at p. 253; Pollock, Contracts (7th Ed.) 171. It is in this sense that the word is used in Walker's Case, 3 Coke, 22 a, su-

(2) **Based on privity of contract.** Upon an assignment by a lessee, though, as we shall presently see, the assignee becomes liable upon the express covenants of the lessee which "touch and concern" the land,²⁹⁵ the lessee remains liable on such covenants, as well as on others, for the reason that one who has subjected himself to a contractual liability cannot divest himself thereof by his own act.²⁹⁶ The fact that the landlord, either expressly or impliedly, consents to such assignment, as when he gives his consent to the assignment in accordance with a requirement in the lease of such consent,²⁹⁷ or he accepts rent from the assignee,²⁹⁸ does not affect the lessee's continuing liability on his

pra. (Compare ante, § 16, note 6). In *Woodward v. Marshall*, 1 Salk. 82, it is said, *arguendo*, and apparently admitted, that debt for rent is founded on the privity of estate, but action of covenant is founded upon the privity of contract.

²⁹⁵ See post, § 158 a (2).

²⁹⁶ *Barnard v. Godscall*, Cro. Jac. 309; *Brett v. Cumberland*, Cro. Jac. 521; *Thursby v. Plant*, 1 Lev. 259; *Baynton v. Morgan*, 21 Q. B. Div. 101, 22 Q. B. Div. 74; *Garner v. Byard*, 23 Ga. 289, 68 Am. Dec. 527; *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490; *Barhydt v. Burgess*, 46 Iowa, 476; *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Holliday v. Noland*, 93 Mo. App. 403, 67 S. W. 663; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485; *Shaw v. Partridge*, 17 Vt. 626; *Fryszka v. Prybeski*, 139 Mich. 461, 102 N. W. 977. See, as to the continuing liability for rent, post, § 181 b, at notes 655-662.

²⁹⁷ *Jordan v. Indianapolis Water*

Co., 159 Ind. 337, 64 N. E. 680; *Rec- tor v. Hartford Deposit Co.*, 190 Ill. 380, 60 N. E. 528; *Wineman v. Phillips*, 93 Mich. 223, 53 N. W. 168; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *House v. Burr*, 24 Barb. (N. Y.) 525; *Pfaff v. Golden*, 126 Mass. 402.

²⁹⁸ *Bachelour v. Gage*, Cro. Car. 188; *Barnard v. Godscall*, Cro. Jac. 309; *Norton v. Acklane*, Cro. Car. 579; *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. 31; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Harris v. Heackman*, 62 Iowa, 411, 17 N. W. 592; *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; *Charless v. Froebel*, 47 Mo. App. 45; *Bouscaren v. Brown*, 40 Neb. 722, 59 N. W. 385; *Taylor v. DeBus*, 31 Ohio St. 468; *Frank v. Maguire*, 42 Pa. 77; *Creveling v. De Hart*, 54 N. J. Law, 338, 23 Atl. 611; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443; *Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233; *Hartz v. Eddy*, 140 Mich. 479, 103 N. W. 852; *Shand v. McCloskey*, 27 Pa. Super. Ct. 260; *Montgomery v. Spence*, 23 U. C. Q. B. 39. In *Platt, Covenants*, 491, other cases to the same effect are cited. *Ascarete v. Pfaff*, 34 Tex. Civ. App. 375,

stipulations. And an express consent in the instrument of lease to the assignment of the leasehold has no greater effect.²⁹⁹

This principle, that the lessee remains liable on his covenants, is most frequently applied in the case of a covenant to pay rent, upon which the lessee continues liable, and which may be enforced against him in case his assignee fails to perform his duty of paying the rent.³⁰⁰ It has also been applied, or its application suggested, in the case of a covenant against waste, so as to render the lessee liable for waste committed by his assignee,³⁰¹ and in the case of covenants to repair,³⁰² to pay taxes,³⁰³ to drill for oil,³⁰⁴ and not to build on adjoining premises.³⁰⁵

Occasional statements are to be found to the effect that while a lessee remains liable after an assignment by him, upon his express covenants, he does not so remain liable on his "implied" covenants.³⁰⁶ The only implied covenant which has been specifically named in this connection is that for rent, "implied" from the words "yielding" and "paying,"³⁰⁷ and such a covenant has accordingly been occasionally held not to bind the lessee after

78 S. W. 974, *contra*, quotes a dictum of Shaw, C. J., rendered in *Patten v. Deshon*, 67 Mass. (1 Gray) 325, which is certainly not law in Massachusetts. See *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64. Nor do the Texas cases cited (*Giddings v. Felker*, 70 Tex. 176, 7 S. W. 694; *Le Gierse v. Green*, 61 Tex. 128) support the decision.

²⁹⁹ *Rector v. Hartford Deposit Co.*, 190 Ill. 380, 60 N. E. 528.

³⁰⁰ See post, § 181, at note 653.

³⁰¹ *Jackson v. Brownson*, 7 Johns. (N. Y.) 227.

³⁰² *Brett v. Cumberland*, Cro. Jac. 521; *Barnard v. Godscall*, Cro. Jac. 309.

³⁰³ *McKeon v. Wendelken*, 25 Misc. 711, 55 N. Y. Supp. 626; *Mason v. Smith*, 131 Mass. 510.

³⁰⁴ *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553.

³⁰⁵ *Batchelour v. Gage*, Cro. Car. 188.

³⁰⁶ *Ghegan v. Young*, 23 Pa. 18; *Charles v. Froebel*, 47 Mo. App. 45; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Fanning v. Stimson*, 13 Iowa, 42; *Harmony Lodge v. White*, 30 Ohio St. 569, 27 Am. Rep. 492; *Kimpton v. Walker*, 9 Vt. 191.

³⁰⁷ In *Bacheloure v. Gage*, Wm. Jones, 223, in deciding that the lessee was liable, under his covenant not to erect a building on the land, for the act of his assignee in erecting a building, the court is reported to have said that "there is a difference between covenant in deed and covenant in law, for if it were a covenant in law, after assignment and acceptance, no action lies against the first lessee." The report of the case in *Batchelour v. Gage*, Cro. Car. 188, states merely that "the court conceived that inasmuch as it is an *ex-*

assignment.³⁰⁸ But, as elsewhere stated,³⁰⁹ it is doubtful whether a covenant created by such language is not properly an express covenant, and, taking this view, there seems to be little, if any, room for the application of the asserted rule that the lessee remains liable on his implied covenants.

It is sometimes said that the lessee is relieved from liability on his covenant if the landlord accepts the assignee "as his tenant."³¹⁰ This, however, as appears from the cases previously cited, is not correct. Such a statement, however, may perhaps mean merely that the lessee is relieved from liability if the circumstances show that the landlord regards the assignee as holding, not under the former lease, but under a new lease, that is, as lessee and not as assignee, in which case there results, as elsewhere explained,³¹¹ a surrender of the previous lease, whereupon the former lessee's liability on the covenants thereof comes to an end.

In case of the death of the lessee, the liability on his covenant may be enforced against his estate, even though he assigned the leasehold, and the breach did not occur during his life,³¹² that is, as he himself remains liable after assignment, his estate is so liable on his death.

As the lessee remains liable on his covenants after assignment, so a guarantor of the performance of his covenants remains liable as such.³¹³

press covenant that he shall not v. Collins, 186 Mass. 507, 71 N. E. build, it shall bind him and his ex- 979.

ecutors," etc. The court presumably had in mind the so-called "implied" covenant to pay rent. An implied covenant, that is, a covenant in law, not to build, is not readily conceivable.

³⁰⁸ Fanning v. Stimson, 13 Iowa, 42; Harmony Lodge v. White, 30 Ohio St. 569, 27 Am. Rep. 492; Kimpton v. Walker, 9 Vt. 191; Anonymous, 1 Sid. 447 (dictum).

³⁰⁹ See post, § 171 b.

³¹⁰ See e. g., Patten v. Deshon, 67 Mass. (1 Gray) 325. The same view is indicated in Whicher v. Cottrell, 165 Mass. 351, 43 N. E. 114; Cooley

³¹¹ See post, § 190 d.

³¹² Brett v. Cumberland, Cro. Jac. 521; Scott v. Lunt, 32 U. S. (7 Pet.) 596, 8 Law. Ed. 797; Broadwell v. Banks, 134 Fed. 470; Greenleaf v. Allen, 127 Mass. 248; Van Rensselaer's Ex'rs v. Platner, 2 Johns. Cas. (N. Y.) 17; Pate v. Oliver, 104 N. C. 458, 10 S. E. 709.

³¹³ Oswald v. Fratenburg, 36 Minn. 270, 31 N. W. 173; Morgan v. Smith, 70 N. Y. 537; Damb v. Hoffman, 3 E. D. Smith (N. Y.) 361; Almy v. Green, 13 R. I. 350. See Way v. Reed, 88 Mass. (6 Allen) 364.

The lessee is not relieved from liability on his covenants by the fact that his assignee expressly assumes liability thereon.³¹⁴

b. **To assignee.** The question of the possible liabilities of the assignor of a leasehold to the assignee thereof has ordinarily arisen with reference to covenants for title by the assignor, express or implied. There are in this country several decisions to the effect that, upon the assignment of a leasehold interest, no covenants for title are to be implied in favor of the assignee,³¹⁵ and this view has the support of a distinguished writer.³¹⁶ On the other hand, it is said, in a modern English case,³¹⁷ that "if the (assignee) be disturbed in his possession, which he is when distrained upon for rent, an action of covenant will lie upon the word 'grant' in the indenture of assign-

³¹⁴ *Wineman v. Phillips*, 93 Mich. 223, 53 N. W. 168; *Charless v. Froebel*, 47 Mo. App. 45; *Ranger v. Bacon*, 3 Misc. 95, 22 N. Y. Supp. 551; *Adams v. Shirk* (C. C. A.) 104 Fed. 54.

³¹⁵ In *Blair v. Rankin*, 11 Mo. 442, it is said that "although the words 'grant' or 'demise' create an implied covenant against the lessor, yet it is nowhere said that the same words will, in an assignment, create an implied covenant against the assignor. The object and intent of the parties in making an assignment is to put the assignee in place of the lessee, and when that is done the assignee ceases to have any further concern with the contract unless he has bound himself by express covenants." In *Waldo v. Hall*, 14 Mass. 486, it was held that no covenants were implied from the words "granted, bargained and sold" used on the assignment of a lease. To the same effect, see *McClenahan v. Gwynn*, 3 Munf. (Va.) 556, and *Sanborn v. Cree*, 3 Colo. 149, in which latter case it is said that an assignee without warranty stands in the position of one claiming under a quitclaim

deed, which is equivalent to saying that there are no implied covenants.

If the owner of the leasehold purports to transfer merely his "right, title and interest" under the lease, he is obviously not liable for any defects of title or incumbrances on the leasehold. *Ballou v. Orr*, 14 Misc. 402, 70 N. Y. St. Rep. 749, 35 N. Y. Supp. 1040; *Alford v. Cobb*, 35 Hun (N. Y.) 651. In *Knickerbacker v. Killmore*, 9 Johns. (N. Y.) 106, there was an express covenant limited to the assignor's own acts, and this itself would prevent the implication of any different covenants. See *Rawle, Covenants for Title*, § 275.

³¹⁶ *Rawle, Covenants for Title*, § 272, citing *Landydale v. Cheyney*, Cro. Eliz. 157. But in that case, though the defendant's counsel argued that there was no warranty implied on the grant or assignment of the leasehold, the decision was apparently based on the ground that, the lessee's estate having terminated, the covenant also came to an end. See *Rawle*, op. cit. § 275.

³¹⁷ *Baber v. Harris*, 9 Adol. & E. 532.

ment." And there is an old authority, apparently, to the effect that the word "grant" in an assignment of a chattel real created a warranty.³¹⁸ There are also occasional decisions or *dicta* to be found in this country to the effect that the ordinary rule that a warranty of title is to be implied on the sale of a personal chattel applies to the assignment of a term for years, a chattel real.³¹⁹ If such a rule applies to the case of the assign-

³¹⁸ In *Simpkin Simeon's Case*, Y. B. 29 Edw. 3, 48, and 30 Edw. 3, 14, it was adjudged, as stated by Lord Coke in *Spencer's Case* (5 Coke, 16), that "this word grant in this case of grant of a ward (being a chattel real) did import of itself a warranty."

In *Platt, Covenants*, 48, the writer says that while the word "grant" did not create a covenant in the case of a conveyance in fee simple, it did so operate on the assignment of a chattel interest. For the latter part of this statement he cites *Person v. Jones*, 2 Rolle, 399, Palm. 388, where there is a *dictum* to the effect that the word "grant" would create a covenant. It does not, however, appear whether an assignment of a chattel interest or a conveyance in fee simple was in question in that case, which is translated in *Viner's Abr., Covenant* (L, a.) p. 446. See, also, *Co. Litt.* 384 a, Butler's note, from which it appears that that learned annotator thought that a covenant might be implied from the word "grant" on an assignment of a leasehold provided the assignment is not in terms a conveyance in fee simple.

³¹⁹ See *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 345, 45 Pac. 680. This case cites, as supporting this doctrine, the case of *Souter v. Drake*, 5 Barn. & Adol. 992, which, however, decided something entirely different,

to-wit, that one who contracts to make an assignment of a leasehold in the future is bound to furnish a good title, a requirement as to the duties of a vendor which exists in the case of one contracting to sell any interest in land. See *Rawley, Covenants for Title*, § 32. In *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004, the same error occurs as to the decision in *Souter v. Drake*, 5 Barn. & Adol. 992, but the court refuses to decide whether there are any implied covenants of title on an assignment. In *Lewis v. Richardson*, 2 Ind. T. 341, 51 S. W. 969, the statement in *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 345, 45 Pac. 680, is quoted with approval. And in *Mains v. Henkle*, 2 Ohio Dec. 730, it is asserted that a covenant of quiet enjoyment is to be implied on an assignment for a valuable consideration.

In *Winstell v. Hehl*, 69 Ky. (6 Bush) 58, it is said that an assignment does not import "an implied undertaking by the assignor; that the assignees of the lease shall have the undisturbed possession of the demised premises during the term," and that "the implied obligation of the assignor is less comprehensive, and does not exceed that which is generally implied by the assignment of a bond for money on the conveyance of land, which is that the assignor has a right to pass to the assignee

ment of a leasehold, it is difficult to see why a warranty of title should not also be implied on the creation of a leasehold, this being a transfer of a chattel interest, to be paid for by installments of rent. But there is, it seems, no such implied warranty by a lessor, apart from the use of certain words of demise.³²⁰

The instrument of assignment may, and frequently does, contain express covenants of title, and these are usually subject to the rules which would apply to similar covenants on a transfer of an estate in fee simple, as to their construction and scope,³²¹ as to what constitutes a breach,³²² the persons entitled to the benefit thereof,³²³ and the measure of damages for breach.³²⁴

what his assignment purports to pass; or, in other words, that he is the absolute and unconditional owner of the land, and has a right to demand what it calls for; and that he will respond for the sufficiency of the obligor or his representatives." What this means it is difficult to say.

³²⁰ See ante, § 80.

³²¹ A stipulation that the lease is "genuine and in full force and effect," and guaranteeing to the assignee "the rights and title of said lease," was regarded as equivalent to a covenant of seisin and of peaceable enjoyment. *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004.

Where the assignor agreed to refund any such sum as might be recovered from the assignee by suit at law by reason of his purchase, it was held that he was liable for the increase of rent incurred by the assignee, upon taking a new lease from the owner of the freehold, after recovery against him by the latter in ejectment. *Wray v. Lemon*, 81* Pa. 273.

³²² A covenant of seisin and peaceable enjoyment was regarded as broken by such assignor if he was unable to deliver possession to the assignee on account of a prior and

paramount title and possession in another. *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004.

A covenant of warranty limited to the right, title and interest of the assignor does not apply to a liability for rent or taxes accruing after the assignment. *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917. A covenant for title was held not to be broken by the fact that a sublease had been made by the assignor, the benefit of which was expressly transferred to the assignee as a part of the transaction of assignment. *Pease v. Christ*, 31 N. Y. 141. It seems that the case would have been the same had the right to the rents reserved on the sublease passed merely as incident to the assignment of the principal lease.

³²³ In *Woodburn v. Renshaw*, 32 Mo. 197, it was held that since a covenant by the assignor that the premises were free from taxes and assessments was broken as soon as made in case there were taxes then due, the benefit thereof did not pass to an assignee of the assignee. See *Rawle, Covenants for Title*, § 205.

³²⁴ The measure of damages for breach of a covenant of seisin and for peaceable enjoyment was held to

A covenant by the lessee, made for the protection of the interests of the landlord, cannot, ordinarily at least, be enforced by an assignee of the leasehold, even in jurisdictions where third persons are allowed to enforce a contract made for their benefit, such a covenant being evidently not made for the benefit of such assignee.³²⁵

§ 158. Liabilities of assignee.

a. **To landlord**—(1) **Based on privity of estate.** The assignee of a leasehold interest becomes the tenant in place of his assignor, and is substituted for the latter as regards liabilities arising from privity of estate. Thus, he is liable for the rent reserved in an action of debt, by reason of such privity, without reference to any covenant,³²⁶ and he is liable if he commits waste.³²⁷

In case the leasehold is by the assignee reassigned to another, the first assignee is no longer in privity of estate with the landlord, and, consequently, his liability based thereon is terminated.³²⁸

(2) **Based on privity of contract**—(a) **At common law and by statute.** It has been said that, at common law, covenants ran with the land, though not with the reversion,³²⁹ that is, that the benefit and burden of the covenants of the lease passed on an

be at least the consideration paid for the assignment. *Wetzell v. Rich-*

creek, 53 Ohio St. 62, 40 N. E. 1004. See, upon the question of measure of damages, Rawle, Covenants for Title, c. 9, summarized in 2 Tiffany, Real Prop. § 400.

³²⁵ The only case bearing on this point is that of *Findlay v. Carson*, 97 Iowa, 537, 66 N. W. 759, where it was decided that a covenant by the lessee of a coal mine not to operate another mine, inserted in the lease in order that the lessee might give his whole time and attention to the mine leased and thus increase the royalties to be paid under the lease, could not be enforced by the lessee's assignee to prevent the lessee compet-

ing in the market with such assignee.

³²⁶ *Walker's Case*, 3 Coke, 22 a; *Thursby v. Plant*, 1 Wms. Saund. 237, note (1); *Howland v. Coffin*, 26 Mass. (9 Pick.) 52, 29 Mass. (12 Pick.) 125; *McKeon v. Whitney*, 3 Denio (N. Y.) 452.

³²⁷ See ante, § 109 b (4).

³²⁸ See *Daniels v. Richardson*, 39 Mass. (22 Pick.) 565.

³²⁹ See 1 Wms. Saund. 241 b, notes 3 and 6 to *Thursby v. Plant*; 1 Smith's Leading Cases (11th Ed.) 55, notes to *Spencer's case*; *Bickford v. Parson*, 5 C. B. 920, 930; *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608. See, also, ante, § 149 b (1), notes 76, 77.

assignment of the leasehold, though not on a transfer of the reversion. The effect of this view would be that, for the purpose of imposing liability under covenants running with the land, the statute of 32 Hen. 8, c. 34, before discussed,³³⁰ was entirely unnecessary. The courts have not been entirely consistent in this regard, they sometimes referring to the rights and liabilities of an assignee of the leasehold, in connection with the covenants of the lease, as being based on this statute, and sometimes ignoring the statute in this connection.

In a number of the states there are specific statutory provisions for the passing of the benefit of and liability under the stipulations of a lease to a transferee of the leasehold, as well as to a transferee of the reversion.³³¹ These statutes are usually expressed in considerably broader terms than the English statute, but the limitations and restrictions upon the running of covenants as established in England have ordinarily been adopted in this country without particular reference to the language of any local statute.

The most important and frequent application of the principle that the assignee is liable upon the lessee's covenants occurs in the case of a covenant to pay rent,³³² but the principle has been applied in connection with numerous other covenants, including covenants to repair,³³³ to pay taxes,³³⁴ to reside on the prem-

In *Fitzh. Abr.*, Covenant, pl. 30, it is said that in 18 Hen. 3, writ of lies against the assign, for it is a covenant was held, by agreement of court, maintainable by assignee for a term of years. Fitzherbert's work was first published in 1514. The case referred to by him is found in Bracton's Note Book, 804, and Professor Maitland, in a note thereto, says that "it is very noteworthy that the benefit of a lessor's covenant was considered assignable at this early date."

does not repair, action of covenant lies against the assign, for it is a covenant which runs with the land." This decision is placed by Brooke in 25 Hen. 8, that is, five years before the passage of the statute.

³³⁰ See ante, § 149 b (1).

³³¹ See ante, § 149 b (1), notes 79-86.

³³² See post, § 181 b.

³³³ *Spencer's Case*, 5 Coke, 16 a; *Minshull v. Oakes*, 2 Hurl. & N. 793; *Williams v. Earle*, L. R. 3 Q. B. 739;

Demarest v. Willard, 8 Cow. (N. Y.) 206; *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561. And see ante, § 116 i.

³³⁴ *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *State v. Martin*, 82

ises,³³⁵ not to carry on particular classes of trade thereon,³³⁶ to insure, under certain circumstances,³³⁷ and not to assign without the lessor's assent, at least when assigns are mentioned.³³⁸ Other covenants, the burden or benefit of which run with the land, have been previously named, as have the general principles determining the running of covenants upon a transfer of the leasehold as well as of the reversion.³³⁹

The assignee cannot repudiate liability on his lessee's covenant on the ground that he did not know thereof, since he is bound to take notice of the contents of the instrument of lease,³⁴⁰ but he is not liable if the landlord expressly agrees at the time of the assignment that he shall not be liable.³⁴¹

(b) **Stipulations not under seal.** Even though it be conceded that covenants ran at common law before the statute of 32 Hen. 8, c. 34, upon an assignment of the reversion,³⁴² it does not appear that stipulations not constituting covenants, as not being under seal, ever ran, and such stipulations are not within the scope of that statute, which applies in terms only to covenants in indentures of leases.³⁴³ Consequently, the question might be suggested whether the benefit or burden of such an unsealed stipulation would run at the present day, without reference to any statute.³⁴⁴ Without question the local statutes in force in a number of states, providing for the transfer of the rights and liabilities of the original parties to the lease, not be-

Tenn. (14 Lea.) 92, 52 Am. Rep. 167; 340 Barroilhet v. Battelle, 7 Cal. Post v. Kearney, 2 N. Y. (2 Comst.) 450; West Virginia, C. & P. R. Co. v. 394, 51 Am. Dec. 303. See ante, §§ McIntire, 44 W. Va. 210, 28 S. E. 696; 143 g, 149 b, note 112. Washington Natural Gas Co. v. John-

son, 123 Pa. 576, 16 Atl. 799, 10 Am. 335 Tatem v. Chaplin, 2 H. Bl. 132. St. Rep. 553.

336 Mayor of Congleton v. Pattison, 10 East, 136; Wertheimer v. Wayne 341 Benedict v. Everard, 73 Conn. Circuit Judge, 83 Mich. 56, 47 N. W. 157, 46 Atl. 870; Pond v. Torrey, 180 Mass. 226, 62 N. E. 266.

337 Vernon v. Smith, 5 Barn. & Ald. 342 See ante, note 329.

1; Northern Trust Co. v. Snyder's 343 See ante, § 149 b (7).

Adm'r, 46 U. S. App. 179, 587; Thom- 344 In Dougherty v. Matthews, 35 as' Adm'r v. Vonkapff, 6 Gill & J. Mo. 520, 88 Am. Dec. 126, the as- (Md.) 372. See ante, § 145 b, at signee of a lessee under an unsealed instrument of lease is regarded as

338 See ante, at note 152.

339 See ante, § 149 b.

not bound by the stipulations there- in.

ing in terms restricted to "indentures of lease,"³⁴⁵ would be regarded as dispensing with any necessity that the lease be under the seal of the covenanting party. And in a number of states, in which the use of private seals has been by statute abolished, the presence or absence of a seal would be immaterial in this as in other connections.

(c) **Breaches of covenant before assignment.** The liability to which the assignee becomes subject is a liability for breaches of the covenant which may occur after the assignment, and not those which may have occurred by the lessee's fault prior thereto.³⁴⁶ Accordingly, in the case of a covenant to pay rent, the assignee is not liable thereunder for rent which may have become due before the assignment,³⁴⁷ unless he expressly assumes liability therefor.³⁴⁸ In some cases the courts seem to have gone rather far in inferring an assumption of liability from the language used.³⁴⁹ Occasionally a covenant is such that any

³⁴⁵ See ante, § 149 b (2), notes 79-86.

³⁴⁶ *Grescot v. Green*, 1 Salk. 199; *Brittin v. Vaux*, Lutw. 109; *St. Saviour's v. Smith*, 3 Burrow, 1271; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Tillotson v. Boyd*, 6 N. Y. Super. Ct. (4 Sandf.) 516; *Dananberg v. Rheinheimer*, 24 Misc. 712, 53 N. Y. Supp. 794; *Farmers' Bank v. Mutual Assur. Soc.*, 4 Leigh (Va.) 69.

But the assignee may lose his leasehold owing to the enforcement of a forfeiture for a breach of covenant which occurred prior to the assignment, when the lease expressly gives a right of re-entry. See *Collender v. Smith*, 20 Misc. 612, 45 N. Y. Supp. 1130, and post, § 194 h.

³⁴⁷ *Thomas v. Connell*, 5 Pa. 13. Even though it was payable in advance for the period during which the assignment was made. *Wolf v. Gluck*, 24 Misc. 763, 53 N. Y. Supp. 874.

³⁴⁸ *Rawlings v. Duvall*, 4 Har. & McH. (Md.) 1.

³⁴⁹ In *Fontaino v. Schulenburg & Boeckler Lumber Co.*, 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648, it was held that a corporation which "stepped into the shoes" of the lessee, occupying the premises and continuing its business, was liable for taxes which had previously become due, since it presumably assumed the lessee's debts. And in *Farmers' Bank v. Mutual Assur. Soc.*, 4 Leigh (Va.) 69, a covenant by the assignee to pay all the rents and perform all the covenants in the lease contained and required to be performed by the lessee was held to render him liable for breaches previous to the assignment. And a like holding was made when the assignment provided that the assignee should hold the lease "under the terms thereof and under and subject to the covenants and rents therein reserved and contained," and the assignee accepted the assignment, caused it to be recorded, and "received the lease thereunder." *Woodland Oil Co. v. Craw-*

breach thereof must have occurred before the assignment, as when something was to be done by the lessee at a certain time and the assignment was after that time, and in such case, necessarily, no burden thereunder passes to the assignee.³⁵⁰

(d) **Necessity of legal assignment.** In order that one be liable on the covenants as an assignee of the leasehold, there must, by the weight of authority, be what purports to be a legal assignment to him, and accordingly, the fact that one has, by a contract to purchase the leasehold or otherwise, become vested with an equitable interest therein, and has entered thereunder, has been regarded as not sufficient to render him liable.³⁵¹ Nor can the equitable assignee be compelled by the landlord to take a legal assignment, so as to impose liability on him.³⁵² This being the case when possession is taken under an equitable assignment, *a fortiori* one is not liable as assignee merely because he has possession without any assignment whatever.³⁵³

In a few cases in this country, the courts have regarded an equitable assignee as liable under the covenants,³⁵⁴ and, occa-

ford, 55 Ohio St. 161, 44 N. E. 1093, 377; St. Louis Public Schools v. 34 L. R. A. 62. Boatmen's Ins. & Trust Co., 5 Mo.

³⁵⁰ Washington Natural Gas Co. v. App. 91; Chicago Attachment Co. v. Johnson, 123 Pa. 576, 16 Atl. 799, 10 Davis Sewing Mach. Co. (Ill.) 25 N. Am. St. Rep. 553 (covenant to begin E. 669; Id., 142 Ill. 171, 31 N. E. 438; gas well at certain time); Townsend Bartlett v. Amberg, 92 Ill. App. 377; v. Scholey, 42 N. Y. 18 (covenant to Haley v. Boston Belting Co., 140 erect building within six months). Mass. 73, 2 N. E. 785; Quackenboss See ante, § 149 b (9), notes 192-194. v. Clarke, 12 Wend. (N. Y.) 555.

³⁵¹ Crouch v. Tregonning, L. R. 7 ³⁵⁴ Astor v. Lent, 19 N. Y. Super. Exch. 88; Cox v. Bishop, 8 De Gex, Ct. (6 Bosw.) 612; Mason v. Breslin, M. & G. 815; Walters v. Northern 9 Abb. Pr. (N. S.) 427; 40 How. Pr. Coal Min. Co., 5 De Gex, M. & G. 629; 436, 32 N. Y. Super. Ct. (2 Sweeny) Mayhew v. Hardesty, 8 Md. 479; 386; Astor v. L'Amoureux, 6 N. Y. Friary, Holroyd & Healey's Breweries v. Singleton [1899] 1 Ch. 86; Super. Ct. (4 Sandf.) 524; Carter v. Hammett, 12 Barb. (N. Y.) 253, 18 Ramage v. Womack [1900] 1 Q. B. Barb. 608; Rothschild v. Hudson, 6 Wkly. Law. Bul. (Ohio) 752; Mead 116. v. Madden, 85 App. Div. 10, 82 N. Y.

³⁵² Moore v. Greg, 2 De Gex & S. Supp. 900; Fontaino v. Schulenburg 304, 2 Phil. Ch. 717, overruling Lucas & Boeckler Lumber Co., 109 Mo. 55, v. Comerford, 1 Ves. Jr. 235, 3 Brown 18 S. W. 1147, 32 Am. St. Rep. 648 Ch. 166; Ramage v. Womack [1900] 1 Q. B. 116; Merchants' Ins. Co. v. (semble); Berry v. McMullen, 17 Mazange, 22 Ala. 168. Serg. & R. (Pa.) 84. And see Wick-

³⁵³ See Camp v. Scott, 47 Conn. 366. ersham v. Irwin, 14 Pa. 108; Negley

sionally, it seems, one has been subjected to liability as assignee merely because in possession of the premises, though he was shown to be in possession neither as legal nor equitable assignee.³⁵⁵ So, although an assignment is, by the statute of frauds or other enactment, required to be in writing, there are occasional decisions to the effect that one is liable as assignee under an oral assignment, if he takes possession of the premises.³⁵⁶ Though these decisions are mostly based on the doctrine of part performance, which, it seems, is properly inapplicable,³⁵⁷ their tendency is in accord with those previously referred to, holding that possession, without any legal assignment, is sufficient to impose liability, since it would frequently be difficult to ascertain whether there is an actual oral assignment accompanying or preceding the change of possession.

v. Morgan, 46 Pa. 285. But as to the New York law, see *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394, and other cases cited post, notes 355, 362.

³⁵⁵ So it was held that where the lessee's husband entered into possession without administration on the lessee's death, he was to be regarded as assignee, and liable as such so long as he remained in possession. *Noble v. Thayer*, 19 App. Div. 446, 46 N. Y. Supp. 302. And there is a suggestion to the effect that one in possession, if not shown to be a sublessee, is liable as an assignee, in *Frank v. New York, L. E. & W. R. Co.*, 122 N. Y. 197, 215, 25 N. E. 332. See, also, *People v. German Bank*, 110 N. Y. Supp. 291.

In *Hatch v. Van Dervoort*, 54 N. J. Eq. 511, 34 Atl. 938, mortgagees of a stock of goods who took possession and occupied the building in which the goods were, for the purpose of selling them, were held liable for rent under the lease. Compare *Fisher v. Pforzheimer*, 93 Mich. 650, 53 N. W. 828; *People v. Gilbert*, 64 Ill. App. 203.

In *Thomas v. Connell*, 5 Pa. 13, and *Wickersham v. Irwin*, 14 Pa. 108, it is said that one becomes liable as assignee by reason of the enjoyment or right of enjoyment of the premises.

³⁵⁶ *Baker v. J. Maier & Zobelein Brewery*, 140 Cal. 530, 74 Pac. 22; *Carter v. Hammett*, 12 Barb. (N. Y.) 253; *Dewey v. Payne*, 19 Neb. 540, 26 N. W. 248; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443. The authorities cited in the first of the above cases furnished no support to the decision. In the last of the above cases there was an express assumption of liabilities by the assignee. That possession is not sufficient for this purpose, at least at law, see *Chicago Attachment Co. v. Davis Sew. Mach. Co.* (Ill.) 25 N. E. 669; *Id.*, 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754; *Welsh v. Schuyler*, 6 Daly (N. Y.) 412.

³⁵⁷ The doctrine of part performance is properly applicable only to an oral contract, and not to an oral conveyance (ante, § 25 g [5]), and an assignment is a conveyance. But even regarding an oral assignment

The various decisions above referred to, apparently to the effect that if a person enters into possession by permission of the lessor or the latter's assignee, he is liable on the covenants as if a legal assignment had been made to him, are presumably to some extent the result of a desire on the part of the courts to impose the liability under the lease upon the person who is enjoying the benefit thereof. But their effect is undoubtedly to confuse the law on the subject, and they are, it is submitted, erroneous as ignoring the well settled rule that a subtenant is not liable on the covenants of the head lease.³⁵⁸ The person going into possession of the premises by permission of the original lessee, or the latter's assignee, but not under a valid legal assignment, must necessarily do so as a tenant of the lessee or of the latter's assignee.^{358a}

The fact that the assignment is in violation of a condition or covenant of the lease is, as before stated, no reason for exempting the assignee from liability under the lessee's covenants, since the assignment is valid in spite of the stipulation.³⁵⁹ An assignee is liable though the assignment is voidable at the option of the assignor, a minor.³⁶⁰

(e) **Assignee's entry unnecessary.** At one time it was held in England that the assignee was not liable on the covenants

as equivalent to a contract to assign, the doctrine of part performance, while properly applicable in favor of the assignor who has put his assignee in possession, to obtain specific performance of the latter's contract to pay a certain sum for the transfer of the leasehold estate, seems entirely inapplicable in favor of a person not a party to such contract to enable him to assert a liability on the part of such intended assignee which can exist only on the theory that the assignment has actually been made. The doctrine of part performance is based on the theory that after a party has been induced partially to perform a contract, it would be inequitable to allow the other party thereto to as-

sert that the contract is not legally enforceable because of the statute of frauds. But there is no such equity in favor of a third person who has done nothing on the faith of the contract.

³⁵⁸ See post, § 162.

^{358a} See ante, §§ 13 a (3), 14 b (2).

³⁵⁹ See ante, § 152 j (2), note 170.

³⁶⁰ *Rothschild v. Hudson*, 8 Ohio Dec. 259, 32 Am. Dec. 707. And see *Mead v. Madden*, 85 App. Div. 10, 82 N. Y. Supp. 900, where it was decided that the fact that an assignment was set aside as in violation of the bankrupt law did not affect the assignee's liability on the covenants. But this was based on the theory that possession was sufficient for the imposition of liability.

until he actually entered,³⁶¹ and this view has occasionally been taken in this country.³⁶² But it has been repudiated in most jurisdictions, the legal assignee being regarded as liable though he never takes possession.³⁶³ He must, however, accept the

³⁶¹ *Eaton v. Jaques*, 2 Doug. 455.
³⁶² *La Dow v. Arnold*, 14 Wis. 458;
Damainville v. Mann, 32 N. Y. 197,
 88 Am. Dec. 324; *McLean v. Caldwell*,
 107 Tenn. 138, 64 S. W. 16; *Snowden v. Memphis Park Ass'n*, 75
 Tenn. (7 Lea) 225. It is so assumed,
 apparently in *Landt v. McCullough*,
 218 Ill. 607, 75 N. E. 1069. And see
Walton v. Cronly, 14 Wend. (N. Y.)
 63; *Moore v. Chase*, 26 Misc. 9, 55 N.
 Y. Supp. 621; *Tate v. Neary*, 52 App.
 Div. 78, 65 N. Y. Supp. 40, and the
 cases cited ante, note 355.

The opinion in *Sanders v. Partridge*, 108 Mass. 556, contains the following language: "It is stated generally in the text books that an actual entry upon the demised premises by an assignee of the lease, is not requisite in order to charge him with the performance of covenants running with the land. But we think this proposition will hold good only in respect of assignments by deed recorded and delivered; which are usually regarded as effecting a transfer, not only of title, but also of the legal possession." And then follows the language quoted post, note 470. Such a view of the subject has never been asserted elsewhere. The assignment must of course be delivered in any jurisdiction, that is, an intention that it shall take effect must be indicated, as in the case of any conveyance (see 2 *Tiffany*, Real Prop. § 406). If by the reference to a "deed" the court means a sealed instrument, it may be remarked that previously the opinion had undertaken to show that a seal was not

necessary to an assignment. The record *vel non* of the assignment would seem to be absolutely immaterial in this respect. If the court had in mind the declarations in earlier cases in that state that a conveyance by deed, duly acknowledged and recorded, is equivalent, as regards results, to livery of seisin, it is sufficient to say that this has no application to the transfer of an estate less than freehold. Nor can the possession in such case be regarded as passing by force of the statute of uses, there being no seisin on which to base the transfer. *Sanders v. Partridge*, supra, is referred to in *Collins v. Pratt*, 181 Mass. 345, 63 N. E. 946, where, in deciding that an assignee of a leasehold was liable although he had not taken possession, the court distinguishes the earlier case, saying: "But in that case the assignment was not under seal, and while this was held to operate as a transfer of the lease, * * * it was further held that he could not escape liability by making a formal assignment without changing possession."

³⁶³ *Williams v. Bosanquet*, 1 Brod. & B. 238; *St. Louis Public Schools v. Boatmen's Ins. & Trust Co.*, 5 Mo. App. 91; *Babcock v. Scoville*, 56 Ill. 461; *University of Vermont v. Joslyn*, 21 Vt. 52; *Mayhew v. Hardesty*, 8 Md. 495; *Benedict v. Everard*, 73 Conn. 157, 46 Atl. 870; *Trabue v. McAdams*, 71 Ky. (8 Bush) 74; *Fennell v. Guffey*, 155 Pa. 38, 25 Atl. 785; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *Whit-*

assignment in order to be thus liable on covenants,³⁶⁴ or, as it may be otherwise expressed, he may, unless he has manifested his acceptance, repudiate the assignment in order to avoid liability.³⁶⁵ A burdensome leasehold cannot, it is evident, be cast upon a man against his will.

(f) **Mortgagee of leasehold.** In jurisdictions in which a mortgage transfers the legal title, the mortgagee is regarded as the assignee of the leasehold, and is as such liable on the covenants, without regard to whether he takes possession under the mortgage.³⁶⁶ Even in jurisdictions where a mortgage does not transfer the legal title, the mortgagee is liable on the covenants, according to some decisions, if he takes possession.³⁶⁷ These

comb v. Starkey, 63 N. H. 607, 4 Atl. 793; *Smith v. Brinker*, 17 Mo. 148, 57 Am. Dec. 265; *Todd v. Cameron*, 2 U. C. Err. & App. 434.

The taking of possession being unnecessary, an averment thereof need not be proven. *Pingry v. Watkins*, 17 Vt. 379; *University of Vermont v. Joslyn*, 21 Vt. 52.

³⁶⁴ *Macfarland v. Heim*, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629; *Frye v. Hill*, 14 Wash. 83, 43 Pac. 1097; *Moore v. Chase*, 26 Misc. 9, 55 N. Y. Supp. 621 (dictum). And this rule applies, it has been decided, in favor of the legatee of a leasehold. *Whitcomb v. Starkey*, 63 N. H. 607, 4 Atl. 793.

³⁶⁵ See *Hannen v. Ewalt*, 18 Pa. 9. This mode of expression would be more correct in those jurisdictions in which a conveyance is regarded as valid, without acceptance, until repudiated by the grantee. See 2 *Tiffany*, Real Prop. § 407.

³⁶⁶ *Williams v. Bosanquet*, 1 Brod. & B. 238; *McMurphy v. Minot*, 4 N. H. 251; *Farmers' Bank v. Mutual Assur. Soc.*, 4 Leigh (Va.) 69; *Mayhew v. Hardesty*, 8 Md. 479; *Abrahams v. Tappe*, 60 Md. 317. See *Simonds v. Turner*, 120 Mass. 328.

Eaton v. Jaques, 2 Doug. 455, in which Lord Mansfield decided that a mortgagee of the term, not in possession, was not liable on the covenants, must be regarded as overruled. In New Hampshire it has been decided that, though an assignee gives a mortgage back to his assignor, the assignee is liable on the covenants, since a mortgagor is to be regarded as legal owner as against all persons other than the mortgagee. The court says that if *McMurphy v. Minot*, 4 N. H. 251, supra, is inconsistent with this, it is to that extent overruled. *Trustees of Donations v. Streeter*, 64 N. H. 106, 5 Atl. 845. See, also, *Lord v. Ferguson*, 9 N. H. 380, questioning *McMurphy v. Minot*.

³⁶⁷ *Walton v. Cronly*, 14 Wend. (N. Y.) 63; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Levy v. Long Island Brew. Co.*, 26 Misc. 410, 56 N. Y. Supp. 242; *Prather v. Foote*, 1 Disn. (Ohio) 434; *McKee v. Angelrodt*, 16 Mo. 283. In *Tallman v. Bresler*, 65 Barb. 369, 56 N. Y. 635, it was decided that one to whom the leasehold was mortgaged to secure his pay as contractor was not liable as a mortgagee in possession merely because

decisions seem in effect to assert the view above referred to,³⁶⁸ that one who takes possession without any assignment, is liable as an assignee. On the other hand it has, in two states, been ruled that a mortgagee, even though he takes possession, is not liable on the covenants.³⁶⁹ In accordance with the latter view are the decisions, rendered in jurisdictions where the legal title passes by a regular mortgage, that one claiming under an equitable mortgage or lien, which does not involve a transfer of the legal title, is not liable on the covenants although he takes possession.³⁷⁰

Although the instrument of lease requires the lessor's consent to any assignment of the mortgage, an assignee by way of mortgage, who is liable on the lessee's covenants by reason of the fact that the mortgage transfers the legal title, may, it has been decided, without the lessor's consent, free himself from liability by giving a release or discharge of the mortgage, the lessor's consent to the mortgage involving his consent to its discharge in the usual way.³⁷¹

(g) **Assignee by operation of law.** When an assignment takes place by operation of law, the assignee ordinarily becomes liable on the covenants running with the land, as if he claimed under a voluntary assignment. Thus, upon a sale of the lessee's lease-

he entered to do work under his contract. In *Astor v. Hoyt*, 5 Wend. (N. Y.) 603, it is held that a mortgagee is in possession within the rule if he takes his mortgagor's share of the fund awarded in condemnation proceedings.

A mortgagee of the leasehold is not in possession so as to be liable on the lessee's covenant merely because he is appointed by the mortgagor as agent to collect rents and make payments therefrom on the mortgage, and acts accordingly. *Ireland v. United States Mortg. & Trust Co.*, 72 App. Div. 95, 76 N. Y. Supp. 177; *Id.*, 175 N. Y. 491, 67 N. E. 1083.

In *Dunlop v. James*, 34 Misc. 708, 70 N. Y. Supp. 1019, it is held that

the mortgagee of a leasehold, paying rent to avoid forfeiture, may recover the amount of the payment from the assignee of the leasehold.

³⁶⁸ See ante, at note 355.

³⁶⁹ *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Cargill v. Thompson*, 57 Minn. 534, 59 N. W. 638.

³⁷⁰ *Moore v. Greg*, 2 Phil. Ch. 717; *Merchants' Ins. Co. v. Mazange*, 22 Ala. 168.

³⁷¹ *Jamieson v. London & Canadian Loan & Agency Co.*, 30 Can. Sup. Ct. 14, affg. 26 Ont. App. 116.

That the execution of a release of the mortgage relieves the mortgagee, although the release is not recorded, see *Horner v. Chaisty*, 101 Md. 593, 61 Atl. 283.

hold interest under execution, and a conveyance thereof to the purchaser by the sheriff, the purchaser becomes liable upon the covenants.³⁷² Likewise, the purchaser under a foreclosure sale of the leasehold,³⁷³ or a purchaser at tax sale,³⁷⁴ may be made personally liable.

(h) **Executor or administrator as assignee.** We have, in another place, considered the liability of the executor or administrator of a deceased lessee to satisfy a covenant of the lease, as any other contract liability on the part of the decedent, out of the assets of the decedent's estate.³⁷⁵ In addition to this liability, the executor or administrator may also, as being the assignee by operation of law of the leasehold interest, be subject to a personal liability on covenants running with the land, as may any other assignee, by reason of his being in privity of estate with the landlord.³⁷⁶ It has been decided, however, that he cannot be thus held liable as assignee unless he enters and takes possession of the premises,³⁷⁷ and the mere fact that he pays rent is not equivalent to taking possession for this purpose.³⁷⁸ If he is sued as assignee for rent, it is no defense that he has fully administered the assets, since the profits of the land are presumed to be greater than the rent, and the executor

³⁷² *Smith v. Brinker*, 17 Mo. 148, 57 Am. Dec. 265; *McMurphy v. Minot*, 4 N. H. 251; *Joslin v. Ervien*, 50 N. J. Law, 39, 12 Atl. 136; *Sutliff v. Atwood*, 15 Ohio St. 186; *Snowden v. Memphis Park Ass'n*, 75 Tenn. (7 Lea) 225. But the purchaser is not liable until a conveyance is made to him. *Thomas v. Connell*, 5 Pa. 13; *Bartlett v. Amberg*, 92 Ill. App. 377.

Wis. 89, 8 N. W. 6; Pardoe v. Stewart, 37 Hun (N. Y.) 259.

³⁷⁴ *Conrad v. Smith*, 12 Phila. (Pa.) 306.

³⁷⁵ See ante, § 55 a.

³⁷⁶ *Hargrave's Case*, 5 Coke, 31 a; *Lyddall v. Dunlapp*, 1 Wils. (pt. 1) 4, 5; *Tilney v. Norris*, 1 Ld. Raym. 553; *Wollaston v. Hakewill*, 3 Man. & G. 297; *Buckley v. Pirk*, 1 Salk. 317; *In re Galloway*, 21 Wend. (N. Y.) 32, 34 Am. Dec. 209; *Howard v. Heinerschit*, 16 Hun (N. Y.) 177; *Becker v. Walworth*, 45 Ohio St. 169, 12 N. E. 1.

³⁷⁷ *Wollaston v. Hakewill*, 3 Man. & G. 297; *Kearsley v. Oxley*, 2 Hurl. & C. 896; *Howard v. Heinerschit*, 16 Hun (N. Y.) 177.

³⁷⁸ *Rendall v. Andreae*, 61 Law J. Q. B. 630, 633.

In *Snowden v. Memphis Park Ass'n*, 75 Tenn. (7 Lea) 225, it is asserted that the purchaser of the leasehold at execution may disclaim the interest in order to avoid liability.

³⁷³ *State v. Martin*, 82 Tenn. (14 Lea) 92, 52 Am. Rep. 167; *Wittman v. Milwaukee, L. S. & W. R. Co.*, 51

has no right to apply such profits otherwise than upon rent.³⁷⁹ He may, however, as against a claim for rent, plead and show that the profits are not equal to the rent, and that he has no assets,³⁸⁰ though he remains liable to the extent of the profits which he could derive from the premises, using proper diligence, during the time he holds the premises as assignee.³⁸¹ Even after entry the executor may, it has been decided, rid himself of this liability on his testator's covenant for rent by relinquishing possession to the landlord, in case the value of the land is less than the rent, and there is a deficiency of assets.³⁸² In the case of covenants to repair, however, it has been decided, the executor cannot plead in defense that the premises yield no profit, or a profit insufficient to satisfy the demand,³⁸³ nor can he, for that cause, relinquish possession to the landlord and thereby free himself from liability on such a covenant.³⁸⁴ The ground of this distinction, made by the English cases, between the right of the executor to relieve himself, by relinquishing possession, from a liability to repair, and his right to so relieve himself from a liability to pay rent, does not clearly appear.³⁸⁵

The executor or administrator can, like any other assignee,³⁸⁶ free himself from liability as assignee for further breaches of covenant by an assignment over to another.³⁸⁷ He cannot, however, thus relieve himself from liability as executor or administrator to the extent of the assets in his hands, if his decedent was the original lessee.³⁸⁸

(i) **Heirs and legatees.** An heir of the lessee may be liable

³⁷⁹ 2 Williams, Executors (9th Ed.) 1636; Buckley v. Pirk, 1 Salk. 317. ³⁸³ Tremeere v. Morison, 1 Bing. N. C. 89; Sleap v. Newman, 12 C. B. (N. S.) 116; Tilney v. Norris, 1

³⁸⁰ Billingham v. Speerman, 1 Salk. 297 (debt); Reid v. Tenterden, 61 Law J. Q. B. 630.

³⁸¹ Tyrw. 111. ³⁸⁴ Sleap v. Newman, 12 C. B. (N.

³⁸² Rubery v. Stevens, 4 Barn. & Adol. 241; In re Bowes, 37 Ch. Div. 128; Hopwood v. Whaley, 6 C. B. 744; Rendall v. Andreae, 61 Law J. Q. B. 630; Inches v. Dickinson, 84

Mass. (2 Allen) 71, 79 Am. Dec. 765. ³⁸⁵ Such a distinction is not recognized by Bayley, B., in Reid v. Tenterden, 4 Tyrw. 118, 120.

³⁸⁶ See post, § 158 a (2) (n).

³⁸⁷ Taylor v. Shum, 1 Bos. & P. 21;

³⁸⁸ See ante, § 157 a (2), note 312; post, § 181 c, note 694.

Goodland v. Ewing, Cab. & E. 43.

Wilkinson v. Cawood, 3 Anstr. 909; Stephens v. Hotham, 1 Kay & J. 575;

Reid v. Tenterden, 4 Tyrw. 111.

under the latter's covenant, to the extent of lands which have descended to him, as upon any other obligation of his ancestor.³⁸⁹ Apart from this liability, which would exist only in case of a deficiency of personal assets, he is, it seems clear, not liable as heir on the lessee's covenants, though these are such as to run with the land, and though the covenant in terms binds the heirs, since the leasehold interest, being personalty, does not pass to heirs. And this has been held to be so even though the heir entered into possession of the premises upon the ancestor's death.³⁹⁰ The heir of the grantee in a conveyance in fee, however, upon which a rent has been reserved, has been regarded as liable on a covenant to pay the rent, since the grantee's interest passes to him by descent.³⁹¹ And in the case of a lease *pur autre vie*, granted to one and his heirs, an heir might, in some jurisdictions, be liable on the covenants of the lease as special occupant.³⁹²

One to whom a leasehold interest is bequeathed is no doubt liable on a covenant of the lease if he does not refuse the bequest. He may, it has been held, exempt himself from liability by such a refusal.³⁹³

(j) **Trustees in bankruptcy.** Upon the bankruptcy of the tenant, assuming that this does not of itself terminate the tenancy,³⁹⁴ his leasehold interest may pass, with his other property, to the trustee in bankruptcy, subjecting the latter to liability like any other assignee, upon the covenants of the lease.³⁹⁵ The trustee is not, however, bound to accept the leasehold interest, if he has reason to believe it will be more of a burden than a benefit,³⁹⁶ and the cases are to the effect that the trustee incurs

³⁸⁹ Woerner, Administration, §§ H. 607, 4 Atl. 793; Howard v. Heinerschit, 16 Hun (N. Y.) 177 (semble). 574-576.

³⁹⁰ Camp v. Scott, 47 Conn. 366.

³⁹⁴ See ante, § 12 g (7).

³⁹¹ Van Rensselaer v. Hays, 19 N. Y. 68, 75 Am. Dec. 278; Van Rensselaer v. Read, 26 N. Y. 558; Tyler v. Heidorn, 46 Barb. (N. Y.) 439.

³⁹⁵ Ex parte Faxon, 1 Lowell, 404, Fed. Cas. No. 4,704; Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889; White v. Griffing, 44 Conn. 437.

³⁹² See 2 Platt, Leases, 381. As to special occupancy, see 1 Tiffany, Real Prop. § 33.

³⁹⁶ In re Chambers, Calder & Co., 98 Fed. 865; In re Ten Eyck, 7 N. B. R. 26, Fed. Cas. No. 13,829;

³⁹³ Whitcomb v. Starkey, 63 N. Griswold v. Morse, 59 N. H. 211.

no liability under the lease until he actually indicates his acceptance, either by word or act.³⁹⁷

In case the lessor re-enters, under a proviso for re-entry in the lease, upon the bankruptcy of the tenant, the tenancy is necessarily terminated, and the bankrupt, or his trustee, is not liable for any rent which would otherwise have subsequently accrued.³⁹⁸ Occasionally the lease provides that upon such re-entry the landlord may "relet" the premises, and assert a liability against the lessee for any deficiency in the amount of rent so obtained, as compared with that originally reserved. Such a contingent liability, like that for the whole rent,³⁹⁹ cannot be proved in the bankruptcy proceeding.⁴⁰⁰

There are in England a number of decisions as to what facts are sufficient to show an acceptance of the leasehold by the trustee or assignee in bankruptcy. It has been there decided that acceptance is not necessarily shown by the fact that the trustee offers the leasehold for sale, in order to ascertain whether it has any value,⁴⁰¹ by his release of a subtenant from liability for rent,⁴⁰² by the payment of rent by him in order to prevent a distress,⁴⁰³ or by keeping the furniture and goods of the bankrupt upon the premises.⁴⁰⁴ On the other hand, there are English

³⁹⁷ In *re Lucius Hart Mfg. Co.*, 17 bankruptcy, and applied even in N. B. R. 459, Fed. Cas. No. 8,592; In cases where, the lease being under *re Washburn*, 11 N. B. R. 66, Fed. seal, there could be no legal action Cas. No. 17,211; In *re Mahler*, 105 for use and occupation. Lowell, Fed. 428; In *re Ives*, 18 N. B. R. 28, Bankruptcy, § 376. Fed. Cas. No. 7,116.

³⁹⁸ *Ex parte Houghton*, 1 Lowell, 554, Fed. Cas. No. 6,725.

³⁹⁹ See post, § 182 l.

⁴⁰⁰ In *re Croney*, 8 Ben. 64, Fed. Cas. No. 3,411; *Ex parte Lake*, 2 Lowell, 544, Fed. Cas. No. 7,991; In *re Ells*, 98 Fed. 967; In *re Shaffer*, 124 Fed. 111.

⁴⁰¹ *Turner v. Richardson*, 7 East, 335; *Carter v. Warne*, 1 Moody & M. 479.

⁴⁰² *Hill v. Dobie*, 8 Taunt. 325.

⁴⁰³ *Wheeler v. Bramah*, 3 Camp. 340; *Goodwin v. Noble*, 8 El. & Bl. 587.

⁴⁰⁴ *Goodwin v. Noble*, 8 El. & Bl.

But if the trustee, without accepting the leasehold, occupies the premises for the purpose of carrying out the trust, he is regarded as liable for the value of such temporary use and occupation. *Bray v. Cobb*, 100 Fed. 270; In *re Grimes*, 96 Fed. 529; In *re Commercial Bulletin Co.*, 2 Woods, 220, Fed. Cas. No. 3,060; In *re Lynch*, 7 Ben. 26, Fed. Cas. No. 8,634; In *re Hufnagel*, 12 N. B. R. 554, Fed. Cas. No. 6,837; In *re Ives*, 18 N. B. R. 28, Fed. Cas. No. 7,116. The imposition of such liability upon the trustee is said to be an equitable practice adopted by the courts of

decisions to the effect that such acceptance is shown by the action of the trustee in taking possession of the premises, without any disclaimer of a purpose to take possession in such capacity,⁴⁰⁵ by his assumption of the management of the farm conducted by the bankrupt upon the premises,⁴⁰⁶ by his use of the premises in such a way as to injure them,⁴⁰⁷ or by his actual sale of the leasehold.⁴⁰⁸ It is said that "no general rule can be laid down as to the effect of remaining in possession of the demised premises, or paying rent for them, or doing any other act consistent with the supposition that the assignees have not elected to take the lease as part of the property of the bankrupt for the benefit of the creditors," but that "each case must be determined by the peculiar circumstances belonging to it."⁴⁰⁹

If the trustee refuses to accept the leasehold interest, it remains in the bankrupt.⁴¹⁰

As before stated, a general covenant or condition against assignment does not apply to such an assignment of the leasehold to the trustee by operation of law, nor does it preclude a reassignment by the bankrupt in the settlement of the estate.⁴¹¹

(k) **Assignees for creditors.** In case of an assignment for the benefit of creditors, the assignee has, by the American decisions, the same right which a bankrupt's trustee has, to refuse to accept the leasehold, if this will involve a greater burden than benefit.⁴¹² And he has, it is said, a reasonable time in which to determine whether he will accept it.⁴¹³ In England a different view is taken, to the effect that if the assignee accepts the conveyance, he cannot refuse to accept any leasehold interests included therein.⁴¹⁴ It has been said, indeed, in this country,

587. See *In re Yeaton*, 1 Lowell, 420, Fed. Cas. No. 18,133.

⁴⁰⁵ *Hanson v. Stevenson*, 1 Barn. & Ald. 303.

⁴⁰⁶ *Thomas v. Pemberton*, 7 Taunt. 206; *Bradshaw v. James*, 20 Law T. (N. S.) 781.

⁴⁰⁷ *Carter v. Warne*, 4 Car. & P. 191, 1 Moody & M. 479.

⁴⁰⁸ *Page v. Godden*, 2 Starkie, 309; *Hastings v. Wilson*, Holt N. P. 290. See *White v. Griffing*, 44 Conn. 437.

⁴⁰⁹ *Goodwin v. Noble*, 8 El. & Bl. 587, per Lord Campbell.

⁴¹⁰ *In re Ells*, 98 Fed. 967; *Ex parte Houghton*, 1 Lowell, 554, Fed. Cas. No. 6,725.

⁴¹¹ See ante, § 152 f, notes 111-115.

⁴¹² *Dorrance v. Jones*, 27 Ala. 630; *Horwitz v. Davis*, 16 Md. 313; *Boyce v. Bakewell*, 37 Mo. 492; *Journey v. Brackley*, 1 Hilt. (N. Y.) 447; *Pratt v. Levan*, 1 Miles (Pa.) 358.

⁴¹³ *Smith v. Goodman*, 149 Ill. 75, 36 N. E. 621; *Walton v. Stafford*, 162 N. Y. 558, 57 N. E. 92.

⁴¹⁴ *White v. Hunt*, L. R. 6 Exch. 32.

that if the leasehold interest is specifically mentioned in the assignment, the acceptance of the assignment operates to charge the assignee to the same extent as would the acceptance of an ordinary assignment of a leasehold interest,⁴¹⁵ but this view has never been actually applied.

The American cases are to the effect that acceptance of the leasehold by the assignee is not to be presumed from his acceptance of the trust for creditors, but that it must be shown in order to impose liability upon him.⁴¹⁶ Neither an entry on the premises to inventory and obtain the chattels of the assignor,⁴¹⁷ nor the use of the premises for their sale,⁴¹⁸ is sufficient, it has been decided, to show an acceptance, nor is, it seems, a transfer by the assignee to another of such right as he may have in the land, if by any possibility he may have any right.⁴¹⁹ But when the assignee entered on the premises and remained there until within a few days of the expiration of the lease and collected rents from the subtenants for the whole of the last quarter, and he did not notify the landlord of his intention not to accept the leasehold, or show that he remained on the premises merely long enough to remove the goods, he was held liable as having accepted;⁴²⁰ and the payment of rent by the assignee has in one case been decided to show an acceptance.⁴²¹ But a different view as to the effect of payment of rent has been adopted elsewhere.⁴²²

It has been decided in one case⁴²³ that the fact that the assignment for creditors is afterwards declared invalid, as in violation of the bankruptcy act, does not affect the liability of the

⁴¹⁵ *Journey v. Brackley*, 1 Hilt. 447; *Pratt v. Levan*, 1 Miles (Pa.) 358. See *White v. Thomas*, 75 Mo.

⁴¹⁶ *Smith v. Goodman*, 149 Ill. 75, 454.

36 N. E. 621; *Medinah Temple Co. v. Currey*, 162 Ill. 441, 44 N. E. 839, 53 Misc. 558, 59 N. Y. Supp. 624.

Am. St. Rep. 320; *Bokee v. Hamersley*, 16 How. Pr. (N. Y.) 461; ⁴²⁰ *Journey v. Brackley*, 1 Hilt. (N. Y.) 447. ⁴²¹ *Jones v. Hausmann*, 23 N. Y. Super. Ct. (10 Bosw.) 168.

⁴²² *Grant v. Gill*, 2 Whart. (Pa.) 42. But see *Pratt v. Levan*, 1 Miles (Pa.) 358.

⁴¹⁷ *Lewis v. Burr*, 21 N. Y. Super. Ct. (8 Bosw.) 140. ⁴²³ *Smith v. Goodman*, 149 Ill. 75, 36 N. E. 621.

⁴¹⁸ *Dorrance v. Jones*, 27 Ala. 630; *Horwitz v. Davis*, 16 Md. 313; *Journey v. Brackley*, 1 Hilt. (N. Y.) 10, 82 N. Y. Supp. 900. ⁴²³ *Mead v. Madden*, 85 App. Div. 10, 82 N. Y. Supp. 900.

assignee for the time he held possession, this view being based upon the theory that one going into possession as assignee is estopped to deny the validity of the assignment. Such a view would seem to place the assignee in a somewhat difficult position.

(1) **Receivers as assignees.** The question of the liability of a receiver, as an assignee of the leasehold, upon the covenants of the lease, including that for rent, would seem, primarily, to depend on the question whether the title to property of that character is vested in the receiver by his appointment. Whether a receiver, by his appointment, obtains title to the property of which he is given control, is a matter on which the decisions are by no means in accord, but it seems that, by the weight of authority, a receiver is, apart from statute, to be regarded as a mere custodian and representative of the court, and not as having title to the property. So regarded, it does not appear that a receiver appointed for a tenant should, unless an assignment were actually made to him by the tenant, be held liable on the covenants of the lease as an assignee, and there are cases to that effect.⁴²⁴ The courts have, however, more usually regarded the receiver as liable on such covenants, as being an assignee by operation of law,⁴²⁵ provided he has indicated an intention to accept the leasehold as a part of the assets of the insolvent tenant, but not otherwise,⁴²⁶ thus applying the same rule as is applied in the case of a trustee in bankruptcy and, by the American decisions, of an assignee for creditors.⁴²⁷ The cases are generally to the effect that the assumption of physical

⁴²⁴ *Gaither v. Stockbridge*, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; *Bell v. American Protective League*, 163

Mass. 558, 40 N. E. 857, 28 L. R. A. 452, 47 Am. St. Rep. 481; *Tradesmen Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 32 S. W. 1097, 31 L. R. A. 593, 49 Am. St. Rep. 943; *Mariner v. Crocker*, 18 Wis. 251. See, also, opinion of Cullen, J., in *Stokes v. Hoffman House*, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870, citing *In re Otis*, 101 N. Y. 580, 5 N. E. 571, where it was decided that, on the ground that the title does not

pass to the committee of a lunatic, he is not liable on the covenants in the lease. ⁴²⁵ *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155, 55 N. E. 179; *De Wolf v. Royal Trust Co.*, 173 Ill. 435, 50 N. E. 1049; *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Frank v. New York, L. E. & W. R. Co.*, 122 N. Y. 197, 25 N. E. 332; *Wells v. Higgins*, 132 N. Y. 459, 30 N. E. 861. ⁴²⁶ *Spencer v. World's Columbian Exposition*, 163 Ill. 117, 45 N. E. 250. And see cases cited post, note 428.

⁴²⁷ See ante, § 158 a (2) (j) (k).

possession and control of the leased premises by the receiver does not show an acceptance by him of the leasehold interest, so as to impose liability on him as an assignee of the leasehold, but that he may retain possession for a "reasonable time" and then give up the property if this seems expedient.⁴²⁸ But it is generally held or assumed that, apart from any question of the acceptance of the leasehold, the landlord is entitled to payment of rent, for the period of the receiver's occupation for the purpose of settling the estate, as one of the expenses of the receivership,⁴²⁹ at least to the extent of the earnings⁴³⁰ or the rental value⁴³¹ of the property. A receiver has, indeed, rarely been held liable, as assignee of the leasehold, for a period beyond that of his actual occupation, though he has occasionally been so held.⁴³²

It has been asserted in one state that the receiver may at any time "surrender" the premises to the landlord,⁴³³ meaning that he can terminate the rights and liabilities created by the lease by relinquishing possession to the landlord, irrespective of the consent of the latter. Elsewhere a contrary view has been taken,⁴³⁴ and it does not appear why the receiver should be able

⁴²⁸ *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 322, 35 Law. Ed. 1025; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 Law. Ed. 632; *United States Trust Co. v. Wabash W. R. Co.*, 150 U. S. 287, 37 Law. Ed. 1085; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 58 Fed. 257; *Carswell v. Farmers' Loan & Trust Co. (C. C. A.)* 74 Fed. 88; *Empire Distilling Co. v. McNulta*, 23 C. C. A. 415, 77 Fed. 700; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 268; *Park v. New York, L. E. & W. R. Co.*, 57 Fed. 799; *Clyde v. Richmond & D. R. Co.*, 63 Fed. 21; *Dayton Hydraulic Co. v. Felsenthal*, 54 C. C. A. 537, 116 Fed. 961; *Tradesmen Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 32 S. W. 1097, 31 L. R. A. 593, 49 Am. St. Rep. 943.

⁴²⁹ *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 35 Law. Ed. 1025; *Farm-*

ers' Loan & Trust Co. v. Northern Pac. R. Co., 58 Fed. 257; *Carswell v. Farmers' Loan & Trust Co. (C. C. A.)* 74 Fed. 88; *Dayton Hydraulic Co. v. Felsenthal*, 54 C. C. A. 537, 116 Fed. 961; *Frank v. New York, L. E. & W. R. Co.*, 122 N. Y. 197, 25 N. E. 332; *Nelson v. Kalkhoff*, 60 Minn. 305, 62 N. W. 335; *Stoepel v. Union Trust Co.*, 121 Mich. 221, 80 N. W. 13.

⁴³⁰ See *United States Trust Co. v. Wabash W. R. Co.*, 150 U. S. 289, 37 Law. Ed. 1085; *Clyde v. Richmond & D. R. Co.*, 63 Fed. 21; *Park v. New York, L. E. & W. R. Co.*, 57 Fed. 799.

⁴³¹ *Carswell v. Farmers' Loan & Trust Co. (C. C. A.)* 74 Fed. 88.

⁴³² *De Wolf v. Royal Trust Co.*, 173 Ill. 435, 50 N. E. 1049; *People v. National Trust Co.*, 82 N. Y. 283.

⁴³³ *New Hampshire Trust Co. v. Taggart*, 68 N. H. 557.

⁴³⁴ *New York, P. & O. R. Co. v.*

so to do. Conceding that the receiver becomes liable for rent by retaining possession, he can terminate that liability by assigning over to some "man of straw."⁴³⁵

(m) **Partial assignment.** In case of an assignment by the lessee of his interest, not in all the land leased but in part thereof, the burden of a covenant passes to the assignee, so as to render him subject to a liability thereunder proportioned to the value of such part. Accordingly he has been held liable for a proportionate share of the rent,⁴³⁶ of the burden of repairs,⁴³⁷ and of the taxes assessed on the land.⁴³⁸ He is not, it has been decided, liable for the entire rent.⁴³⁹

The same principle of proportionate liability applies, it seems, in case of the assignment of an undivided interest in the whole premises, as regards the liability for rent; and assignees of separate undivided interests, at least if by distinct conveyances, are liable only for a proportionate part of the rent and not for the whole.⁴⁴⁰ Nor will the fact that the assignee of an undivided interest has exclusive possession of the premises render him liable for the whole rent,⁴⁴¹ except in jurisdictions where the liability of an assignee of the leasehold is based on possession rather than title.⁴⁴² In the case, however, of covenants other

New York, L. E. & W. R. Co., 58 v. Vultee, 1 N. Y. Super. Ct. (1 Hall) Fed. 268; De Wolf v. Royal Trust 384. And see cases cited post, § 181 Co., 173 Ill. 435, 50 N. E. 1049; People v. National Trust Co., 82 N. Y. 283. b, notes 669, 678.

⁴³⁵ See post, § 158 a (2) (n).

⁴³⁶ Babcock v. Scoville, 56 Ill. 461; Harris v. Frank, 52 Miss. 155; Van Rensselaer v. Gifford, 24 Barb. (N. Y.) 349; Cox v. Fenwick, 7 Ky. (4 Bibb) 538. Although there is an averment of the assignment to defendant of all the lessee's right, title and interest in the land, evidence that the assignment was of the leasehold in a part of the land only, it has been decided, does not show a fatal variance, this involving not the right of action, but the measure of the recovery.

⁴³⁷ Congham v. King, Cro. Car. 221; Stevenson v. Lambard, 2 East, 580. Van Rensselaer v. Gallup, 5 Denio (N. Y.) 454.

⁴³⁸ Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3 (the proportion to be based on value and not on area). ⁴⁴⁰ Babcock v. Scoville, 56 Ill. 461.

⁴³⁹ Hare v. Cator, Cowp. 766; Holford v. Hatch, 1 Doug. 183; Curtis v. Spitty, 1 Bing. N. C. 760; Babcock v. Scoville, 56 Ill. 461; Norton v. Boatmen's Ins. Co., 5 Mo. App. 91. ⁴⁴¹ Babcock v. Scoville, 56 Ill. 461; St. Louis Board of Public Schools v. Boatmen's Ins. Co., 5 Mo. App. 91. ⁴⁴² Damainville v. Mann, 32 N. Y. 197. This case is well criticised in the cases cited in the next preceding

than for rent, the assignee of an undivided interest has occasionally been regarded as liable for the whole, without reference to the question of his possession or the amount of his interest.⁴⁴³

(n) **Reassignment**—(aa) **Ordinarily terminates liability.** The liability of the assignee of the leasehold on the covenants entered into by the lessee, though based primarily on “privity of contract,” as existing only by reason of such covenants, is also, in a sense, based on privity of estate, as being imposed on him by reason of his ownership of the leasehold.⁴⁴⁴ Consequently, such liability endures only so long as this privity continues, and it comes to an end when the privity is ended by the assignment of the leasehold interest of the assignee to another, a “reassignment” by him, as it is frequently expressed.⁴⁴⁵ The effect thus

note. See, as to the cases basing liability on possession, ante, § 158 d. *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *Hintze v. Thomas*, 7 Md.

⁴⁴³ It was so decided in *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 190, 166 Ill. 361, 46 N. E. 1105, 38 L. R. Am. St. Rep. 75, as regards a cove-

nant to repair and deliver up at the end of the term, the assignees of different undivided interests being regarded as jointly and severally liable. And in *Norval v. Pascoe*, 34 Law J. Ch. 83, it was held that where, of three joint tenants of a leasehold, two assigned their interests to another, the assignee was liable for the whole amount of compensation for injuries to the premises under a covenant entered into by all three to pay such compensation. In *Merceron v. Dowson*, 5 Barn. & C. 479, it was held that the fact that the defendant was assignee of a partial interest only was no bar to the whole action, whether or not it might be a partial defense.

⁴⁴⁴ That his liability is based on privity of estate, see *Barker v. Damer*, Carth. 182; *Stevenson v. Lambard*, 2 East, 575; *Copeland v. Stephens*, 1 Barn. & Ald. 593, 607; *Paul v. Nurse*, 8 Barn. & C. 486; *Bowdre v. Hampton*, 6 Rich Law (S. C.) 208;

Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104; *Hintze v. Thomas*, 7 Md. 346; *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624.

⁴⁴⁵ *Pitcher v. Tovey*, 1 Salk. 81; *Paul v. Nurse*, 8 Barn. & C. 486; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Voigt v. Resor*, 80 Ill. 331; *Trabue v. McAdams*, 71 Ky. (8 Bush) 78; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Bell v. American Protective League*, 163 Mass. 558, 40 N. E. 857, 47 Am. St. Rep. 481; *Durand v. Curtis*, 57 N. Y. 7; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; *State v. Martin*, 82 Tenn. (14 Lea) 92, 52 Am. Rep. 167; *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624.

Accordingly he is freed from liability for rent or taxes falling due after his reassignment although these cover in part the period of his ownership. *McKeon v. Wendelken*, 25 Misc. 711, 55 N. Y. Supp. 626; *Mason v. Smith*, 131 Mass. 510. So he is relieved from liability for a breach of the covenant to repair

given to a reassignment by the assignee is not changed by the fact that it is made for the purpose of freeing him from liability, or that it is made with knowledge on his part that his assignee is entirely insolvent, a mere beggar in fact, or is otherwise unable to perform the covenants of the lease.⁴⁴⁶ But if the reassignment by the assignee is merely colorable, as being made to one who is to hold in behalf of the assignor and subject to his control, equity will relieve in favor of the landlord.⁴⁴⁷

In order that the reassignment of the leasehold may relieve the assignee from liability, it is not necessary that the landlord be notified of the reassignment, or that he consent thereto,⁴⁴⁸ and it has been held that the reassignment is effective for this purpose though it is in violation of a covenant of the lease not to assign without license,⁴⁴⁹ this according with the general rule that an assignment in violation of such a covenant is valid.⁴⁵⁰

In one state it has been decided that a transfer by the assignee to another of the mere equitable title, this involving a right of possession and enjoyment, is sufficient to relieve the former,^{450a} but this appears not to accord with the view ordinarily taken that a transfer of the equitable title is insufficient to impose liability on the transferee.⁴⁵¹ It has been decided that the liability of a mortgagee of the leasehold is not divested by a sale

which occurs after his reassignment. the merely colorable character of
Blardman v. Wilson, L. R. 4 C. P. the assignment.
57.

⁴⁴⁶ Taylor v. Shum, 1 Bos. & P. 21; 451, 39 Pac. 102. It is so stated in
Valliant v. Dodomedes, 2 Atk. 546; the English text books, citing the
Lekeux v. Nash, 2 Strange, 1221; cases of Valliant v. Dodomedes, 2
Barnfather v. Jordan, 2 Doug. 452; Atk. 546; Lekeux v. Nash, 2 Strange,
Johnson v. Sherman, 15 Cal. 287, 76 1221; Onslow v. Corrie, 2 Madd. 330.
Am. Dec. 481; Johnston v. Bates, 48 These cases do not, however, direct-
N. Y. Super. Ct. (16 Jones & S.) 180; ly decide this point, but they as-
Goss v. Woodland Fire Brick Co., 4 sume it, as do in fact all the cases,
Pa. Super. Ct. 167. both in England and this country.

⁴⁴⁷ McBee v. Sampson, 66 Fed. ⁴⁴⁸ Paul v. Nurse, 8 Barn. & C. 486.
416; Philpot v. Hoare, 2 Atk. 219, See Donaldson v. Strong, 195 Mass.
Amb. 485. See Hopkinson v. Lov- 429, 81 N. E. 267. But Springer v.
ering, 11 Q. B. Div. 97; Hartman v. Chicago Real Estate & Loan Co., 202
Thompson, 104 Md. 389, 65 Atl. 117, Ill. 17, 66 N. E. 850, is contra.
118 Am. St. Rep. 422. In 2 Platt, ⁴⁵⁰ See ante, § 152 j (2).
Leases, 417, it is stated that the ^{450a} Wickersham v. Irwin, 14 Pa.
landlord may, even at law, assert 108. And see post, at note 473.
⁴⁵¹ See ante, § 158 a (2) (d). {p 47.

under a decree of foreclosure not consummated by a conveyance to the purchaser or payment of the price.⁴⁵²

It has been decided that the second assignee must accept the reassignment in order that the first assignee may be freed from liability.⁴⁵³ In jurisdictions, however, in which a conveyance is valid without acceptance,⁴⁵⁴ it seems rather that the first assignee would be freed from liability by the reassignment, unless and until this is repudiated by the second assignee.

An assignee is not relieved from liability on the covenants of the lease by the fact that his property generally has passed to his trustee in bankruptcy, unless the latter has accepted the leasehold,^{454a} or unless the view is adopted, which has been occasionally asserted, that bankruptcy terminates the tenancy.^{454b} If the trustee accepts the leasehold, he may in turn relieve himself from liability on the covenants by a reassignment, even to a "man of straw."^{454c}

(bb) **Covenants assumed by assignee.** A reassignment by the assignee does not terminate his liability if, on originally taking an assignment of the leasehold, he expressly agreed to perform the covenants of the lease,⁴⁵⁵ though such an agreement, if made with the assignor alone, can be enforced by the landlord only in jurisdictions where a third person is entitled to sue on a con-

⁴⁵² *Magrath v. Todd*, 26 U. C. Q. Minn. 483, 75 N. W. 731; *Lindsley v. Joseph Schnaide Brew. Co.*, 59 Mo. App. 271; *Springer v. De Wolf*, 194 Ill. 218, 62 N. E. 542, 56 L. R. A. 465, 88 Am. St. Rep. 155.

⁴⁵³ *Beattie v. Parrott Silver & Copper Co.*, 7 Mont. 320, 17 Pac. 451; *Hannen v. Ewalt*, 18 Pa. 9.

⁴⁵⁴ See ante, § 32.

^{454a} *Copeland v. Stephens*, 1 Barn. & Ald. 593. See *Lowell, Bankruptcy*, § 372.

^{454b} See ante, § 12 g (7).

^{454c} *Hopkinson v. Lovering*, 11 Q. B. Div. 92; *Onslow v. Corrie*, 2 Madd. 330; *Ex parte Buxton*, 15 Ch. Div. 291.

⁴⁵⁵ *Doran v. Kenny, Jr.*, 3 Eq. 148; *Wilson v. Lunt*, 11 Colo. App. 56, 52 Pac. 296; *Borgman v. Spellmire*, 7 Ohio Dec. 344; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Dickinson Co. v. Fitterling*, 72

The landlord's assent to an assignment has been held sufficient consideration to support an agreement by the assignee to perform the covenants, provided the lease required the landlord's assent to an assignment. *Lindsley v. Joseph Schnaide Brew. Co.*, 59 Mo. App. 271, distinguishing *Dougherty v. Matthews*, 35 Mo. 520, 88 Am. Dec. 126, on the ground that in the earlier case no consent to the assignment was necessary. To the same effect is *Adams v. Shirk*, 55 C. A. 25, 117 Fed. 801.

tract made for his benefit.⁴⁵⁶ Whether such an express agreement is created by the language of the instrument of assignment has been the subject of decision in a number of cases. Such an agreement, it has been decided, does not result from the fact that the assignment is of the lease "with all its covenants, terms and conditions,"⁴⁵⁷ or from a covenant, on the part of the assignor, that the assignment is free from all prior incumbrances "except the agreements in the lease to be performed by the lessee."⁴⁵⁸ And an express agreement to pay the rent reserved has been held not to result from a recital that the land is subject to a certain rent, which the assignees are to pay,⁴⁵⁹ or from a provision in terms making the assignment "subject to the rents, covenants, conditions and provisions" contained in the instrument of lease.⁴⁶⁰ But a different construction has been placed on an assignment in terms made in consideration of the payment of a sum named and "the assumption by the assignee of all the obligations and liabilities of the assignor."⁴⁶¹ An instrument executed by the lessor and a proposed assignee, by which the former assented to the assignment "subject to all covenants in said lease contained," and the latter "accepted the transfer with all its responsibilities," has been held to involve an assumption by the latter of the covenants of the lease.⁴⁶²

⁴⁵⁶ See *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151.

⁴⁵⁷ *Reid v. John F. Weissner Brew. Co.*, 88 Md. 234, 40 Atl. 877.

⁴⁵⁸ *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624.

⁴⁵⁹ *Congregational Soc. v. Rix* (Vt.) 17 Atl. 719. In *Walker v. Physick*, 5 Pa. 193, it was held that a conveyance of land in terms "under and subject to the payment of the said rent as the same shall accrue forever" does not impose a personal liability for a perpetual rent previously created thereon, which would endure after a reconveyance to another. This case is followed in *American Academy of Music v. Smith*, 54 Pa. 130.

⁴⁶⁰ *Dassori v. Zarek*, 71 App. Div. 538, 75 N. Y. Supp. 841. In *Wolveridge v. Steward*, 1 Crompt. & M.

644, it was held that the words "subject nevertheless to the payment of the yearly rent, and the performance of the covenants and agreements reserved and contained in the said indenture of lease," did not impose a continuing liability upon the assignee.

⁴⁶¹ *Springer v. De Wolf*, 194 Ill. 218, 62 N. E. 542, 56 L. R. A. 465, 88 Am. St. Rep. 155.

⁴⁶² *Lindsley v. Joseph Schnaide Brew. Co.*, 59 Mo. App. 271.

In *Springer v. Chicago Real Estate Loan & Trust Co.*, 202 Ill. 17, 66 N. E. 850, it was held that the consent of the lessor to any assignment be-

There is a quite recent decision in New York to the effect that an assignee of the leasehold is not relieved from liability for rent even by his reassignment, accompanied by abandonment of possession, if the rent in question has accrued subsequently to the exercise by him of an option in the lease "for an extension of the term," apparently on the theory that the exercise of the option by him involves an entry into new contractual relations, not based on privity of estate, with the landlord.⁴⁶³ The correctness of this decision, it is submitted, is questionable. The court expressly says that the result of the exercise of the option "was not the creation of a new lease, but the continuance of an existing lease pursuant to the terms thereof," the only possible meaning of which would seem to be that the lease was for a period which included the extension period, with an option in the tenant to terminate the lease before the commencement of that extension period.⁴⁶⁴ The assignee, by his conduct, in effect refused to exercise this option, and it is difficult to see how such refusal by him could have the effect of bringing him into new contractual relations with the landlord.

A question might arise, under the fourth section of the statute of frauds, as to the validity of a clause, in an instrument of assignment, by which the assignee assumes to perform the covenants of the lease, if such instrument is not signed by the assignee, and the covenants are such as may not be performed within a year.⁴⁶⁵⁻⁴⁶⁷

(cc) **Transfer of possession.** The view ordinarily accepted, that one's liability as assignee on the covenants arises only upon the transfer to him of the legal title,⁴⁶⁸ would seem to involve the corollary that, upon a retransfer by him of such legal title, his liability ceases, even though he remains in possession, and there are decisions to that effect.⁴⁶⁹ In some jurisdictions, however,

ing required by the terms of the lease, the fact that his consent specified that the assignment was subject to every covenant and condition of the lease subjected the assignee to the liabilities of the original lessee so long as he remained assignee. But he would have been so subject, it is conceived, even apart from such special stipulation.

⁴⁶³ *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584, 64 N. E. 504.

⁴⁶⁴ See post, § 218.

⁴⁶⁵⁻⁴⁶⁷ See ante, § 53 b, at note 56.

⁴⁶⁸ See ante, § 158 a (2) (d).

⁴⁶⁹ *Walker v. Reeve*, 3 Doug. 19; *Taylor v. Shum*, 1 Bos. & P. 21; *Donaldson v. Strong*, 195 Mass. 429, 81 N. E. 267. But the fact that the assign-

the view has been expressed, more or less clearly, that the reassignment is effective to terminate his liability only when followed by his relinquishment of possession.⁴⁷⁰ In New York this seems to be the rule,⁴⁷¹ it according with the decisions previously referred to that one's liability as assignee commences upon his assumption of possession, without the necessity of a legal assignment to him.⁴⁷² It seems also to be a logical sequence of these decisions, making the question of liability as assignee dependent on possession alone, that a transfer of the possession to another, without any legal reassignment, should relieve the assignee from liability, and that it does have that effect has occasionally been decided.⁴⁷³ It appears, however, that in most jurisdictions an assignee cannot thus rid himself of liability by relinquishing the possession to another, without transferring the

or remains in possession may show consequently it would seem that, that the assignment is merely col- in the ordinary case, when the assignee is no longer entitled to possession because he has reassigned, orable. the mere fact that he fails immediately to deliver possession would not make him liable for subsequent breaches.

⁴⁷⁰ In *Sanders v. Partridge*, 108 Mass. 556 (ante, note 362), it is said that "an assignment without deed, as of a chattel interest only, requires some act of entry, or change of actual possession, to complete its operation and divest the assignor of responsibility which arises from the holding of the estate." The text book authority cited does not in the least support such a view.

In *Negley v. Morgan*, 46 Pa. 281, it is held that the liability of an assignee was not terminated if, after the reassignment, the assignee collected an installment of a sub-rent when it fell due, he thus having the beneficial enjoyment of the premises when the covenant to pay rent to the original lessor was broken. It may be observed, however, that in this case the court clearly states that the privity which renders the assignee liable continues only so long as his beneficial enjoyment or "right to it" remains, and

⁴⁷¹ The courts of this state, in referring to the cessation of the assignee's liability, speak of this as resulting from the reassignment "and" relinquishment of possession. *Durand v. Curtis*, 57 N. Y. 7; *Clark v. Aldrich*, 4 App. Div. 523, 40 N. Y. Supp. 440; *Dassori v. Zarek*, 75 N. Y. Supp. 841. But *Tate v. McCormick*, 23 Hun (N. Y.) 218, is a direct decision *contra*.

⁴⁷² See ante, § 158 a (2) (d), note 355.

⁴⁷³ *Carter v. Hammett*, 18 Barb. (N. Y.) 608; *Astor v. L'Amoureux*, 6 N. Y. Super. Ct. (4 Sandf.) 524, reversed, but not on the merits of the case, 8 N. Y. (4 Seld.) 107; *Fechter v. Schonger*, 53 Misc. 648, 103 N. Y. Supp. 738.

legal title.⁴⁷⁴ So in one state, where the legal title does not pass until the instrument is recorded, it has been decided that the assignee remains liable until this is done.⁴⁷⁵ And though in the same state it was decided that, on the judicial sale of a leasehold as the property of an assignee thereof, his liability ceased immediately, this was based on the ground that the deed thereafter made by the trustee who made the sale related back to the time thereof.⁴⁷⁶

The mere abandonment of possession by the assignee, not accompanied by a reassignment to another, nor by delivery of possession to him, cannot relieve the assignee from liability under his covenants,⁴⁷⁷ and this, it would seem, must be the case even in states in which delivery of possession to and its acceptance by another would be sufficient for this purpose.

(dd) **Breaches prior to reassignment.** In some of the quite early English reports there are *dicta* tending to the conclusion that, after a reassignment by an assignee, there is no longer a right of action at law against him, even for breaches of a covenant occurring before the reassignment, but that relief therefor must be sought in equity, and it has been argued in favor of this view that, since the right of action at law against the assignee is based on privity of estate, it ceases when this ceases by reassignment.⁴⁷⁸ But the fact that there is no longer such privity of estate as will give rise to a new right of action seems no reason for holding that the right of action already accrued is to be destroyed by the cessation of such privity, and it has been explicitly so decided.⁴⁷⁹ In one state, however, the view has been taken and adhered to that the landlord must go into equity

⁴⁷⁴ In *Simonds v. Turner*, 120 Mass. 328, it is decided that a mere contract by an assignee to reassign does not terminate his liability. *Lean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16.

⁴⁷⁵ See *Platt, Covenants* (3 Law Library) 495, where the earlier decisions are fully stated.

⁴⁷⁶ *Lester v. Hardesty*, 29 Md. 50; *Nickel v. Brown*, 75 Md. 172, 23 Atl. 736. But ordinarily a failure to record would not affect the validity of the reassignment. ⁴⁷⁸ *Harley v. King*, 2 Crompt. M. & R. 18; *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937 (semble); *Quackenboss v. Clarke*, 12 Wend. (N. Y.) 55; *State v. Martin*, 82 Tenn. (14 Lea) 92, 52 Am. Rep. 167 (semble); *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16.

⁴⁷⁷ *City of Baltimore v. Peat*, 93 Md. 696, 50 Atl. 152, 698.

⁴⁷⁸ *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *Mc-*

if he delays to institute his action on the covenant till after the reassignment.⁴⁸⁰

b. **To assignor.** The liabilities of an assignee of the leasehold as regards his assignor are ordinarily determined by the agreement between them, as in the case of the transfer of any interest in land, the payment of the agreed purchase price being the chief consideration in this connection. The assignor has, however, if he is the original lessee, apart from any express agreement, certain rights as to the payment of the rent, or performance of other covenants, by the assignee.

While, as has been seen, both the lessee and the lessee's assignee are liable on the former's covenants, the former by privity of contract, and the latter by privity of estate, the liability of the assignee is, as between him and the lessee, regarded as primary, and the lessee is, as between them, a surety only for the payment of the rent and the performance of the other covenants. Consequently the lessee, the surety, on paying the rent or discharging any other covenant, may recover from the assignee the amount of his expenditure in this regard,⁴⁸¹ and this he may do

⁴⁸⁰ *Hintze v. Thomas*, 7 Md. 346; *Mayhew v. Hardesty*, 8 Md. 479; *589; Humble v. Langston*, 7 Mees. & Lester v. Hardesty, 29 Md. 50; *Donelson v. Polk*, 64 Md. 501, 2 Atl. 824; *Crompt. & M.* 659; *Farrington v. Reid v. Weissner & Sons Brew. Co.*, Kimball, 126 Mass. 313, 30 Am. Rep. 88 Md. 234, 40 Atl. 877. The earlier of these decisions is based in part on *Fagg v. Dobie*, 3 Younge C. Ch. 96, decided a few years later than *Harley v. King*, 2 Crompt. M. & R. 18, supra, but in which the latter case was not referred to. In *Fagg v. Dobie*, Baron Alderson said that "equity will give relief as to antecedent rent due, or antecedent breaches of covenant committed at the time the party was liable for them, although by his subsequent assignment the remedy at law is gone." This statement, however, not called for by the case, cannot weigh against the explicit decision, after full argument, rendered in *Harley v. King*.

⁴⁸¹ *Burnett v. Lynch*, 5 Barn. & C. 530; *Wolveridge v. Steward*, 1 Kimball, 126 Mass. 313, 30 Am. Rep. 680; *Mason v. Smith*, 131 Mass. 510; *Collins v. Pratt*, 181 Mass. 345, 63 N. E. 946; *Trabue v. McAdams*, 71 Ky. (8 Bush) 74; *Crowley v. Gormley*, 59 App. Div. 256, 69 N. Y. Supp. 576; *McKeon v. Wendelken*, 25 Misc. 711, 55 N. Y. Supp. 626; *McHenry v. Carson*, 41 Ohio St. 212; *Bender v. George*, 92 Pa. 36. See *Brinkley v. Hambleton*, 67 Md. 169, 8 Atl. 904. In *Frye v. Hill*, 14 Wash. 83, 43 Pac. 1097, it is decided that one to whom the leasehold is assigned as collateral security (a mortgagee *semble*) can, in an equitable proceeding, assert the liability of a subsequent absolute assignee from the lessor, under such assignee's agreement to pay the rent.

even after a reassignment by the assignee to another,⁴⁸² provided the breach of covenant occurred before such reassignment, that is, while the assignee had title to the leasehold.⁴⁸³ The liability thus to indemnify the lessee extends even to a remote assignee, that is, an assignee of an assignee, each successive assignee in effect undertaking to indemnify the original lessee against breaches of covenant occurring during such assignee's tenancy.⁴⁸⁴

In order that the lessee may assert such a liability against the assignee, it is necessary that the lessee have liquidated the obligation imposed by the covenant, and he cannot assert it, merely because the assignee has broken the covenant.⁴⁸⁵ Nor can he claim reimbursement for a sum paid by him for a release from liabilities under his covenants not yet accrued.⁴⁸⁶ The assignor paying the rent has no lien for his indemnity upon the leasehold, which he may enforce against it in the hands of a subsequent assignee.⁴⁸⁷

It has been decided that the liability of the assignee in such case may be enforced by an action of case, as well as by assumpsit, on the ground that the right to maintain that action for the nonfulfillment of a common-law duty is not affected by the fact that the law implies a promise for its fulfillment.⁴⁸⁸

⁴⁸² *Burnett v. Lynch*, 5 Barn. & C. 589; *Moule v. Garrett*, L. R. 5 Exch. 132, L. R. 7 Exch. 101.

⁴⁸³ *Wolveridge v. Steward*, 1 Cromp. & M. 644; *Crouch v. Tregonning*, L. R. 7 Exch. 88; *Mason v. Smith*, 131 Mass. 510; *Brinkley v. Hambleton*, 67 Md. 169, 8 Atl. 904; *Walker v. Physick*, 5 Pa. 193. In *City of Baltimore v. Peat*, 93 Md. 696, 50 Atl. 152, 698, it was held that the reassignment took place at the time of the sale of the assignee's interest by judicial decree, for this purpose, though no deed was executed till after suit was brought by the lessee for indemnity.

⁴⁸⁴ *Moule v. Garrett*, L. R. 5 Exch. 132, L. R. 7 Exch. 101; *Farrington v. Kimball*, 126 Mass. 313, 30 Am. Rep. 680.

⁴⁸⁵ *Farrington v. Kimball*, 126 Mass. 313, 30 Am. Rep. 680.

In *Darmstaetter v. Hoffman*, 120 Mich. 48, 78 N. W. 1014, while this is recognized as the general rule, it is decided that the fact that the assignment was in breach of a stipulation of the lease against assignment changes the rule, and entitles the lessee to recover the rent from the assignee though he has not himself paid it. No reason is given in the opinion for thus rewarding the lessee, as it were, for his breach of the stipulation of the lease.

⁴⁸⁶ *McHenry v. Carson*, 41 Ohio St. 212.

⁴⁸⁷ *In re Russell*, 29 Ch. Div. 254.

⁴⁸⁸ *Burnett v. Lynch*, 5 Barn. & C. 589, referred to in *Hare, Contracts*, 153, and followed in *Ashford v. Hack*, 6 U. C. Q. B. 541.

The right of one of two joint lessees, who has assigned his undivided interest in the premises to the other, to assert a claim for reimbursement against the other, as regards any sums which he has been compelled to pay under his covenant, has been judicially recognized,^{488a} and it would seem that the same principle would apply in such case as in the case of an assignment by a sole lessee to a stranger.^{488b}

Usually in England, and in this country occasionally, the assignee, by express provision, agrees to indemnify the lessee against liability by reason of any subsequent breach of covenants. and under a covenant thus broadly expressed the lessee may recover against the assignee even on account of breaches incurred after a reassignment by the assignee.⁴⁸⁹ And he may so recover upon the mere breach of the covenant by the assignee without having himself made any expenditure on account thereof, if the covenant is absolute in terms and not merely one for indemnity.⁴⁹⁰ The covenant may even be sufficiently broad to cover breaches occurring before the assignment.⁴⁹¹

^{488a} *McHenry v. Carson*, 41 Ohio St. 212.

^{488b} In *Holman v. De Lin-River Finley Co.*, 30 Or. 428, 47 Pac. 708, a lessee who had assigned to his co-lessee brought suit against the latter and the latter's assignees to recover the amount of rent due, and to become due, this having been paid by him to the landlord. He had taken a transfer from the landlord of the latter's reversionary interest to protect himself, and sued in use and occupation, and the court held that the obligation to pay rent was discharged by his payment of the rent, and that he could not recover. No suggestion is made that he might, in a proper form of action, have recovered against each assignee to the amount of the rent which accrued previous to a reassignment by the latter, but it is submitted that he might have done so.

⁴⁸⁹ *Crossfield v. Morrison*, 7 C. B.

286. But the fact that the assignment is in terms "subject to payment of the rent and performance of the covenants" does not create a covenant, thus rendering the assignee liable after reassignment. *Wolveridge v. Steward*, 1 Crompt. & M. 659; and a like decision was made where a transfer of land, which was subject to a perpetual rent charge, was in terms "under and subject to the payment of the said rent as the same shall accrue forever." *Walker v. Physick*, 5 Pa. 193.

⁴⁹⁰ *Jackson v. Port*, 17 Johns. (N. Y.) 479; *Smart v. Smart*, 24 Hun (N. Y.) 127.

⁴⁹¹ *Gooch v. Clutterbuck* [1899] 2 Q. B. 148, where a covenant by the assignee "to perform the lessee's covenants and keep him indemnified from the payment and performance thereof" was held to cover previous breaches of a covenant to repair.

A covenant by the assignee to perform and observe the covenants of the lease is, it has been held, a mere covenant of indemnity, and consequently gives to the lessee no right to enforce by injunction the assignee's performance of negative covenants contained in the instrument of lease.⁴⁹²

If, in the case of successive assignments of the leasehold, each assignee covenants to indemnify his assignor, the first assignee may, upon indemnifying the lessee, or upon recovery against him by the lessee for such indemnity, recover the amount of such indemnity against the second assignee.⁴⁹³

Under a covenant of indemnity the lessee cannot, it has been held, recover from the assignee a sum which he has been compelled to pay to the lessor, on account of a breach of covenant committed in respect of premises used by the assignee, with his knowledge, for an immoral purpose.⁴⁹⁴

Under a covenant of indemnity the lessee may recover, it has been decided, not only any sum which he has been compelled to pay the lessor on account of the assignee's breach, but also all costs which he may have incurred in reasonably, though unsuccessfully, defending an action by the lessor.⁴⁹⁵ But when the extent of the liability to the lessor for breach of covenant has already been determined, in an action brought by the latter against the lessee, an intermediate assignee should pay the amount thereof without suit, and cannot recover against the ultimate assignee the cost of defending an action for indemnity brought against him by the lessee.⁴⁹⁶ The lessee may, it has been held, recover substantial, and not merely nominal, damages against the assignee, in respect of a breach of a covenant to repair, if the premises are found to be dilapidated at a date subsequent to a reassignment by the assignee, although there is no direct evidence that the breach took place in his time.⁴⁹⁷ The right of the lessee under an express contract of indemnity to recover the amount of rent paid by him is not affected by the fact that,

⁴⁹² *Harris v. Boots, Cash Chemists* [1904] 2 Ch. 376.

⁴⁹³ *Cousins v. Phillips*, 3 Hurl. & C. 892; *Smith v. Howell*, 6 Exch. 730.

⁴⁹⁴ *Smith v. White*, L. R. 1 Eq. 626.

⁴⁹⁵ *Howard v. Lovegrove*, L. R. 6 Exch. 43; *Spence v. Hector*, 24 U. C. Q. B. 277. But not interest. *Id.*

⁴⁹⁶ *Smith v. Howell*, 6 Exch. 730.

⁴⁹⁷ *Smith v. Peat*, 9 Exch. 161.

since such payment by him, the assignee has surrendered the leasehold.⁴⁹⁸

§ 159. Rights of assignor.

The rights of the assignor as against the assignee have already been considered in discussing the liabilities of the latter.⁴⁹⁹ It remains to consider the rights of the assignor after the assignment as against the original lessor or the latter's transferee.

As an assignee succeeds to the rights based on privity of estate, and also to those based on privity of contract, that is, on the express covenants of the lessor,⁵⁰⁰ and he alone is interested in the assertion of such rights, it would seem to follow that he alone, and not the assignor, would have the right to assert the lessor's obligations, in reference to breaches thereof occurring after the assignment. The question has, however, it seems, never been decided.⁵⁰¹

§ 160. Rights of assignee.

The rights of an assignee as against the assignor have previously been considered in connection with the liabilities of an assignor.⁵⁰²⁻⁵⁰⁴ It remains to consider his rights as against the original lessor.

An assignee necessarily becomes vested with any rights arising from privity of estate, that is, based on the relation of landlord and tenant, and also the benefit of such of the lessor's covenants as touch and concern the land will pass to him.⁵⁰⁵ The

⁴⁹⁸ *Brown v. Lennox*, 22 Ont. App. Wood, 189 Ill. 352, 59 N. E. 619, 442.

⁴⁹⁹ See ante, § 158 b.

⁵⁰⁰ See post, note 505.

⁵⁰¹ See *Blackmore v. Boardman*, 28 Mo. 420, as supporting this view, and also the authorities cited ante, § 148, note 66, to the effect that a lessor cannot sue on a covenant after assigning his interest. Mr. Sims (*Covenants which Run with the Land*, 92) expresses a different view. There is also an implication in accordance with the text in *Cleveland, C., C. & St. L. R. Co. v.*

where it was held that after assigning the lessee could sue for a breach by the lessor which was previous to the assignment. See, also, *Rawle Covenants of Title*, § 215, as to the inability of one who has assigned to sue on a covenant for title unless injured by the breach.

⁵⁰²⁻⁵⁰⁴ See ante, § 157 b.

⁵⁰⁵ *Palmer v. Edwards*, 1 Doug. 186, note; *McClenahan v. Gwynn*, 3 Munf. (Va.) 556; *Cleveland, C., C. & St. L. R. Co. v. Wood*, 189 Ill. 352, 59 N. E. 619; *Bac. Abr.*, Covenant

right of the lessee, or of his assignee, to enforce liability for breaches occurring during the period of his ownership of the leasehold, is obviously not affected by the fact that he has, since such breaches, assigned the leasehold to another, though he may divest himself of such right of action by assigning the right itself. He has, however, no right of action for breaches of such covenants occurring before the assignment to him, unless this right is expressly assigned.^{506, 507} And after his reassignment of the leasehold interest, he obviously cannot sue on account of subsequent breaches.

It has been decided that the fact that an assignment is invalid under the statute of frauds cannot be asserted by the lessor in defense to an action by the assignee on a covenant of the lease, the instrument of lease having been delivered to the latter, together with possession of the premises.⁵⁰⁸ This appears to accord with occasional decisions, before referred to,⁵⁰⁹ that the invalidity of the assignment cannot be asserted by the assignee in defense to an action by the lessor on a covenant. It has, however, been decided in England⁵¹⁰ that a mere equitable assignee, though in possession, cannot sue on a covenant.

§ 161. Liabilities of sublessor.

a. **To landlord.** A sublease does not, as does an assignment

(e 5). See, also, ante, §§ 79 e, 87 d (4); 87 e (4); post, §§ 230, 267, 271 h. ceived, merely an application of the doctrine, since apparently exploded (ante, § 149 b [8], notes 173-178),

In *Portmore v. Bunn*, 1 Barn. & C. 694, 3 Dowl. & R. 145, it was held that an assignee of a lease of a right to use water passing through a particular channel was not liable in covenant to the lessor for the annual sum agreed to be paid therefor, it appearing from the instrument of lease itself that the lessor did not have the power to make the lease, and that the lessee consequently had no interest with which the liability on the covenant could run under the statute of 32 Hen. 8, c. 34. The grounds of the decision are stated but obscurely, but it is, it is con-

ceived, merely an application of the doctrine, since apparently exploded (ante, § 149 b [8], notes 173-178), that when the lack of title appears on the face of the instrument, there is no interest with which the covenant can run.

^{506, 507} *Shelton v. Codman*, 57 Mass. (3 Cush.) 318; *Woodburn v. Renshaw*, 32 Mo. 197. And see the decisions, in reference to the analogous case of the rights of a transferee of the reversion, ante, § 149 b (9).

⁵⁰⁸ *Cleveland, C., C. & St. L. R. Co. v. Wood*, 189 Ill. 352, 59 N. E. 619.

⁵⁰⁹ See ante, note 356.

⁵¹⁰ *Friary, Holroyd & Healey's Breweries v. Singleton* [1899] 1 Ch. 86.

consented to by the lessor,⁵¹¹ relieve the lessee making it from liabilities based on privity of estate, since the sublessor still remains the tenant of the lessor. Nor is an assignee relieved from liability for subsequent breaches of covenant by the making by him of a sublease, as he is by the making of a reassignment, since he still remains in privity with the landlord.

As a lessee is not relieved from his contractual liabilities by his assignment to another, even though the latter becomes also liable, so *a fortiori*, he is not relieved from such liabilities by the fact that he makes a sublease.^{511a} The continuance of the lessee's liability on his covenant to pay rent is not affected even by the fact that the sublessee agrees to pay rent to the original landlord.⁵¹² The lessee is, however, relieved from liability if the sublessee is substituted as tenant by a new demise, effectuating a surrender of the former term.⁵¹³

b. **To sublessee.** Upon a sublease, it seems, the same covenants are to be implied as against the sublessor from the use of certain words of demise, or from the mere creation of the relation of tenancy, as are to be implied as against any other lessor.⁵¹⁴ Upon the sublessor's express covenants in his favor the sublessee obviously has a right of action, as has his assignee, if they are such as run with the land.

§ 162. Liabilities of sublessee.

The sublessee is not in privity of contract with the head landlord, since there are no contractual relations between them, and he is not in privity of estate with him, since there is no relation of tenancy between them and he merely holds possession for the lessee. Consequently, he is not liable to the landlord on the

⁵¹¹ See ante, § 158 a (1).

^{511a} *Kenyon v. Young*, 48 Neb. 890, 67 N. W. 885.

⁵¹² *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938. So in the case of the assumption by the sublessee of a covenant to pay taxes. *Hendrix v. Dickson*, 69 Mo. App. 197.

⁵¹³ See post, § 190 d.

⁵¹⁴ See ante, §§ 79 a, 80, 81.

In one case, without reference to any covenant for title or quiet enjoy-

ment, it was held that if a tenant induced one to take a sublease from him by representing that he had power to make it, and he subsequently induced the head landlord to oust the sublessee owing to the lack of the landlord's consent to the sublease, the sublessee had a right of action against him. *Calvert v. Hobbs*, 107 Mo. App. 7, 80 S. W. 681.

The theory of the decision is not stated.

covenants of the original lease,⁵¹⁵ nor on the covenants of the sublease,⁵¹⁶ nor can there be any recovery against him by the head landlord in use and occupation,⁵¹⁷ since for this a relation of tenancy is necessary.⁵¹⁸

Though the subtenant is not personally liable to the lessor, the making of the sublease does not affect any rights which the lessor might otherwise have in regard to the premises, or chattels thereon. Consequently, the subtenant has no right to retain possession beyond the term named in the head lease, although that named in the sublease has not expired,⁵¹⁹ and such is the case though the expiration of the original term is by force of a special limitation.⁵²⁰ So the subtenant may be dispossessed, as might the tenant under the original lease, in case of the breach of a condition in such lease.⁵²¹ Likewise the chattels of the subtenant may be subject to a statutory lien,⁵²² or to a distress for rent,⁵²³ in favor of the head landlord.

Occasionally a covenant as to the use of the premises may be such as to cover the use thereof to be made by the subtenant, so that a use by him in violation thereof will be a ground for the recovery of damages from the head lessee or tenant, or for the forfeiture of the estate of the latter.⁵²⁴ Furthermore, under the doctrine of the English cases and that of some states, that one taking property with notice of an existing restriction upon its use is bound thereby, he may be restrained by injunction from

⁵¹⁵ *Holford v. Hatch*, 1 Doug. 183; the rent was expressly made payable to the original lessor. *A different view might be taken in jurisdictions where a third party is allowed to sue on a contract.* *Comstock v. Mills*, 33 N. J. Law, 254; *McFarlan v. Watson*, 3 N. Y. (3 Comst.) 286; *Crowe v. Riley*, 63 Ohio St. 1, 57 N. E. 956; *Dunlap v. Bullard*, 131 Mass. 161; *Haley v. Boston Belting Co.*, 140 Mass. 73, 2 N. E. 785; *Mayhew v. Hardesty*, 8 Md. 479; *Harvey v. McGrew*, 44 Tex. 412.

⁵¹⁶ *Derby v. Taylor*, 1 East, 503; *Ashley v. Young*, 79 Miss. 129, 29 So. 822; *Martin v. O'Connor*, 43 Barb. (N. Y.) 514. In *Derby v. Taylor*, 1 East, 502, it was decided that the original lessor could not sue the sublessee on a covenant of the sublease to pay rent, although

⁵¹⁷ *Krider v. Ramsay*, 79 N. C. 354.

⁵¹⁸ See post, § 302.

⁵¹⁹ See *Besley v. Besley*, 9 Ch. Div. 103; *Clayton v. Leech*, 41 Ch. Div. 103.

⁵²⁰ *Eten v. Luyster*, 60 N. Y. 252; *Bove v. Coppola*, 45 Misc. 636, 91 N. Y. Supp. 8.

⁵²¹ See post, § 194 h, note 188.

⁵²² See post, § 319 d (5).

⁵²³ See post, chapter XXXII.

⁵²⁴ See ante, § 123 j, notes 93-95.

using the property in violation of restrictions contained in the head lease, or in any other instrument in the sublessor's claim of title.⁵²⁵ It has also been decided that an injunction will issue at the suit of the head landlord against the subtenant to restrain waste.⁵²⁶ That the subtenant is charged with notice of any conditions or restrictions contained in the head lease is generally recognized.⁵²⁷

§ 163. Rights of sublessor.

The rights of one who makes a sublease, as against his lessor, or the transferee of his lessor, are the same as if he had not made the sublease. The making of a sublease by a tenant under a lease in no way changes the relations previously existing between the tenant and his landlord.

The rights of the sublessor as against the sublessee are determined by the provisions of the sublease, to the same extent as in the case of a lease by one not holding under a lease from another. His rights by reason of the sublessee's breach of his contract to repair, in connection with the sublessor's own obligations in this regard to the head landlord, have been previously stated.⁵²⁸ It is to be observed that the sublandlord has no right to enter upon the premises to make repairs, even though the subtenant has agreed to make them and has failed so to do, and even though the former's estate is liable to forfeiture by reason of the absence of repairs, and an injunction might issue to restrain his entry for this purpose.⁵²⁹ In view of the possibility that the sublessor's estate may be forfeited by the sublessee's failure to make repairs or by his mode of using the premises, it is recognized as expedient for the sublessor to require the sublessee to agree to indemnify him against any loss which he may

⁵²⁵ See ante, § 123 j, notes 97-98 b. 63 Ohio St. 1, 57 N. E. 956; Shan-

⁵²⁶ *Farrant v. Lovel*, 3 Atk. 723. non v. Grindstaff, 11 Wash. 536, 40
See *Peer v. Wadsworth*, 67 N. J. Eq. Pac. 123; *Missouri, K. & T. R. Co.*
191, 58 Atl. 379. v. *Keahey*, 37 Tex. Civ. App. 330, 83

⁵²⁷ *Dunn v. Barton*, 16 Fla. 765; S. W. 1102; *Clements v. Welles*, L.
Blachford v. Frenzer, 44 Neb. 829, R. 1 Eq. 200.

62 N. W. 1101; *Stees v. Kranz*, 32 ⁵²⁸ See ante, § 116 h, at notes 998
Minn. 313, 20 N. W. 241; *Foster v. a-998 e.*

Reid, 78 Iowa, 205, 42 N. W. 649, 16 ⁵²⁹ *Stocker v. Planet Bldg. Soc.*,
Am. St. Rep. 437; *Crowe v. Riley*, 27 Wkly. Rep. 877.

thus cause the latter by noncompliance with the stipulations of the head lease.^{529a}

§ 164. Rights of sublessee.

A sublessee, since he is in no privity of contract or estate with the original lessor, has, apart from statute, no rights which he can assert as against him⁵³⁰ except the right to the possession of the land. In two states there are statutes which undertake to give to a sublessee a personal right of action against the head landlord as upon a covenant.⁵³¹

The rights of the sublessee, or of his assignee, as against the sublessor or his assignee, are ordinarily determined by the terms of the sublease, as in the case of a lease by one not holding under a lease from another. One right which a sublessee has as against his sublessor, a character of right which can exist only in favor of a sublessee or his assignee, is that of paying, in order to protect his possession, any claim against the land for rent under the head lease, and to assert such payment as a *pro tanto* payment of the rent under the sublease. The decisions with reference to this matter are subsequently considered.⁵³²

It has been decided that if separate portions of the premises are subleased to different persons, and one of the sublessees, under threat of distress by the head landlord, pays the entire rent reserved upon the head lease, he cannot recover a portion of such payment from the other sublessee as money paid to his

^{529a} See *Wheeler v. Earle*, 59 Mass. 1901, § 7098), and Kansas (Gen. St. (5 Cush.) 31, 51 Am. Dec. 41. It 1905, § 4065), it is provided that is also desirable for the sublessor sublessees shall have the same remedy upon "the original covenant" to reserve a right to enter to make repairs on the sublessee's failure against the head landlord as they might have had against their immediate lessor. What is meant by T. 285. the original covenant does not appear.

⁵³⁰ *Ganson v. Tift*, 71 N. Y. 48. That he cannot assert any rights upon a covenant of the head lease as against the head landlord, see *South of England Dairies v. Baker* [1906] 2 Ch. 631. against his immediate lessor.

⁵³² See post, § 177 e.

⁵³¹ In *Indiana* (Burns' Ann. St.

use.⁵³³ And, similarly, it was held that when one part of the demised land is assigned, and the balance subleased, the assignee cannot demand contribution by the subtenant.⁵³⁴

It has been decided that the assignees of the original sublessees need not join in suing upon a covenant by the sublessor to endeavor to obtain a renewal of a head lease to him, since such assignees are tenants in common, having separate and distinct interests in the term, and the damages are, in their nature, severable, and may well be apportioned, according to the value of the share of each.⁵³⁵

⁵³³ *Hunter v. Hunt*, 1 C. B. 300.

⁵³⁵ *Simpson v. Clayton*, 4 Bing.

⁵³⁴ *Johnson v. Wild*, 44 Ch. Div. N. C. 781.

CHAPTER XVI.

RENT.

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- b. Assignees of the leasehold.
- c. Executors and administrators.
- d. Subtenants.
- e. Principals and agents.
- f. Sureties and guarantors.
 - (1) Nature of contract.
 - (2) Form and validity of contract.
 - (3) Evidence of relation.
 - (4) Expiration of liability.
 - (5) Discharge of liability.
 - (6) Assignment of right of action.
 - (7) Remedies.

182. Defenses available to tenant —Suspension or extinguishment of rent.

- a. Exclusion of lessee from possession.
 - (1) By one having paramount title.
 - (2) By stranger without right.
 - (3) By lessor.
- b. Failure of lessee to take possession.
- c. Invalidity of lease.
- d. Defect in lessor's title.
- e. Eviction of tenant. *p. 1157*
 - (1) By landlord.
 - (a) Total eviction.
 - (b) Partial eviction.
 - (2) By paramount title.
 - (a) Total eviction.
 - (b) Partial eviction.
- f. Merger.
- g. Surrender.
- h. Abandonment by tenant.
- i. Release.
- j. Forfeiture of leasehold interest.
- k. Taking under eminent domain.
- l. Discharge in bankruptcy.

- m. Destruction of or injury to premises by unforeseen casualty.
 - (1) Destruction of building on land leased.
 - (2) Destruction of entire premises.
 - (3) Destruction of building before commencement of term.
 - (4) Change of possession after destruction.
 - (5) Flooding or inundation of premises.
 - (6) Express stipulations extinguishing or suspending rent.
 - (a) General considerations.
 - (b) Character of injury.
 - (c) Cause of injury.
 - (d) Effect as terminating tenancy.
 - (e) Revival of liability for rent.
 - (f) Possession pending restoration.
 - (g) Rent payable in advance.
 - (7) Stipulations as to repair and restoration.
 - (8) Statutes relieving from liability for rent.
 - (a) The provisions of the statutes.
 - (b) Injuries caused by tenant.
 - (c) Extent of relief from rent.
 - (d) Exclusion of statute by stipulations of lease.
 - (e) Premises made "untenantable."
 - (f) Relinquishment of possession by tenant.
 - (g) Termination of tenancy.
 - n. Untenantable condition of premises.
 - (1) At common law.
 - (2) Under statutes.
 - (3) Specific conditions.
 - o. Unfitness of premises for particular purpose.
 - p. Lack of repair.
 - q. Making of repairs.
 - r. Breach of covenant or other contract by landlord.
 - (1) Dependent and independent covenants.
 - (2) Contract to make repairs or improvements.
 - (3) Contract to furnish heat, power, or other facilities.
 - (4) Miscellaneous contracts and covenants.
 - s. War and military occupation.
 - t. Particular stipulations as to rent.
- § 183. Right to payment of rent as against levy under execution.
- a. Statutory provisions.
 - b. The tenancy.
 - c. The execution or other process.
 - d. Rent due or to become due.
 - e. Goods and chattels levied on.
 - f. Notice to the sheriff.
 - g. The duty and liability of the sheriff.

§ 165. The nature of rent.

Rent is not a necessary incident of the relation of landlord and tenant, that is, a demise is perfectly valid although no rent is reserved.¹ The cases, however, of a demise without any reservation of rent are but few, and the rights and liabilities of the parties in reference to rent constitute an important part of the law of landlord and tenant.

Rent, for the purpose of the law of landlord and tenant, may be defined as a tribute or return of a certain amount, which is regarded as issuing out of land, as part of its actual or possible profits, and is payable by one having an estate in the land, as a compensation for his use, possession and enjoyment of the land. This definition of rent, however, like other suggested definitions thereof, does not bring into view the fact that the word "rent" is used in at least four distinct senses. Firstly, it is used in a general, abstract sense, to describe any and every tribute which may be thus payable by any person having an estate in land, as when we say that rent is usually payable in money, or rent is collectible by distress, or rent must be certain in amount, and, thus used, it applies either to one payment of tribute to be made, one "installment of rent," or to a succession of such payments. The word, when used in this sense, is ordinarily found without any article preceding it. Secondly, the word "rent" is used in a specific, concrete sense, to describe a particular payment of tribute, to be made by a tenant of particular land, or a succession of such payments. For instance, we may say that the rent due by a tenant of certain land is overdue, meaning thereby either that one installment of rent is overdue, or that a

¹ Co. Litt. 143 a; Knight's Case, Getchell, 59 N. H. 281; Hunt v. Com-
5 Coke, 55 a; Lillard v. Kentucky stock, 15 Wend. (N. Y.) 665; Peer
Distilleries & Warehouse Co., 67 C. C. v. O'Leary, 8 Misc. 350, 28 N. Y.
A. 74, 134 Fed. 168; Amter v. Con- Supp. 687; Mitchell v. Com., 37 Pa.
lon, 22 Colo. 150, 43 Pac. 1002; Osborne 187; Floyd v. Floyd, 4 Rich. Law (S.
v. Humphrey, 7 Conn. 340; Sherwin C.) 23; Allen v. Koepsel, 77 Tex. 505,
v. Lasher, 9 Ill. App. (9 Bradw.) 14 S. W. 151; Hanks v. Price, 32
227; Hooton v. Holt, 139 Mass. 54, Grat. (Va.) 107. Contrary state-
29 N. E. 221; McKissack v. Bulling- ments, as in Simpkins v. Rogers, 15
ton, 37 Miss. (8 George) 535; Alex- Ill. 397, and Shaw v. Hill, 79 Mich.
ander v. Gardner, 29 Ky. Law Rep. 86, 44 N. W. 422, are unquestionably
958, 96 S. W. 818; Savings Bank v. erroneous.

number of installments are overdue. And so we speak of an action having been brought "for the rent," meaning thereby an action for one installment or several installments. The word "rent," when used in this specific, concrete sense, is ordinarily preceded by the definite article. Thirdly, the word is used in a specific, concrete sense to describe the right which a particular person or persons may have to a succession of payments by the tenant or tenants of a particular piece of land, as when we refer to a man as having a rent or a ground rent, or say that the rent upon (issuing from) a certain piece of land belongs to a named individual. The word "rent," when used in this sense, is used with either the definite or indefinite article. Fourthly, the word is used to designate sums paid as rent, the proceeds, that is, of the payment of one or more of the periodic installments, as when one speaks of applying the rent in a certain manner, meaning thereby what is received on account of rent. The word is frequently used in this sense in the phrase "rents and profits." When so used, the word is ordinarily preceded by the definite article.

§ 166. Future rent not present debt.

The obligation of the tenant under a lease to make payments of rent as they become due does not constitute a present debt to be paid in the future. "Although there be a lease, which may result in a claim for rent, which will constitute a debt, yet no debt accrues until enjoyment (of the land) has been had."² The obligation to pay rent is contingent upon the lessee's continued enjoyment of the land, and hence his liability is analogous to that of one who has agreed to pay for a building to be erected in the future, or for goods to be delivered, and not that of one who has promised to pay a sum unconditionally. As a consequence, a release by the lessor of all "actions" against the lessee,³ or of all "demands" against him,⁴ does not relieve him

² *Bordman v. Osborn*, 40 Mass. Lord Coke, "it was neither *debitum* (23 Pick.) 295, per Shaw, C. J. nor *solvendum* at the time of the And see the full discussion of the release made; for if the land be question by *Kennedy, J.*, in *Bank of evicted from the lessee before the Pennsylvania v. Wise*, 3 Watts (Pa.) rent become due, the rent is avoided." *Co. Litt.* 292 b.

³ *Litt.* § 513. "Because," says ⁴ *Collins v. Harding*, Cro. Eliz.

from liability for subsequently accruing rent. And so rent to become due is not a debt which can be subjected to attachment at the suit of a creditor of the landlord,⁵ and a statute making a stockholder liable for any debt, contracted by the corporation, or accruing, while he is stockholder, was held not to impose liability for rent thereafter accruing.⁶ For the same reason, the landlord cannot, in the course of administration proceedings upon the estate of his deceased tenant, assert a claim for rent still to accrue,⁷ and such a claim cannot be presented in bankruptcy proceedings.⁸

§ 167. Classes of rent.

At common law three classes of rent were recognized, rent service, rent charge, and rent seck. Rent service was the term applied to rent reserved upon a conveyance, whether in fee or for a less estate, by which a tenure was created.⁹ Since, after the statute of *Quia Emptores*, a conveyance in fee no longer created a relation of tenure,¹⁰ rent reserved upon such a conveyance made after the statute was not rent service.¹¹ But this statute did not affect the principle that tenure was created by a conveyance of less than a fee simple estate, leaving a reversion in the grantor, and consequently rent reserved upon such a conveyance (a lease) was, after the statute as before, rent service.¹²

Upon a failure by the tenant to pay rent reserved to his lord, as on his failure to perform any feudal service, the lord was entitled to seize the chattels upon the land, this being known as

606; *Henn v. Hanson*, 1 Lev. 99; *Ingram v. Bray*, 2 Lev. 210; *Stephens v. Snow*, 2 Salk. 578; Co. Litt. 292 a, 295. *Cairns*, 107 Iowa, 727, 77 N. W. 478. ⁶ *Bordman v. Osborn*, 40 Mass. (23 v. Snow, 2 Salk. 578; Co. Litt. 292 a, Pick.) 295.

Butler's note.

⁷ 2 Woerner, Administration,

⁸ *Mason v. Belfast Hotel Co.*, 89 Me. 381, 36 Atl. 622; *Wood v. Partidge*, 11 Mass. 488; *Thorp v. Preston*, 42 Mich. 511, 4 N. W. 227; *Ordway v. Remington*, 12 R. I. 319, 34 Am. Rep. 646; *Haffey v. Miller*, 6 Grat. (Va.) 454. Contra, *Rowell v. Felker*, 54 Vt. 526. That rent to become due is within a statute authorizing attachment "when nothing but time is wanting to fix an absolute indebtedness," see *Brown v.*

818; *Deane v. Caldwell*, 127 Mass. 242.

⁹ See post, § 182 l.

¹⁰ Litt. §§ 213-216; *Gilbert, Rents*, 9.

¹¹ See ante, § 1.

¹² Litt. §§ 215-217; Co. Litt. 143 b, Hargrave's note: *Bradbury v. Wright*, 2 Doug. 624; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278.

¹³ Litt. §§ 214, 215.

- the remedy of distress.¹³ This right of distress was a distinctive feature of rent service. When the tenant had an estate of fee simple, the right of distress was incident to the right of lordship, the "seignory" as it was called, and, when the tenant had an estate less than a fee simple, to the reversion remaining in the lord. Consequently, if the lord transferred the seignory or reversion, while retaining the rent, or granted the rent, while retaining the seignory or reversion, it could no longer be enforced by distress, and was accordingly no longer "rent service" but was termed "rent seek" (dry rent).¹⁴

Rent might also, at common law, be created by the grant to another, by one having an estate in land, of a rent issuing out of such land. There was in such case no relation of tenure, and consequently no remedy by way of distress to enforce payment of the rent, and accordingly rent so created was another form of "rent seek," unless a right of distress was expressly given on the creation of the rent, in which case the rent was known as "rent charge," as being expressly charged on the land by the grant of such remedy.¹⁵ Rents charge of this character, since they do not involve any relation of tenancy, do not properly come within the limits of a treatise on landlord and tenant, and they are, it is believed, practically unknown in any part of this country. In England they are not uncommon, being sometimes granted by the purchaser of land as part of the consideration therefor, and being also utilized as a mode of providing for younger sons and others in family settlements.

Rent reserved upon a conveyance in fee simple, made since the statute of *Quia Emptores*, is "rent seek" unless there is an express clause of distress inserted in the conveyance, in which case it is "rent charge."¹⁶ In Pennsylvania it has been decided that the statute of *Quia Emptores* is not in force and that consequently, upon a conveyance in fee simple, a relation of tenure arises, so as to make rent reserved on such conveyance rent service and not rent charge or rent seek.¹⁷

¹³ See 1 Pollock & Maitland, Hist. Eng. Law, 353. See post. chapter 11.

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¹⁴ Litt. §§ 218, 225-228.

¹⁵ Litt. §§ 218, 219; Co. Litt. 150 b; 2 Pollock & Maitland, Hist. Eng. Law, 129.

¹⁶ See authorities cited ante. note 11.

¹⁷ *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337; *Franciscus v. Reigart*, 4 Watts (Pa.) 98. In *Wallace v. Harmstad*, 44 Pa. 492, however, it was decided that, though the rent

Rent service is said by Littleton to exist "where the tenant holdeth his land of the lord by fealty and certain rent, or by other services and certain rent,"¹⁸ and his commentator says that it is called rent service "because it hath some corporal service incident unto it, which at least is fealty."¹⁹ Upon the strength of this latter statement, as transmitted by Blackstone,²⁰ it has been asserted, in at least two states in this country, that, in view of the fact that fealty is not there recognized, rent service is likewise nonexistent.²¹ The correctness of such a view seems, however, questionable. In the time of Littleton and Coke, fealty was always incident to the relation of tenure,²² and consequently rent service, being essentially tenurial in character, could not exist apart from fealty. It was therefore natural that those writers should describe rent service as that class of rent which was accompanied by fealty or other service. But the view, stated by Coke, that rent service was so called because the rent was accompanied by fealty or other service, seems hardly so probable as that it was so called because rent reserved to the lord *was* a service.²³ The expression "rent service" was in use nearly two hundred years before the time at which Littleton wrote,²⁴ and the writers of that earlier time, as well as the judges, speak of rent

reserved on a conveyance in fee is a rent service to which distress is incident, there is no relation of tenure to which the right of distress is incident, and that, if the deed by which the rent is reserved is destroyed, there is no right of distress. The decision is difficult to understand and has been strongly criticised. See Cadwallader, *Ground Rents*, § 125 et seq.; Sharswood, *Lectures*, p. 220.

¹⁸ Litt. § 213.

¹⁹ Co. Litt. 142 a.

²⁰ 2 Blackst. Comm. 42.

²¹ *Herr v. Johnson*, 11 Colo. 393, 18 Pac. 342; *Penny v. Little*, 4 Ill. (3 Scam.) 301.

²² Litt. §§ 91, 132; Co. Litt. 67 b, 92 a.

²³ The view suggested would serve to explain why a right of distress exists for rent reserved upon a tenancy at will, though there is no fealty in such case. In reference to this it is said, in Co. Litt. 57 b, that a lessor at will "may distrain for the rent, and yet it is no rent service, for no fealty belongeth thereunto, but a rent distrainable of common right." "Of common right" means merely "by the common law." (Co. Litt. 142 a), and the statement of Coke is equivalent merely to a statement that there is in such case a right of distress because there is such a right.

²⁴ See Y. B. 33-35 Edw. 1, p. 352, referred to in 2 Pollock & Maitland, *Hist. Eng. Law*, 128 note.

as one class of service.²⁵ So regarded, the abolition of fealty could not affect the applicability of the term "rent service" to rent reserved upon a lease. Even conceding the correctness of the view that rent service was so called because always accompanied by fealty, it does not seem that the abolition of this mere feudal incident could in any way alter the essential character of rent so reserved, or the rights and liabilities connected therewith.²⁶ In two or three of the older states it has been clearly recognized that rent reserved on a lease for years is rent service,²⁷ and the rules which at common law govern the apportionment of rent service as to amount have invariably been applied to rent so reserved.²⁸

The term "ground rent," which is quite frequently to be seen, is used with different meanings in different jurisdictions. In England it is said that "by the expression 'ground rent,' if unexplained, is to be understood a rent less than the rack rent²⁹ of the premises; its proper meaning is the rent at which land is let for the purpose of improvement by building; but the expression is very carelessly used."³⁰ It is probably, in some of the states, applied to rent reserved on a lease for a term of considerable length for purposes of improvement. In Pennsylvania the term is applied ordinarily to rent reserved upon a conveyance in fee, that is, a perpetual rent, and in Maryland to a rent reserved upon a lease for ninety-nine years with a covenant for perpetual renewal.

§ 168. What may be reserved as rent.

Coke says that "rent is reserved out of the profits of the land,"³¹ and Blackstone says that it "is a profit issuing out of"

²⁵ See Bracton, bk. 2, c. 16, fol. 35 (3 J. S. Green) 192; *Ingersoll v. a; Britton* (Nichol's Ed.) bk. 1, c. Sergeant, 1 Whart. (Pa.) 337.

28, § 16; bk. 2 c. 10, § 1; Y. B. 33-35 Edw. 1, p. 208; Y. B. 1 & 2 Edw. 2 (Selden Soc.) p. 119, pl. 36; Y. B. 2 & 3 Edw. 2, p. 140, pl. 58.

²⁶ See remarks of Woodworth, J., in *Cornell v. Lamb*, 2 Cow. (N. Y.) 652.

²⁷ *Ehrman v. Mayer*, 57 Md. 621; *Doe d. Farley v. Craig*, 15 N. J. Law

²⁸ See post, § 175.

²⁹ "Rack rent" is the full annual value of the tenement. 2 Blackst. Comm. 43.

³⁰ 1 Dart, *Vendors & Purchasers* (6th Ed.) 138; 2 Stroud, *Judicial Dict.* (2d Ed.) 841.

³¹ Co. Litt. 141 b.

the land.³² These statements presumably mean merely that, as stated in the definition above given, rent is in theory part of the actual or possible profits of the land, a theory which is no doubt closely related to another theory, that rent, like any feudal service, is something issuing from and owed by the land itself, and not by any particular tenant of the land.³³ The chief consequences of the theory that rent is payable out of the actual or possible profits of the land are that if the lessee is deprived of the opportunity to take the profits, as by eviction, the landlord's right to rent ceases or is suspended,³⁴ and that, as above stated, the rent is not a debt until the profits have been taken, in the absence of an express provision to the contrary.³⁵

The statement that rent is reserved or is payable out of the profits of the land does not mean, nor has it ever meant, that the rent must be paid by the delivery to the landlord of a part of the products of the soil, and this never occurs except when it is so expressly provided, as in the case of the reservation of a crop rent. Rent is ordinarily reserved and made payable in money, and this may or may not be obtained by a sale of the profits or products of the land. It may, however, be reserved and made payable or "rendible" in almost any medium. "The rent may as well be in delivery of hens, capons, roses, spurres, bowes, shafts, horses, hawkes, pepper, comine, wheat, or other profit that lyeth in render, office, attendance, and such like, as in payment of money."³⁶ So it has been held that the rent reserved may take the form of doing a manual service, such as cleaning a church,³⁷ ringing a church bell at stated intervals,³⁸ caring for the premises,³⁹ doing labor and making repairs thereon,^{39a} or doing a certain amount of hauling;⁴⁰ or the rent may consist partly in the doing of such service and partly in the payment of

³² 2 Blackst. Comm. 41.

³³ Doe d. Edney v. Billett, 7 Q. B.

³³ 2 Pollock & Maitland, Hist. 976.

Eng. Law, 126, 129; see post, § 171, at note 122.

³⁹ Gleason v. Gleason, 62 Mass. (8 Cush.) 32; Shaw v. Hill, 79 Mich. 86, 44 N. W. 422.

³⁴ Clun's Case, 10 Coke, 126 b. See post, § 182 e.

^{39a} Price v. Thompson (Ga. App.) 60 S. E. 800.

³⁵ See ante, § 166.

³⁶ Co. Litt. 142 a.

⁴⁰ Van Rensselaer v. Jones, 5

³⁷ Doe d. Edney v. Benham, 7 Q. B. 976.

Denio (N. Y.) 449; Van Rensselaer v. Jewett, 2 N. Y. (2 Comst.) 141.

money.⁴¹ Occasionally, while a fixed money rent is named by the lease, it is expressly made payable in manual services to be rendered by the lessee.⁴² It has even been said that a stipulation that the lessee should have his corn ground at the lessor's mill was in effect a reservation of a rent, so long as the mill belonged to the reversioner, the price to be paid for the grinding being in effect a varying rent.⁴³

As stated in the above quotation from Coke, rent may consist in the rendition of specific articles, and so rent in the form of wine,⁴⁴ as well as in a specific quantity of grain or cotton,⁴⁵ has been judicially recognized. In this country it is a quite general usage to reserve as rent a certain proportion of the crop which may be raised on the demised premises.⁴⁶

It is said by Coke that "a man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like. For a reservation ought not to be a reservation of the profits themselves, since these are granted, but of a new return out of the profits."⁴⁷ In another place⁴⁸ he calls attention to the "diversity between an exception (which is ever of part of the thing granted and of a thing *in esse*), and "a reservation, which is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised." It has in one case⁴⁹ been asserted, on the strength of statements by textbook writers which

⁴¹ See *Doe d. Tucker v. Morse*, 1 3 Blackf. (Ind.) 264; *Briscoe v. McBarn. & Adol.* 365; *Vyvyan v. Arthur*, 1 Barn. & C. 410. *Elween*, 43 Miss. 556; *Brooks v. Cunningham*, 49 Miss. 108; *Fraser v.*

⁴² *Marlborough v. Osborn*, 5 Best Davie, 5 Rich Law (S. C.) 59.

& S. 67; *Woods v. Rock*, Alc. & N. ⁴⁶ See post, § 253.

57; *Smith v. Colson*, 10 Johns. (N. ⁴⁷ Co. Litt. 142 a.

Y.) 91; *Smith v. Fyler*, 2 Hill (N. ⁴⁸ Co. Litt. 47 a. So it is said in

Y.) 648. *Bro. Abr., Reservation*, pl. 46, citing

⁴³ *Vyvyan v. Arthur*, 1 Barn. & C. 410. *St. Germain's Doctor and Student*, that "if a man leases land, reserving

⁴⁴ *Pitcher v. Tovey*, 4 Mod. 71. common out of it, or the herbage

⁴⁵ *Y. B. 15 Edw. 3, 326* (Roll's Series); *St. Cross Hospital v. De Wal-* demised, it is a void reservation, for

den, 6 Term R. 338; *Toler v. Seabrook*, 39 Ga. 14; *Townsend v. Isen-* this is part of the thing granted."

berger, 45 Iowa, 670; *Boyd v. Mc-* ⁴⁹ *Moulton v. Robinson*, 27 N. H. 550.

Combs, 4 Pa. 146; *Clark v. Frazley*.

are themselves based on these *dicta* of Coke,⁵⁰ that a reservation of any part of the annual crops cannot take effect as a reservation of rent. But it seems that a distinction might perhaps be made between a reservation of vesture or herbage or other natural products of the soil (*fructus naturales*) which have at least an embryonic existence as part of the land at the time of the lease, and annual crops resulting from planting and labor (*fructus industriales*) which cannot well be regarded as a part of the land at the time of the lease. The statement by Coke himself that the rent may be in delivery of "pepper, comine, wheat, or other profit that lyeth in render,"⁵¹ would seem to suggest the possibility of the reservation of a part of the annual crop, and the validity of a reservation of a grain rent has always been recognized.⁵² The common-law authorities do not, however, in terms assert the validity of the reservation of a rent consisting of a part of the very grain grown upon the land demised, and ordinarily, no doubt, the purpose of the reservation of a grain rent was merely to avoid fluctuations in the value of the rent as a result of fluctuations in the value of money, without reference to the question whether the premises were adapted for the production of the grain in which the rent was reserved. But whether the reservation as rent of a portion of the annual crops (*fructus industriales*), grown on the premises demised, would in England be regarded as valid or invalid, there can be no question as to its validity in most jurisdictions in this country, where a provision for the payment to the landlord of a share of the crops as rent has been frequently enforced as constituting a reservation of rent.⁵³ Even were such a provision void as a reservation, it would be effective by way of contract as between the original parties to the lease.

The asserted rule, that rent cannot consist of a part of the

⁵⁰ Sheppard's Touchstone, 80; 3 Cruise's Dig. tit. 28, c. 1, § 3; Comyn, Landl. & Ten. 95. 3 specific portion of the crop in lieu thereof. Morton v. Lacy Bros. & Kimball, 84 Ark. 396, 106 S. W. 200.

⁵¹ See ante, at note 36.

⁵² See Bracton, bk. 2, c. 16, fol. 35 a; Y. B. 15 Edw. 3, 326.

⁵³ See post, § 253.

It was held in one case that if the lessee made a sublease and thereby disabled himself from delivering a portion of the crop, the lessor could demand the cash rent named. Dassance v. Cold, 101 Iowa, 610, 70 N. W. 719.

profits of the land, has never been regarded, even in England, as precluding a computation of the amount of pecuniary rent by reference to the amount of such profits removed. For instance, upon the lease of a brick yard, a reservation of a certain sum for every thousand bricks manufactured, the aggregate for all the bricks removed in any one year to be paid at the end of such year, was regarded as rent.⁵⁴ And it has been decided that the asserted rule does not apply when the reservation is, not of any part of a mineral in the ground, in its natural and primitive state, but of a metal produced from that mineral by smelting, in which process the native mineral is mixed with coal, or charcoal, and subjected to the operation of fire.⁵⁵ There is at least one English case in which a reservation of the mineral itself is regarded as a reservation of rent,⁵⁶ but there the validity of the reservation seems not to have been the subject of consideration. In other cases it has been said that, though the grantor or lessor of land undertakes to reserve to himself as rent a share of the ore which may be removed from the land, this constitutes in reality an exception from the grant or lease, and not a reservation of rent.⁵⁷ An attempted reservation as rent of ore in the ground seems, however, clearly distinguishable in this regard from a reservation of crops to be planted as well as gathered in the future.

There are occasional decisions to the effect that a stipulation for the furnishing of board or support to the lessor by the lessee, in return for the making of the lease, constitutes a stipulation for the payment of rent.⁵⁸ The chief objection to such a view

⁵⁴ Reg. v. Westbrook, 10 Q. B. 178. tion of a portion of the ore taken

⁵⁵ Rex v. Pomfret, 5 Maule & S. out was regarded as a reservation of
139. rent under a power to lease reserv-

⁵⁶ Buckley v. Kenyon, 10 East, ing the best possible rent.

⁵⁷ See Gowan v. Christie, L. R. 2
139, where the rent reserved was a H. L. Sc. 273, 284, per Lord Cairns;
certain proportion of the ore taken Coltness Iron Co. v. Black, 6 App.
out or its value in money, and if Cas. 315, 335, per Lord Blackburn;
this value did not equal a sum Greville-Nugent v. Mackenzie [1900]
named, then such additional rent App. Cas. 83, per Lord Halsbury. To
as would make up that sum, and re- the same effect, see Fairchild v. Fair-
covery was allowed in favor of a child (Pa.) 9 Atl. 255; Duff's Ap-
transferee of the reversion on the peal, 21 Wkly. Notes Cas. (Pa.) 491.
covenant to pay the rent. In Camp-
bell v. Leach, 2 Amb. 740, a reserva-

⁵⁸ Shouse v. Krusor, 24 Mo. App.

would seem to lie in the possible uncertainty as to the character of the board or support.

A stipulation for the support of a third person, although contained in the instrument of lease, and intended to secure compensation for the use and enjoyment of the land, would not, under the common-law rule that rent must be reserved to the lessor,⁵⁹ constitute a stipulation for or reservation of rent. But presumably a provision for the furnishing of board to the lessor and to his family would be regarded as a reservation to the lessor within the rule.⁶⁰

§ 169. Payments which are not properly rent.

a. **Sums payable under lease of incorporeal thing.** Rent can, by the common-law authorities, be reserved only upon a lease of land and things constituting a part thereof, to which the landlord may have recourse to distrain, and cannot be reserved out of incorporeal things.⁶¹ Whether the statement that rent must be reserved out of things to which the landlord may have recourse to distrain is to be regarded as a statement of the reason for the rule precluding the reservation of rent out of incorporeal things, or a statement of a result of the rule, does not clearly appear. In favor of the former view it is said that the king may reserve rent upon a lease of incorporeal things, for the reason that, by virtue of his prerogative, he can distrain on all lands of his lessee,⁶² and so it is said that it may be reserved on a 'demise of the vesture or herbage of lands for the reason that the lessor may distrain the cattle on the land.⁶³ The question is of interest at the present day, owing to the fact that the common-law remedy by distress is no longer recognized in most jurisdictions, and whether as a consequence sums reserved upon a lease of an in-

279; *In re Williams' Estate*, 1 Misc. 35, 22 N. Y. Supp. 906.

⁵⁹ See post, § 170.

⁶⁰ In *Baker v. Adams*, 59 Mass. (5 Cush.) 99, the provision was for a certain amount yearly, which was to be paid by boarding the lessor and his family. This is obviously different from an attempted reservation to the lessor's family

of board to be furnished by the lessee.

⁶¹ Co. Litt. 47, 142 a; *Gilbert*, Rents, 20; 2 Blackst. Comm. 41; *Lovelace v. Reynolds*, Noy, 59; *Gardner v. Williamson*, 2 Barn. & Adol. 336; *Buszard v. Capel*, 8 Barn. & C. 141.

⁶² Co. Litt. 47 a, Hargrave's note.

⁶³ Co. Litt. 47 a.

corporeal thing are there to be regarded as rent, with all the other common-law or statutory incidents thereof, involves a problem of considerable difficulty. In one state in which the remedy by distress does not exist, the common-law view that rent, properly so-called, cannot be reserved on a grant of an incorporeal thing, is apparently still recognized.⁶⁴ In another of the states in which distress no longer exists, but without reference to that fact, sums agreed to be paid annually for the right to take water from a canal were regarded as rent,⁶⁵ on the theory, apparently, that sums agreed to be paid in connection with a lease, even though of an incorporeal thing, are necessarily rent, a view not in harmony with that of the common law. Even though a sum reserved on a grant or lease of an incorporeal thing be not regarded as rent, it is recoverable, as between the original parties, by action of debt⁶⁶ or of covenant.⁶⁷

b. **Sums payable for enjoyment of license.** Sums which by agreement one pays for a license to go upon land for certain limited purposes are not properly rent, even though so termed.⁶⁸ The licensee has no interest in the land out of which the rent can issue.

c. **Sums payable under bailment of chattels.** Payment reserved by way of "rent" on a lease or bailment of personal chat-

⁶⁴ *Raby v. Reeves*, 112 N. C. 688, 16 S. E. 760.

⁶⁵ *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, 64 N. E. 680.

In *Manderbach v. Bethany Orphans' Home*, 109 Pa. 231, 2 Atl. 422, it was held that a sum which an owner of land agreed to pay annually for the use of water from the adjoining land was rent, as being "a profit issuing out of lands," and consequently the right thereto passed on a transfer of such adjoining land. This was certainly not a rent service according to common-law standards, there being no demise with a reservation of rent. It is also somewhat difficult to regard

it as a rent charge, there being no indication of an intention to grant a rent issuing out of the land.

There would seem to have been merely a promise by the owner of land to pay an annual sum for a privilege to be enjoyed in connection with his land.

⁶⁶ *Co. Litt.* 47 a; *Dean & Chapter of Windsor v. Gover*, 2 Wms. Saund. (pt. 2) 302.

⁶⁷ *Raby v. Reeves*, 112 N. C. 688, 16 S. E. 760.

⁶⁸ *Hancock v. Austin*, 14 C. B. (N. S.) 634; *Ward v. Day*, 4 Best & S. 337; *Rendell v. Roman*, 9 Times Law R. 192. See, as to the nature of a license, ante, § 7 a.

tels are not properly rent, since rent cannot issue out of chattels.⁶⁹

In the case of a lease of land together with chattels, as for instance of a farm with the stock thereon, or of a house with the furniture therein,^{69a} the whole rent is to be regarded as issuing from the land alone, so as to authorize a distress on the land for the entire amount thereof.⁷⁰ So, upon an eviction from the land, the liability for rent will be entirely suspended, without reference to the fact that the lessee continues to enjoy the use of the chattels included in the lease;⁷¹ and a declaration in an action for rent is not defective because it avers a demise of land alone, although chattels also were included.⁷² On the same principle, that the rent issues entirely out of the land, it has been decided in one state, that the executor of the lessor, though entitled to the chattels, has no right to receive any portion of the rent reserved on a lease of land and chattels.⁷³ There are other cases, however, which refuse or fail to apply this theory when calculated to produce unjust results. For instance, it has been

⁶⁹ *Spencer's Case*, 5 Coke, 17 a; not only from lands and tenements, *Sutliff v. Atwood*, 15 Ohio St. 186. but also the personal property necessary for their enjoyment," meaning thereby merely that the sums reserved are rent though chattels are included in the lease, a proposition which has never been disputed.

^{69a} See post, § 254.

⁷⁰ *Newman v. Anderton*, 2 Bos. & P. (N. R.) 224; *Selby v. Greaves*, L. R. 3 C. P. 594; *Stein v. Stely* (Tex. Civ. App.) 32 S. W. 782; *Toler v. Seabrook*, 39 Ga. 14; *Lathrop v. Clewis*, 63 Ga. 282.

In *Mickle v. Miles*, 31 Pa. 20, it is likewise decided that distress will lie for rent in such case, but there the court bases its decision not on the theory that rent issues only out of land, but on the theory that rent issues out of both lands and chattels when they are both included in the lease. The court mistakenly thinks that the common-law statement that rent issues only out of land means that the sum reserved is not rent if chattels are included in the lease, and undertakes to correct this statement. So in *Vetter's Appeal*, 99 Pa. 52, it is said that "rent may issue

If chattels on the premises are sold to the lessee by the lessor, their price, it has been decided, cannot be distrained for, though it is included in a gross sum to be paid by the lessee for such chattels and for the use of the land. *Cranston v. Rogers*, 83 Ga. 750, 10 S. E. 364.

⁷¹ *Gilbert*, Rents, 175; Y. B. 12 Hen. 8, 11, pl. 5; *Emott v. Cole*, Cro. Eliz. 255; *Read v. Lawnse*, 2 Dyer. 212 b. Contra, *Bro. Abr.*, Apportionment, pl. 24.

⁷² *Farewell v. Dickenson*, 6 Barn. & C. 251.

⁷³ *Armstrong v. Cummings*, 58 How. Pr. (N. Y.) 332; *Fay v. Holloran*, 35 Barb. (N. Y.) 295.

decided that the grantee of the reversion in the land, without any interest in the chattels, is not entitled to the whole rent reserved, as against the grantor, retaining the chattels,⁷⁴ and there are two cases in which it is decided that if the chattels leased with the land are lost or destroyed, the rent should be apportioned, that is, diminished proportionally.⁷⁵ These last cited cases, however, would seem hardly to accord with the ordinary rule, hereafter stated,⁷⁶ that no apportionment of rent occurs on the destruction by fire of the buildings on the land leased, and in one of such cases the decision seems to be regarded as involving a repudiation of that rule.

Where the mortgagor of premises let them, with the furniture thereon, and the tenant, upon receipt of notice from the mortgagee,⁷⁷ paid the whole rent to him, it was held that the mortgagor might still recover for the use of the furniture, if not on the ground that the rent might be apportioned, on the ground that a new agreement might be implied on the part of the tenant to take the house at a reasonable rent from the mortgagee, and to pay a reasonable amount to the mortgagor as compensation for the use of the furniture.⁷⁸

d. Sums payable under lease but not for use of the land. Rent reserved on a lease is a compensation for the tenant's right to the use and enjoyment of the land during the term of the lease, and, therefore, sums, although in terms reserved as rent, evidently payable on a different account, are not properly rent. It

⁷⁴ *Buffum v. Deane*, 70 Mass. (4 Gray) 385. In *Newton v. Speare Laundering Co.*, 19 R. I. 546, 37 Atl. 11, it is decided that the transferee of the land in such case is entitled only to the value of the use and occupation of the land.

In *Jones v. Smith*, 14 Ohio, 606, it is decided that upon a transfer of the reversion in the land alone, the covenant to pay rent does not pass. This decision appears questionable. The decision in *Spencer's Case*, 5 Coke, 16, to the effect that a covenant by the lessee to return the chattels does not run with the land, cited in the Ohio case, is evidently no

authority for the view that the covenant for rent does not run if chattels are included in the lease.

⁷⁵ *Newton v. Wilson*, 3 Hen. & M. (Va.) 470; *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277. The same view is favored by *Le Taverrier's Case*, 1 Dyer, 56 a. *Bussman v. Ganster*, 72 Pa. 285, contains a *dictum* contra, but cites only the case last cited from Dyer, which does not support it.

⁷⁶ See post, § 182 m (1).

⁷⁷ See ante, § 73 a (3).

⁷⁸ *Salmon v. Matthews*, 8 Mees. & W. 827.

is apparently on this ground that sums reserved, over and above the rent named, expressed to be by way of compensation for good will, are not rent,⁷⁹ and a like decision has been made as to periodic sums which the tenant, during the lease, agreed to pay under the name of rent, in consideration of the making of improvements by the landlord.⁸⁰ And sums agreed to be paid by the lessee in payment of past indebtedness are not rent, even though so called in the instrument of lease.⁸¹ Decisions to the effect that sums due under a stipulation that the lessee would pay the lessor for gas furnished by the latter,⁸² and that a sum which the tenant agreed to add to the rent reserved in consideration of the landlord's consent to an immediate surrender,⁸³ constituted rent, seem decidedly questionable. It may also be doubted whether an agreement to reimburse the landlord for certain repairs by a payment termed "rent" can be properly considered a reservation of rent.⁸⁴

e. **Sums payable for furnishing of power.** The word "rent" is not infrequently applied to sums payable by agreement for mechanical power furnished by one person to another, for manufacturing or similar purposes. In such cases the obligation to make the designated payments is purely contractual, and does not, as does rent proper, issue out of a particular thing in which the obligor has a proprietary interest or estate. The obligee has a right to recover such payments by an action of contract, as one has to recover rent, but the principles peculiar to the law of rent have properly no application to such payments.

⁷⁹ *Smith v. Mapleback*, 1 Term R. 441. this case the agreement to pay such sum was made after the lease and in consideration merely of the landlord's agreement to make the improvements.

⁸⁰ *Hoby v. Roebuck*, 7 Taunt. 157; *Donellan v. Read*, 3 Barn. & Adol. 899.

⁸¹ *Paxton v. Kennedy*, 70 Miss. 865, 12 So. 546; *Miners' Bank of Pottsville v. Heilner*, 47 Pa. 452; *First Nat. Bank of Sioux City v. Flynn*, 117 Iowa, 493, 91 N. W. 784.

⁸² *Fernwood Masonic Hall Ass'n v. Jones*, 102 Pa. 307.

⁸³ *Brisben v. Wilson*, 60 Pa. 452.

⁸⁴ But in *People v. Loomis*, 27 Hun (N. Y.) 328, 2 Civ. Proc. R. 278, this was held to constitute rent. In

In *Sipp v. Reich*, 88 N. Y. Supp. 960, it was provided in the instrument of lease that the tenant should make certain improvements, and that if he failed to do so within a certain time he should pay the landlord \$2,400, and it was decided that this sum so due was not rent, it being "nowhere stated in the lease or elsewhere shown to be for rent."

f. **Sums payable on sale of land.** Payments on the purchase price of land cannot, it has been decided, be made subject to the principles and rules applicable to rent, by a mere agreement between the parties to that effect.⁸⁵ But it has been decided that a lease may be made at a certain rent, with a stipulation that in case the rent is paid promptly the lessor will convey the premises to the lessee.⁸⁶ Interest which a vendor agrees to pay on purchase-money payments made by a vendee, until possession is given such vendee, is not rent.⁸⁷

g. **Cash bonus or premium paid by lessee.** A cash bonus or premium, paid by a lessee for the lease, is not properly rent, it being not reserved, but paid, and the payment being in anticipation and consideration of the creation of a tenancy, and not as a result thereof. It may be, however, that the word "rent" in a particular case may be construed as covering a premium so paid, as when a lessee agrees to pay a portion of the rent received by him upon making a sublease, and receives a premium upon subleasing.⁸⁸ And so it has been suggested that such a premium, if considerable in amount, might be regarded as an "improved rent" within the meaning of a certain act of parliament.⁸⁹

h. **Taxes paid by lessee.** As before stated,⁹⁰ a stipulation by the lessee for the payment of the taxes as they accrue has been regarded as one for the payment of rent. But the propriety of regarding as rent sums which the lessee thus agrees to pay a third person on behalf of the lessor may well be doubted. Such payments are, in a sense, a part of the return made by the tenant for his use and enjoyment of the land, in that the rent presumably would be higher were they not to be paid by him. But they lack one primary characteristic of rent, in that they are payable not to the landlord but to a third person,⁹¹ and the fact that their payment to such person by the tenant relieves the landlord from the burden thereof does not, it would seem, alter their character in this respect. One characteristic of rent at common-law is that the lessor has a right to bring an action of debt

⁸⁵ Sackett v. Barnum, 22 Wend. (N. Y.) 605.

⁸⁶ See ante, § 43 d, note 48.

⁸⁷ Mason v. Rogers, 109 Pa. 315, 1 Atl. 665.

⁸⁸ Constantine v. Wake, 31 N. Y. Super. Ct. (1 Sweeny) 239.

⁸⁹ Irish Soc. v. Needham, 1 Term R. 486.

⁹⁰ See ante, § 143 b.

⁹¹ See post, § 170.

therefor by reason of privity of estate,⁹² but he could not do so in the case of sums so reserved payable to another person, and he would be restricted to an action based upon the privity of contract alone.

It has been well said, in this connection, that "rent has a fixed legal meaning, and to consider all payments which, by the terms of a lease, a tenant is bound to make, as coming within its definition, would lead to a confusion of ideas without necessity or advantage. * * * In one sense the performance of every covenant on the part of the lessee is a return made by the tenant for the use of the land. Yet it would hardly be contended that money stipulated to be expended in repairs or for insurance, or in the way of improvements, was any portion of the rent."⁹³

The fact that the parties intend that payments thus agreed to be made by the tenant on account of taxes shall be regarded as payments of rent cannot, it is conceived, have any effect in this regard. The question of what constitutes rent is one of law, not of intention. There are a few decisions that a covenant to pay taxes is not one to pay rent.⁹⁴⁻⁹⁶

§ 170. The reservation of rent.

In technical language, the rent which is provided for by the terms of a lease is "reserved," as distinguished from a part of the land, which may be "excepted."⁹⁷ The recognized words by which rent is reserved at common law are "yielding and paying," but no particular language is necessary, it being sufficient that it indicates an intention that the rent named be paid or rendered to the lessor. Thus, such expressions as "provided the lessee shall pay" the rent named,⁹⁸ or "at or under a yearly rent of" a sum named,⁹⁹ are sufficient, as are words by which the lessor covenants or agrees to pay.¹⁰⁰

⁹² See post, § 288 a.

⁹⁷ Co. Litt. 47 a; Doe d. Douglas

⁹³ Garner v. Hannah, 13 N. Y. v. Lock, 2 Adol. & E. 705, 743.

Super. Ct. (6 Duer) 262, per Slosson, J.

⁹⁸ Harrington v. Wise, Cro. Eliz. 486.

⁹⁴⁻⁹⁶ Evans v. Lincoln Co., 204 Pa. 448, 54 Atl. 321; Garner v. Hannah, 13 N. Y. Super. Ct. (6 Duer) 262; People v. Swayze, 15 Abb. Pr. (N. Y.) 432; Hodgkins v. Price, 137 Mass. 13.

⁹⁹ Doe d. Rains v. Kneller, 4 Car. & P. 3.

¹⁰⁰ Drake v. Munday, Cro. Car. 207; Alfo v. Henning, Owen, 151; Attoe v. Hemmings, 2 Bulst. 281; Anonymous, 12 Mod. 73. That is, a

It is a well settled rule of the common law that rent must be reserved to the lessor or grantor himself, and not to a stranger, since it is to be paid by way of retribution for the land, and consequently should go to him from whom the land passes.¹⁰¹ It was accordingly considered that a reservation of rent to the heir of the lessor was void,¹⁰² unless the lease was not to begin till after the lessor's death,¹⁰³ as was a reservation to the lessor's son, who joined in the lease, even though the lease was not to begin till after the lessor's death, since a reservation to the son by name, and not as heir, is the same as a reservation to a stranger.¹⁰⁴ And where the reservation was to the lessor and his wife, the wife had no right to any part of the rent, even after his death.¹⁰⁵ Such an attempted reservation to a stranger, if it can be construed as a covenant to pay the sum named as rent, is, however, ground for an action of covenant by the covenantee,¹⁰⁶ and, it seems, in jurisdictions where one not a party to a contract is allowed to sue thereon, for an action by the person to whom the rent is attempted to be reserved. Furthermore, if there is a condition of re-entry in case of nonpayment, the lessor, though not the stranger named, can re-enter on nonpayment.¹⁰⁷ In several states decisions are to be found which apparently regard a reservation of rent to a stranger to the lease as valid,^{108, 109} but it may be questioned whether even in those states sums so reserved are to be regarded as rent, properly speaking, the payment of which can be enforced by the remedies provided in the case of rent, such as distress, or the assertion of a statutory lien. The right to such payments would evidently not pass on a transfer of the reversion, and it seems question-

covenant to pay rent will supply the place of a reservation.

¹⁰¹ Litt. § 346; Co. Litt. 143 b; 2

Rolle, Abr. 447; Gilbert, Rents, 54;

Ryerson v. Quackenbush, 26 N. J. Law, 236.

¹⁰² Co. Litt. 213 b.

¹⁰³ 2 Rolle, Abr. 447, pl. 2.

¹⁰⁴ Oates v. Frith, Hob. 130. In Murray v. Cazier, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880, a provision for the payment of the rent, after the lessor's death, to his wid-

ow, was held void as an attempted testamentary disposition of property.

¹⁰⁵ 2 Rolle, Abr. 447, pl. 7.

¹⁰⁶ Deering v. Farrington, 1 Mod. 113.

¹⁰⁷ Litt. § 345; Gilbert, Rents, 55.

^{108, 109} In Toan v. Pline, 60 Mich.

385, 27 N. W. 557; Schneider v. White, 12 Or. 503, 8 Pac. 652; Brod- die v. Johnson, 33 Tenn. (1 Sneed) 464, a sum so reserved, payable to a third person, is spoken of as rent,

able whether the liability therefor would pass on an assignment of the leasehold.

The presence in the instrument of lease of a stipulation that rent shall be applied to a specific purpose by the lessor does not, it has been held, affect its character as rent.¹¹⁰

As there can be no reservation of rent to a stranger during the life of the lessor, "so" it is said "rent cannot be reserved after the death of the lessor to any person who has not the reversion after his death."¹¹¹ Consequently, if one having a fee simple estate in land makes a demise for years, reserving an annual rent "to him, his heirs, executors and assigns," the word "executors" will be rejected, and the rent will enure to the benefit of the heir.¹¹² But the reservation may be "general," without mention of the lessor or of any other person to whom the rent is to be paid, and in that case the rent will, on the lessor's death, follow the reversion. That is, if the reversion is a fee simple, the rent will pass with it to the heir or devisee, while if the reversion is personalty, the rent will pass with it to the personal representative.¹¹³ This is the safe and proper form of reservation to be used.

If the reservation is "particular," as when a tenant in fee leases for years reserving rent to himself, without more, or to him and his executors, or to him and his assigns, or to him and his executors or assigns, the rent comes to an end, it has been de-

but the question involved is merely as to the right of such person to sue therefor, which he could do, presumably, whether it is rent or not. See ante, at note 106. In *Brett v. Sayle*, 60 Miss. 192, an agreement by a sublessee with his lessor to pay rent to the original lessor was regarded as an agreement for rent, but the decision was merely that, in a suit for the rent by the lessee, the sublessee could not set off an account against the latter, since he could not have set it off against the lessor.

In *Ege v. Ege*, 5 Watts (Pa.) 134, rent to a certain amount was reserved generally, and there was

merely a stipulation that it might be paid by payments to the lessor's creditors. Such a stipulation as to the mode of payment would not, it seems, affect the character of the sums reserved, and they were properly regarded as rent, but the court held that no distress would lie in favor of the lessor.

¹¹⁰ *Ryerson v. Quackenbush*, 26 N. J. Law, 236. And see *Ege v. Ege*, 5 Watts (Pa.) 134, ante, notes 108-109.

¹¹¹ *Gilbert, Rents*, 61.

¹¹² *Gilbert, Rents*, 61.

¹¹³ *Co. Litt.* 47 a; 2 *Platt, Leases*, 88; *Gilbert, Rents*, 64; *Jaques v. Gould*, 58 Mass. (4 Cush.) 384.

cided, on the death of the lessor,¹¹⁴ and likewise, if a tenant for years makes a sublease reserving rent to himself and his heirs, the rent ceases on the lessor's death, it is said, since the heir has no right to succeed to a chattel interest, and there are no words to carry it to the executor.¹¹⁵ But the addition of the words "during the term" will, it has been decided, prevent such a result, in any of the above cases, and have the effect of causing the rent to pass after the lessor's death to the person succeeding to the reversion.¹¹⁶

Whether the above rule, that in the case of a "particular" reservation of rent, not naming the proper person to take after the lessor's death, the rent ceases upon such death, would ordinarily be recognized in this country, may be questioned, and that, in the case of a reservation to the lessor, without more, the rent would be regarded as so incident to the reversion as to pass therewith on the lessor's death, is hardly open to doubt.¹¹⁷ The contrary view, that the rent in such case ceases on the lessor's death, appears to be based on the theory that a reservation to a certain man, without more, is equivalent merely to a reservation to him for his life, and thus seems to be analogous to, and is perhaps an outgrowth of, the common-law rule that a conveyance of land passes a life estate only, in the absence of words of inheritance.¹¹⁸ The policy, embodied in the statutes of a number of states, dispensing with the requirement of the word "heirs" in the latter case, might well be extended by the courts to the former case.¹¹⁹

¹¹⁴ Gilbert. Rents, 66; 2 Platt, favored, on principle, by Sergeant Leases, 88. Williams. See 2 Wms. Saund. 368,

¹¹⁵ Sacheverel v. Frogate, 1 Vent. note to Sacheverel v. Frogate.

161. As to the presumption in regard to the character of the lessor's estate in case of a reservation to the lessor, "his administrators and assigns," see Dollen v. Batt, 4 C. B. ¹¹⁸ See 1 Tiffany, Real Prop. § 20.

(N. S.) 760. ¹¹⁹ In this country when, upon a conveyance of land, an easement is sought to be created therein by the same instrument in favor of the grantor, the language used for this purpose is ordinarily referred to as a reservation. Some courts have a tendency to call language thus creating an easement in the grantor an exception rather than a reservation.

¹¹⁶ Gilbert, Rents, 67, 68; 2 Platt, Leases, 91 et seq. in order to obviate any necessity of

¹¹⁷ This view was occasionally asserted by early judges, including Littleton. See Y. B. 14 Hen. 6, 26, pl. 77; Y. B. 10 Edw. 4, 18, pl. 22. It is

In the case of a lease made by a life tenant under a power, though the reservation of rent is to the lessor, his heirs and assigns, the rent will, after the lessor's death, go to the remainderman, since the lease is considered, in such case, as emanating from the creator of the power.¹²⁰

If two or more pieces of land are demised by a single instrument, and there is a reservation of a distinct rent for each piece, each rent so reserved is a separate rent, and payment of any particular rent can be enforced only as against that particular piece of land as to which it is reserved.¹²¹

§ 171. Covenants for the payment of rent.

a. **Express covenants.** The reservation of rent upon the making of a lease does not, strictly speaking, involve any contractual liability on the part of the lessee. At common law the land was regarded as owing the rent created by the reservation, and the lessee owed the rent merely by reason of his tenancy of the land,¹²² that is, as it is ordinarily expressed, by reason of his "privity of estate."¹²³ This liability on his part, as we shall see later, was asserted by an action of debt,¹²⁴ which was not properly a contractual action, but rather an action to recover money belonging to the plaintiff and withheld by the defendant.¹²⁵ In other words, while the land was regarded as the original debtor, the tenant could be charged as pernor or taker of the profits by means of an action of debt.

Though the landlord thus had a right of recovery against the lessee on the privity of estate, the practice arose, in comparatively modern times, of inserting in the instrument of lease an express covenant by the lessee to pay the rent, thus imposing on the lessee a liability by reason of "privity of contract." There

using the word "heirs" to create a fee simple estate in the easement. See an article by T. Cyprian Williams, in 13 Law Quart. Rev. 288. See Tiffany, Real Prop. § 383, note 143. where this matter is learnedly discussed.

¹²⁰ *Isherwood v. Oldknow*, 3 Maule & S. 382; *Gilbert*, Rents, 70; 2 Platt, 22 a. ¹²² See *Walker's Case*, 3 Coke, 22 a.

¹²¹ *Tanfield v. Rogers*, Cro. Eliz. 340; *Gilbert*, Rents, 35. ¹²⁴ See post, § 290 a. ¹²⁵ *Pollock*, Contracts in Early English Law, 6 Harv. Law Rev. 398; *Holmes*, Common Law, 252, 264; 2

¹²² See ante, § 157 a (1), note 294.

is ordinarily such a covenant at the present day, and, in fact, informally drawn instruments quite frequently contain the language of a covenant for rent, without any language expressly reserving the rent. In such case the words of covenant do duty as words of reservation of the rent¹²⁶ as well as of a covenant to pay it.

The question seems never to have been considered whether there may be, in connection with a written conveyance by way of lease, a valid oral stipulation as to the payment of rent, the written instrument containing no reference to the matter of rent. Regarding such a stipulation as a reservation, creating an interest in a thing of an incorporeal nature, that is, rent, it might perhaps be considered as within the various state statutes requiring estates and interests in land to be created by writing; but on the other hand it might be argued that, since at common law a rent service might be created without the use of a seal,¹²⁷ which was ordinarily required for the creation of an incorporeal thing, a writing should not be necessary for that purpose, even though ordinarily required for the creation of an incorporeal thing, and there can indeed be little or no question as to the validity of an oral reservation of rent, when the lease itself is valid though oral. To the validity of an oral reservation of rent, however, when occurring in connection with a written instrument of lease, a valid objection would seem to be presented by the "parol evidence rule," the reservation in effect withdrawing from the operation of the lease part of the property rights which it purports to convey.¹²⁸ But regarding the oral stipulation for rent, not as a reservation of rent, but as a contract to pay periodic sums, it might be regarded as a "collateral agreement," so as not to be within the parol evidence rule, it referring to a matter not referred to in the written instrument.

b. **Implied covenants.** The cases not infrequently contain references to an "implied contract" or an "implied covenant" to pay rent as distinct from one which is "express," and it is desirable to obtain a clear conception, so far as possible, of what is meant by these expressions. As elsewhere explained, one who

Pollock & Maitland, *Hist. Eng. Law*, 203; Ames, *History of Assumpsit*, 2 Harv. Law Rev. 55.

¹²⁷ Litt. § 214; Co. Litt. 143 a.

¹²⁸ See *Bolton v. Tomlin*, 5 Adol. & E. 856, ante, § 53 b, note 57 a.

¹²⁶ See ante, note 100.

occupies another's land by permission may do so under such circumstances that the law imposes a liability upon him for use and occupation, though there is no express agreement in this regard, and this liability is quite frequently expressed by the statement that in such case a contract to pay rent is "implied." This mode of expression is not, however, entirely accurate, since the contract implied in such case is not to pay rent, properly so called, but merely to pay the value of the use and occupation. Implied contracts of this sort are elsewhere considered.¹²⁹ The question with which we are now concerned is whether, in the absence of express words by which the lessee agrees to pay rent, an "implied covenant" to that effect can be regarded as arising by reason of the presence of the ordinary words of reservation, such as "yielding and paying."

With reference to the question whether a covenant is created by words of reservation, several alternative views might be suggested. In the first place the words of reservation might be regarded as creating no covenant whatever, express or implied, on the part of the lessee, even though the instrument of lease is executed by him; not an express covenant, because not intended to create any contractual liability, and not an implied covenant, because not within any rule of law which gives them such an effect, apart from intention. This view is not clearly asserted in any case, it seems. In the second place, applying the distinction between "express covenants" and "implied covenants" or "covenants in law," which has previously been stated,¹³⁰ the words of reservation in a lease might be regarded as giving rise to a covenant which is in legal effect an express covenant, though it may be said to be "implied," in that actual words of covenant or agreement are not used, but that an intention on the part of the lessee to become contractually bound for the rent may be inferred from the words of reservation. This, it seems, may be what is meant by the occasional *dicta* to the effect that an "implied covenant" arises from the words "yielding and paying,"¹³¹ there being nothing in the decisions in which these statements occur to show that they have any other significance. Such expres-

¹²⁹ See post, chapter XXX.

¹³⁰ See ante, § 50.

¹³¹ Webb v. Russell, 3 Term R.

402; Iggulden v. May, 9 Ves. Jr. 330;

Vyvyan v. Arthur, 1 Barn. & C. 410.

sions need consequently not be regarded as opposed to earlier dicta¹³² to the effect that the words "yielding and paying" create an "express covenant" and not "a covenant in law," or to the American cases which take a similar view.¹³³ As an alternative to the above possible views, that the words of reservation create no covenant, or that they create a covenant, which is in reality an express covenant, and can be said to be "implied" only in the sense that it is a matter of inference and construction, these words might perhaps be regarded as creating a covenant implied by law, or a covenant "in law," as it would be called by the older authorities, on the theory that such words, after having their primary operation as creating the rent, have a secondary operation as creating a covenant to pay the rent, not on the theory that they, of themselves or with their context, show an intention to that effect, but because a rule of law has become established that they shall have that effect. That is, as the word "demise" is said to import a covenant for quiet enjoyment,¹³⁴ so the words "yielding and paying" might be regarded as importing a covenant to pay rent. Such a view of the effect of the words of reservation is not, however, clearly asserted in any decision, and, even assuming that these words create an "implied covenant" in this sense, it does not appear that the effect thereof as regards the liability of the covenantor would be in any respect different from that of an express covenant. They are both, indeed, "express contracts," as regards their place in the general law of contracts.¹³⁵

¹³² *Hellier v. Casbard*, 1 Sid. 266; *sumers' Ice Co. v. Bixler*, 84 Md. 437, *Newton v. Osborn*, Style, 387; *Porter v. Swetnam*, Style, 406; *Hollis v. Carre*, 2 Mod. 91.

¹³³ In *Bussman v. Ganster*, 72 Pa. 285, it is said that an express covenant arises from the words "the rent to be paid monthly." In *Hallett v. Wylie*, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457, it was said that there was an express covenant to pay rent when the premises were demised "at the rent of" a certain sum per annum, and the lessee "agreed to take the premises on the terms and conditions aforesaid." In *Con-*

¹³⁴ See ante, § 79 a.

¹³⁵ See article, *Covenants as Quasi Contracts*, by Louis L. Hammon in 2 Mich. Law Rev. 106.

In some cases, neither of the above three alternative views is in terms adopted, or indeed suggested, but the view is indicated that words of this character give rise to an implied covenant, or covenant in law, which imposes on the lessee a liability different from, and more restricted than, that imposed by an express covenant. These cases we will now consider. It is stated in an early case, under a "semble," that the covenant created by the words of reservation is a "covenant in law," on which an action does not lie against the lessee after an assignment by him of the leasehold,¹³⁶ and in this country, likewise, it has been clearly decided in one state that there is in such case an "implied covenant" on which the lessee is not liable after assignment.¹³⁷ As is elsewhere stated,¹³⁸ a lessee covenanting to pay rent is ordinarily liable on his covenant even after he has assigned his interest to another, that is, his liability by reason of privity of contract remains, although his liability based on privity of estate, that is, on the relation of tenancy, ceases upon such assignment, consented to by the lessor. The effect of the cases just referred to, however, is to exclude the application of this rule as to the lessee's continuing liability, in cases in which there is no covenant other than that "implied" from the words of reservation. On the same theory, it has been decided that where the premises were leased "at a yearly rent" of a sum named, although with the additional clause "the lessees well and truly keeping and performing their part of these presents to be by them performed as aforesaid," there was merely an "implied cove-

¹³⁶ Anonymous, 1 Sid. 447, pl. 9.

In *Bacheloure v. Gage*, Wm. Jones, 223, it is said that there is a difference between covenant in deed and covenant in law, for if covenant in law, after assignment and acceptance, no action lies against the first lessee, but if covenant in deed it is otherwise, for there the action at all times lies against the first lessee." See ante, § 157 a (2), note 307.

In *Harper v. Burgh*, as reported in 2 Lev. 206, the fact that the action could be regarded as being on the covenant implied from the words of

reservation seems to be considered to have some bearing upon the question whether the right to the rent ran with the reversion. The report is in this respect most obscure. The report in *Thos. Jones*, p. 102, merely states that the court held that the action of covenant would lie on such words.

¹³⁷ *Kimpton v. Walker*, 9 Vt. 191. There is a dictum to that effect in *Kunckle v. Wynick*, 1 Dall. (Pa.) 305.

¹³⁸ See post, § 181 a.

nant" to pay rent, and consequently the lessees' liability ceased upon assignment by them.¹³⁹ The same idea is, in other cases, suggested by the statement that the lessee remains liable after assignment, if there is an "express" covenant to pay rent,¹⁴⁰ thereby intimating that there might be an "implied" covenant to that effect under which he does not remain liable. These decisions and *dicta* might at first suggest a theory that, besides express covenants, and implied covenants (covenants in law) properly so termed, there is a third class of covenants, which are "implied" from a reservation of rent, and the peculiar characteristic of which is to impose a liability based on privity of contract, which is similar to that which already exists by reason of privity of estate, in that it ceases upon an assignment of the leasehold. But a consideration of the language used in the cases referred to is calculated to induce the suspicion that the expression "implied covenant," as used in these cases, is but an inaccurate mode of referring to the lessee's liability by reason of privity of estate, they indeed occasionally stating in terms that it is based on such privity.¹⁴¹ Such a restatement, in terms of

¹³⁹ *Fanning v. Stimson*, 13 Iowa, 42.

¹⁴⁰ *Auriol v. Mills*, 4 Term R. 94; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Ghegan v. Young*, 23 Pa. 18.

¹⁴¹ See *Fanning v. Stimson*, 13 Iowa, 42; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 448, 35 Atl. 1086. So it is said that the lessee remains liable only on his express contract to pay rent, and does not remain liable when there is "no express covenant to pay other than that implied from occupancy," in which case "the right of the landlord to collect rent rises out of a privity of estate." *Charless v. Froebel*, 47 Mo. App. 45. And in *Sutliff v. Atwood*, 15 Ohio St. 186, it is said that there are two sorts of obligations by which the tenant may be liable to the lessor, those which arise from express agreement and those which are "implied," and that

the latter are such as the law raises from the relation of the parties, in the absence of any agreement between them on the subject.

In *Harmony Lodge v. White*, 30 Ohio St. 569, 27 Am. Rep. 492, it was held that lessees holding over, who paid the same rent as before, which was accepted by the lessors, were not liable as on an express covenant to pay rent, and consequently did not remain liable after their assignment and the acceptance of rent from the assignee, since their obligation to pay rent was only that implied by law from the "privity of estate" between the parties. As to this, however, it would seem that since the renewal for another year, which the law presumes in such case, is on the same terms and conditions as the original demise, the lessee would in such case be liable as on an

covenant, of the lessee's liability which exists, by reason of privity of estate, apart from any covenant, seems unnecessary and misleading, if not positively erroneous.

§ 172. Time at which rent is due.

a. **Usually at end of rent period.** A lease of land ordinarily states either the periods with reference to which the installments of rent are to be computed, as by providing for a "weekly," "monthly," "quarterly" or "annual" rent, or it specifies the exact days on which rent is to be paid. In the latter case the question as to the time for payment of the successive installments of rent is merely one of construction of the language used. In the former case the rent for the particular period named, whether it be a week, a month, a quarter, or a year, does not become due until the end of such period,¹⁴² in the absence of a stipulation,¹⁴³ or, it seems, a custom,¹⁴⁴ to the contrary, the theory being that, since rent is a part of the profits of the land, it is not payable until it has been earned by the tenant's enjoyment of the premises. In determining what is the last day of the rent period, whether a year, a quarter, a month, or a week, for this purpose, the same method of computation is employed, it seems, as in determining the length of a term,¹⁴⁵ that is, the last day of each period, on which day the rent becomes due, is not that corresponding to the first day, but the day previous thereto. For instance, if the term begins on the second day of January, and rent is in terms payable monthly, it becomes due on the first and not the second day of each of the following months, and, if payable

express contract if the original demise contained a covenant to that effect. & S. (Pa.) 432; *Hilsendegen v. Scheich*, 55 Mich. 468, 21 N. W. 894; *Gibbs v. Ross*, 39 Tenn. (2

Head) 437. See post, § 172.
¹⁴² *Coomber v. Howard*, 1 C. B. 440; *Kistler v. McBride*, 65 N. J. Law, 553, 48 Atl. 558; *Hilsendegen v. Scheich*, 55 Mich. 468, 21 N. W. 894; *Castleman v. Du Val*, 89 Md. 657, 43 Atl. 821; *Ridgley v. Stillwell*, 27 Mo. 128; *Parker v. Gortatowsky*, 129 Ga. 623, 59 S. E. 286; *Holt v. Nixon*, 73 C. C. A. 268, 141 Fed. 952. See *Gibbens v. Thompson*, 21 Minn. 398.
¹⁴³ Appeal of *Menough*, 5 Watts
¹⁴⁴ *Buckley v. Taylor*, 2 Term R. 600; *Doe d. Hall v. Benson*, 4 Barn. & Ald. 588; *Calhoun v. Atchison*, 67 Ky. (4 Bush) 261, 96 Am. Dec. 299; *McFarlane v. Williams*, 107 Ill. 33; *Tignor v. Bradley*, 32 Ark. 781; *Watson v. Penn*, 108 Ind. 21, 8 N. E. 636, 58 Am. Rep. 26.
¹⁴⁵ See ante, § 12 c (3) (a).

yearly, it becomes due on the first day of each of the following years.¹⁴⁶

When a yearly, quarterly, monthly, or weekly rent is reserved, or the rent is expressed to be payable at such intervals, this is construed to mean that the rent is so payable throughout the term.¹⁴⁷

If a tenancy from year to year or for another year is created by the action of the tenant in holding over the term, and the landlord's consent thereto,¹⁴⁸ the rent is payable at the same times as under the original demise.¹⁴⁹ But ordinarily, in the case of a tenancy from year to year, the rent is, unless it is otherwise stipulated, payable at the end of each year,¹⁵⁰ and so, on a tenancy from month to month, it is payable at the end of each month,¹⁵¹ the rule being the same in the case of such a tenancy as in that of one for years, that *prima facie* the day for payment is the last day of each of the periods with reference to which the rent is computed.

Occasionally a statute specifies the time for the payment of rent in case no time is named in the lease and there is no usage to the contrary.¹⁵²

b. **Specification of rent days.** A specification of the days for payment of rent is conclusive, and cannot be controlled by the times named for the commencement and ending of the term.¹⁵³

¹⁴⁶ So, if the term begins **January** 10th. and the rent is payable quarterly, the rent falls due on April 9th, July 9th, October 9th, and January 9th, and not on the tenth day of each of these months. *Donaldson v. Smith*, 1 Ashm. (Pa.) 197.

¹⁴⁹ *Vegely v. Robinson*, 20 Mo. App. 199; *Laguerenne v. Dougherty*, 35 Pa. 45.

¹⁵⁰ *Indianapolis, D. & W. R. Co. v. First Nat. Bank*, 134 Ind. 127, 33 N. E. 679; *Cowan v. Henika*, 19 Ind. App. 40, 48 N. E. 809. See *Blodgett v. Lanyon Zinc Co.*, 58 C. A. 79, 120 Fed. 893.

¹⁵¹ *Dauchy Iron Works v. McKim Gasket & Mfg. Co.*, 85 Ill. App. 584 (semble).

¹⁵² See *Alabama Code* 1907, § 4735; *California Civ. Code*, § 1947; *North Dakota Rev. Codes* 1905, § 5533; *Oklahoma Rev. St.* 1903, § 869; *South Dakota Civ. Code* 1903, § 1439.

¹⁵³ *Tomkins v. Pinsent*, 2 Ld. Raym. 819.

¹⁴⁷ 2 Rolle, Abr. 449; Bac. Abr., Rent (F).

¹⁴⁸ See post, § 210 a.

And where, by a lease dated the eighth of September, premises were demised for seven years at an annual rent payable quarterly, the first payment to be made on the twenty-fifth of March, it was held that one quarter's rent only became due then, and that the previous quarter's rent could not also be collected at that time, but that this was postponed till the end of the term.¹⁵⁴ Nor is the time for payment, as named by the lease, extended by the fact that the landlord has no right of re-entry for nonpayment until a subsequent date.¹⁵⁵

The question whether an oral agreement as to the time at which the rent is to be paid may be shown would properly depend upon whether it can, in the particular case, be regarded as "collateral" to the transaction incorporated in the written instrument.¹⁵⁶ If the time for the payment of rent is expressly stated, evidence cannot be introduced to show that a different date was agreed on.¹⁵⁷

Days specified by the lease for the payment of the installments of rent do not necessarily correspond to the days on which the installments would fall due in the absence of such specification. For instance, in the case of a monthly rent payable under a lease dated on the first day of the month, while the rent would, in the absence of a stipulation otherwise, fall due on the last day of each month, the lease will frequently provide for its payment on the first day of the following month. So the day for the payment of the last installment of rent may be fixed some time after the end of the term,¹⁵⁸ or a monthly rent may be made payable "after the termination of each month of the tenan-

¹⁵⁴ *Hutchins v. Scott*, 2 Mees. & W. 809. stock, 4 N. Y. (4 Comst.) 270, 53 Am. Dec. 374.

¹⁵⁵ *Rowe v. Williams*, 97 Mass. 163; *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 149; *Clun's Case*, 10 Coke, 129 a. A subsequent oral extension of the time of payment was held to be nugatory in view of a statutory provision that a contract in writing cannot be altered except by a contract in writing or by executed oral agreement. *Harloe v. Lambie*, 132 Cal. stock, 4 N. Y. (4 Const.) 270, 53 Am. Dec. 374.

¹⁵⁶ That such an agreement can be shown, see *Hartsell v. Myers*, 57 Miss. 135. Compare *Giles v. Comment*. *Harloe v. Lambie*, 132 Cal. stock, 4 N. Y. (4 Const.) 270, 53 Am. Dec. 374.

¹⁵⁷ *Carpenter v. Shanklin*, 7 E. 463; *Hutchins v. Scott*, 2 Mees. & W. 809.

¹⁵⁸ *Hopkins v. Helmore*, 8 Adol. & Blackf. (Ind.) 308; *Giles v. Comment*.

cy."¹⁵⁹ Such seems to have been the effect of the provision for "days of grace" formerly common in England, the rent being stated to be payable on certain days named, or within so many days or weeks thereafter.¹⁶⁰ Whether, when rent is thus made payable after the end of the period during which it is being earned, the courts can consider it as due for any purpose after the end of the period and before the day named for payment, is a question to which the cases give no satisfactory answer. In a leading English case¹⁶¹ it was decided that rent, payable by express provision on the usual quarter days, or within a named period thereafter, cannot be apportioned as to time, in case there is a change of ownership or termination of the tenancy during such period, the theory being that, if the rent is not paid on the first of the days named, the case stands as if the rent had been expressly made payable on the second of such days, and on no other. There is, however, one case in this country to the effect that if the rent is not payable until a date later than the expiration of the period during which it was earned, the right to the rent is to be determined without reference to a change of title after the expiration of such period, though before the day for payment of the rent.¹⁶²

¹⁵⁹ *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137. Here the tenancy began on the 15th of a

month, and a monthly rental was named, payable as stated in the text, and it was said that the rent "accrued on the 14th of a subsequent month, while not payable till the next day." The term "accrued" is somewhat ambiguous when thus used. The court evidently means that the period during which it was being earned ended on that day, but the word "accrue" is frequently used as meaning "become payable." In *Slack v. Sharpe*, 8 Adol. & E. 366, Pattenon, J., says that "rent accrues when it becomes due, and at no other time."

In *Slack v. Sharpe*, 8 Adol. & E. 366, Pattenon, J., says that "rent accrues when it becomes due, and at no other time."

¹⁶⁰ 2 Platt, Leases, 116; *Clun's Case*, 10 Coke, 128 b.

¹⁶¹ *Clun's Case*, 10 Coke, 126 b. And see dictum of Pattenon, J., ante, note 159.

¹⁶² *Noble v. Tyler*, 61 Ohio St. 432, 56 N. E. 191, 48 L. R. A. 735, where the life tenant who made the lease, and who died after the term of the lease and before the day fixed for payment of the rent, was held to be entitled to all the rent, it being said that "the accrual of rent does not necessarily depend upon the time fixed by the parties for its payment. The accrual of rent has respect to the term of the lease."

In *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137, as before stated (ante, notes 146, 159), it was held that the rent "accrued" on the last day of the month though not payable till the next day, the lease

c. **Ascertainment with reference to calendar year.** When the rent is made payable quarterly or semi-annually, this ordinarily means at intervals of a quarter or half year, calculated from the date of the lease and not from the beginning of the calendar year.¹⁶³ The lease may, however, call for another construction.¹⁶⁴ If specific days of the calendar year are named for payment of rent, the first installment of rent will become payable on the first of such days which occurs after the commencement of the tenancy, irrespective of the order in which the days may be named by the lease.¹⁶⁵

Where a lease, made on the fourteenth day of a certain month, provided that the lessee should hold "from the first day of that month," and that rent was to be paid "on the last day of each and every month," the rent was regarded as payable on the last day of each calendar month during the term.¹⁶⁶

d. **At end of term.** In case the lease merely states the aggregate amount of the rent, without any statement as to the dates

making it "payable after the termination of each month." It was held that a conveyance on the last day of the month terminated the tenancy, it being at will. If the conveyance had been on the next day, the case would have presented the question, referred to in the text, whether the rent was due on the last day of the month, so that the lessor's right thereto would not be affected by a conveyance after the end of the month. In *Ordway v. Remington*, 12 R. I. 319, 34 Am. Rep. 646, it seems to be thought that a quarter's rent, though specified to be paid December 1st, could be regarded as due on that day, for the purpose of an attachment then levied, if the quarter could be computed as ending November 30th.

making it "payable after the termination of each month." It was held, construing the lease as a whole, that the rent was payable on the quarter days on which rent in that city is ordinarily payable. *Wolf v. Merritt*, 21 Wend. (N. Y.) 336, 34 Am. Dec. 238.

¹⁶⁵ *Hill v. Grange*, Plowd. 164, 171; *Gilbert, Rents*, 50; 2 *Platt, Leases*, 114.

¹⁶⁶ *McGlynn v. Moore*, 25 Cal. 384, 85 Am. Dec. 133. But in *Com. v. Contner*, 21 Pa. 266, where a lease was in terms for a certain term from the first day of a month previous to the month of its execution, at a specified annual rent, payable semi-annually in advance, and the first half-yearly payment was made on the day of the date of the lease, it was held that rent began to run from the date of the lease, and not from the date named as the commencement of the term, since the fact that the term was calculated months "at the yearly rent of \$300, from the previous date named did

¹⁶³ 2 *Rolle*, Abr. 450; *Gilbert, Rents*, 50.

¹⁶⁴ Thus, where premises in New York city were demised for seven months "at the yearly rent of \$300, from the previous date named did

on which it shall be paid, or the periods by which it shall be calculated, it is payable, in case the demise is for a year or for less than a year, at the end of the term and not before,¹⁶⁷ unless there is a stipulation or custom to the contrary.¹⁶⁸ Presumably, likewise, in case the demise is for more than a year, and a certain sum is named as rent for the whole period, without the naming of any time for payment, no part of this sum becomes payable till the end of the term.¹⁶⁹

The cases above cited, to the effect that if there is no statement as to the time of payment or as to the periods by which the rent is to be computed, it is payable at the end of the term, are not in strict accordance with the definition of a rent usually given as a "periodical" payment, but there is, it seems no reason that rent may not be payable in a lump sum as well as in installments. At common law, in the case of a lease for a year, the whole rent would necessarily, unless it is otherwise provided, be payable at the end of the year, rent being regarded as issuing yearly out of the premises.

e. **Rent payable in advance.** Much more frequent than a provision that rent shall be paid on a day subsequent to the end of the period during which it is earned is one that it shall be paid on the first day of the period during which it is to be earned. In England this is termed a "forehand" rent, while in this country it is merely said, in such case, that the rent is payable "in advance." Such a stipulation is perfectly valid,¹⁷⁰ and a custom for rent to be paid in advance has in England been regarded as binding.¹⁷¹ Whether the instrument of lease contains a stip-

not start rent running before the tenancy was actually created.

¹⁶⁷ *Watson v. Penn*, 108 Ind. 21, 8 N. E. 636, 58 Am. Rep. 26; *Tignor v. Bradley*, 32 Ark. 781; *McFarlane v. Williams*, 107 Ill. 33; *Menough's Appeal*, 5 Watts & S. (Pa.) 432, 30 Am. Dec. 334; *Duryee v. Turner*, 20 Mo. App. 34.

¹⁶⁸ *Elmer v. Sand Creek Tp.*, 38 Ind. 56; *Indianapolis, D. & W. R. Co. v. First Nat. Bank*, 134 Ind. 127, 33 N. E. 679; *Tignor v. Bradley*, 32 Ark. 781. See ante, notes 143, 144.

¹⁶⁹ See *Indianapolis, D. & W. R. Co. v. First Nat. Bank*, 134 Ind. 127, 33 N. E. 679; *David Bradley & Co. v. Peabody Coal Co.*, 99 Ill. App. 427. ¹⁷⁰ See *London & Westminster Loan & Discount Co. v. London & N. W. R. Co.* [1893] 2 Q. B. 49; *Hopkins v. Helmore*, 8 Adol. & E. 463; *Giles v. Comstock*, 4 N. Y. (4 Comst.) 270; *Hilsendegen v. Scheich*, 55 Mich. 468, 21 N. W. 894.

¹⁷¹ *Buckley v. Taylor*, 2 Term R. 600; *Calhoun v. Atchison*, 67 Ky. (4 Bush) 261, 96 Am. Dec. 299.

ulation to this effect is a question of its construction, having reference to the circumstances under which it was made.¹⁷²

The fact that the first installment of rent is required to be paid on the first day of the term has been held not to show that the subsequent installments are to be paid in advance,¹⁷³ although it would seem to be an indication to that effect.¹⁷⁴ Where a lease provided that the rent should be paid "in advance, if required," the rent was due in advance, it was held, but no proceeding could be instituted for its collection till after demand.¹⁷⁵

¹⁷² A lease for a term to commence on October 20th, with rent payable "on the 20th day of each and every month," was held not to require payment in advance. *Castleman v. Du Val*, 89 Md. 657, 43 Atl. 821.

Where a lease for ten years provided for payment, for the first six years, of a certain amount monthly, in advance, and that the rent for the last four years should be determined by arbitration, it was held that the rent for the last four years, when so determined, was intended to be paid, like the other, monthly in advance. *Stose v. Heissler*, 120 Ill. 433, 11 N. E. 161, 60 Am. Rep. 563.

In *Deyo v. Bleakley*, 24 Barb. (N. Y.) 9, where the lease was "from the first day of April next" for the term of five years, at a yearly rent payable "in equal quarter-yearly payments on the first days of April, July, October and January in each year," it was held that in view of the privileges given the lessee by the lease and the evident anxiety of the lessor to secure the rent, it was payable in advance on each of the days named.

In *Ellis v. Rice*, 195 Pa. 42, 45 Atl. 655, where the lease provided that the rent paying period should not begin till November 1st, more

than a month after the date of the lease, and contained a clause "the lessee yielding and paying the yearly rent in monthly payments" of a certain amount, "commencing November 1st," it was held that the word "commencing" evidently referred to the payment and not to the term, and the rent was payable monthly in advance.

A provision for an annual rent, payable in monthly installments on the first day of each month during the term, was held not to require payment in advance. *Goldsmith v. Schroeder*, 93 App. Div. 206, 87 N. Y. Supp. 558. Compare *Sickels v. Shaw*, 37 Misc. 601, 76 N. Y. Supp. 319.

¹⁷³ *Liebe v. Nicolai*, 30 Or. 364, 48 Pac. 172; *Holland v. Palser*, 2 Starkie, 161. Compare *Stose v. Heissler*, 120 Ill. 433, 11 N. E. 161, 60 Am. Rep. 563.

¹⁷⁴ *Joslin v. Jefferson*, 14 U. C. C. P. 260. See *Finch v. Miller*, 5 C. B. 428, where it was held that a stipulation that a quarter's rent should be paid on taking possession, and that this should be allowed the lessee for the last quarter's rent, was in effect a stipulation for a "fore-hand" rent.

¹⁷⁵ *London & Westminster Loan & Discount Co. v. London & N. W.*

Oral evidence is not admissible to show that rent not stated to be payable in advance is so payable,¹⁷⁶ though it is, it seems, admissible for the purpose of aiding in the construction of the lease in this regard.¹⁷⁷

An agreement by the lessee, made after the lease, to pay rent in advance, if not supported by any consideration, is invalid.¹⁷⁸ And it would seem that the same is true of an agreement by the lessor to waive, as to future payments, a requirement in the lease of payment in advance.¹⁷⁹

f. **Option as to time of payment.** It has been decided that when rent was expressed to be payable "either quarterly or monthly," the landlord, and not the tenant, had the option to decide at what intervals it should be payable.¹⁸⁰ And such is the necessary construction of a provision for payment at certain intervals, or at briefer intervals, if demanded, or if required.¹⁸¹ But when the rent was payable on a day named or within a certain period thereafter, the alternative was regarded as for the benefit of the tenant.¹⁸²

g. **Acceleration of rent.** Occasionally the lease provides that the rent for the whole term shall immediately become payable on a certain contingency, as, for instance, upon the insolvency or bankruptcy of the tenant,¹⁸³ his assignment for the benefit of creditors,¹⁸⁴ the removal of his personal property from the premises,¹⁸⁵ or his failure to pay an installment of rent when due,¹⁸⁶

R. Co. [1893] 2 Q. B. 49. See Clarke v. Holford, 2 Car. & K. 540.

¹⁷⁶ Kistler v. McBride, 65 N. J. Law, 553, 48 Atl. 558; Castleman v. Du Val, 89 Md. 657, 43 Atl. 821.

¹⁷⁷ See Deyo v. Bleakley, 24 Barb. (N. Y.) 9; Ellis v. Rice, 195 Pa. 42, 45 Atl. 655.

¹⁷⁸ Hasbrouck v. Winkler, 48 N. J. Law, 431, 6 Atl. 22.

¹⁷⁹ In Wilgus v. Whitehead, 89 Pa. 131, it was held that an oral agreement that rent should no longer be paid in advance was valid. The court apparently regards the agreement as supported by a consideration because, at the time the agreement was made, the lessee could

have terminated the tenancy by notice.

¹⁸⁰ Pemberton v. Van Rensselaer, 1 Wend. (N. Y.) 307.

¹⁸¹ Mallam v. Arden, 10 Bing. 299; London & Westminster Loan & Discount Co. v. London & N. W. R. Co. [1893] 2 Q. B. 49; Stowman v. Landis, 5 Ind. 430. See Musewald v. Seeker, 51 Misc. 355, 101 N. Y. Supp. 287.

¹⁸² Chun's Case, 10 Coke, 126 b.

¹⁸³ Platt v. Johnson, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877.

¹⁸⁴ Soper v. Fane, 31 Can. Sup. Ct. 572.

¹⁸⁵ Goodwin v. Sharkey, 80 Pa.

and such a provision has been regarded as valid.¹⁸⁷ It might, however, in the particular jurisdiction, be regarded as invalid by reason of the provisions of the bankrupt or insolvent laws forbidding preferences.¹⁸⁸

Many jurisdictions have adopted the doctrine that, if one of the parties to an executory contract renounces it before the time for performance, or renders it impossible of performance, the other party may treat this as an "anticipatory breach" and may immediately sue therefor,¹⁸⁹ and the question has occasionally arisen whether this doctrine applies in the case of a covenant for rent, with which, before the time for payment, the lessee announces that he will not comply, or compliance with which he renders impossible. In one state this doctrine was applied in a case in which a receiver appointed for the lessees repudiated the lease, it being held that the lessor had immediately a claim for damages which he might assert against the assets in the hands of the receiver,¹⁹⁰ and a like view was taken where the lessee, a corporation, put it out of its power to pay rent in the future by instituting voluntary proceedings for a dissolution, the claim for damages being there regarded as provable, under the local

149; *McAnniny v. Miller*, 19 Pa. Super. Ct. 406. *Smith*, 29 U. C. C. P. 109; *Lazier v. Henderson*, 29 Ont. 673; *In re Hoskins*, 1 Ont. App. 379. As to the questionable validity of a provision making all the rent due upon the bankruptcy of the tenant, see cases cited post, note 1309.

¹⁸⁶ *Hart v. Wynne* (Tex. Civ. App.) 40 S. W. 848; *Teufel v. Rowan*, 179 Pa. 408, 36 Atl. 224.

¹⁸⁷ In *Mitchell v. McCauley*, 20 Ont. App. 272, it is held that a stipulation that the rent for the current

year shall be immediately due if execution issues against the lessee's goods is not severable, and so the benefit thereof does not pass to the grantee of the leasehold in part. The theory of the decision is that, the stipulation involving a contingency, it is a condition and so not apportionable. It is difficult to see how the mere introduction of words of contingency, such as "if," into a covenant, can make it a condition.

¹⁸⁹ *Hammon*, *Contracts*, 895, 897; *Wald's Pollock, Contracts* (Williston's Ed.) 355 et seq.

¹⁹⁰ *Minneapolis Baseball Co. v. City Bank*, 74 Minn. 98, 76 N. W. 1024, distinguishing *Wilder v. Peabody*, 37 Minn. 248, 33 N. W. 852, where it was decided that a claim for rent accruing subsequently to an assignment for creditors by the lessees, a firm of individuals, was not provable against the assigned estate, since it was contingent, and since the partners remained individually

¹⁸⁸ See *Tew v. Toronto Sav. & Loan Co.*, 30 Ont. 76; *Young v. liable*.

statute, against the corporate assets.¹⁹¹ Likewise, the lessee was subjected to liability in damages when he made an assignment for creditors and the assignee abandoned possession, the lessor having improved the premises on the strength of the lessee's contract to take the lease which was subsequently made.¹⁹² In two states, on the other hand, it has been decided that the fact that the tenant abandons the premises and notifies the landlord that he will not abide by the terms of the lease does not enable the latter to maintain an action for rent prior to the time originally named for its payment,¹⁹³ and the same view has been adopted in Canada.¹⁹⁴

h Time of day for payment. The tenant may make a valid payment of rent at any time of the day on which, by the lease, expressly or inferentially, the rent is payable,¹⁹⁵ but he is not bound to pay it till midnight of that day, and he is not in default till the beginning of the next day.¹⁹⁶ That the landlord makes a demand for the rent at sunset, in order to establish his right to re-enter for breach of the covenant to pay rent, as hereafter explained,¹⁹⁷ does not affect the tenant's right to defer payment of the rent till midnight.¹⁹⁸

The doctrine, above indicated, that rent, though it may be paid at any time on the day named for payment, is not actually due till midnight following that day, is applied, as elsewhere stated,¹⁹⁹ under particular circumstances, to determine the person entitled in case the reversioner dies upon the rent day. It

¹⁹¹ *Kalkhoff v. Nelson*, 60 Minn. 284, 62 N. W. 332.

¹⁹² *In re Reading Iron Works*, 150 Pa. 369, 24 Atl. 617. Apparently the decision would have been the same without reference to the previous contract.

¹⁹³ *Nicholes v. Swift*, 118 Ga. 922, 45 S. E. 708; *Miller v. Benton*, 55 Conn. 529, 13 Atl. 678, 3 Am. St. Rep. 70.

¹⁹⁴ *Connolly v. Coon*, 23 Ont. App. 37.

¹⁹⁵ *Clun's Case*, 10 Coke, 127 b; *Dibble v. Bowater*, 2 El. & Bl. 564; *Comyn, Landl. & Ten.* 219.

¹⁹⁶ *Duppa v. Mayo*, 1 Wms. Saund. 287, and note (17); *Cutting v. Derby*, 2 W. Bl. 1077; *Leftley v. Mills*, 4 Term R. 170; *Dibble v. Bowater*, 2 El. & Bl. 564; *Sherlock v. Thayer*, 4 Mich. 355, 66 Am. Dec. 539; *Dalton v. Laudahn*, 27 Mich. 529; *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137; *Sweet v. Harding*, 19 Vt. 587 (semble).

¹⁹⁷ See post, § 194 f (1).

¹⁹⁸ See *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217.

¹⁹⁹ See post, § 180 b (6).

has also been applied to relieve the tenant from liability, when the tenancy was terminated by the act of the landlord in the course of the rent day,^{199a} and an eviction under a paramount title occurring on that day has been held to relieve the tenant.^{199b}

i. **Crop rent.** The rule that rent is to be paid at the end of the term, or at the end of each of the periods by which it is to be calculated, has in some cases been applied when the rent was payable not in money, but in crops, with the result of postponing the time for payment till the end of the year, without reference to the time at which the crops may have matured.²⁰⁰ By other decisions the share of the landlord in the crops, representing the rent due him, must be delivered to him within a reasonable time after the maturity of the crop,²⁰¹ and this may, it seems, require a division of parts of the crop as they are gathered, without waiting for the gathering of the whole crop.²⁰²

j. **Rent falling due on holiday.** If the day on which an installment of rent falls due under the lease happens to be Sunday, the tenant has the whole of the next day in which to pay it,²⁰³ while if the rent day is some other legal holiday, he is bound

^{199a} *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137. See ante, note 162.

^{199b} *Smith v. Shepard*, 32 Mass. (15 Pick.) 147, 25 Am. Dec. 432.

²⁰⁰ *Dixon v. Nicolls*, 39 Ill. 372, 89 Am. Dec. 312; *Boyd v. McCombs*, 4 Pa. 146; *King v. Bosserman*, 13 Pa. Super. Ct. 480; *Ostner v. Lynn*, 57 Mo. App. 187; *Nowery v. Connolly*, 29 U. C. Q. B. 39.

²⁰¹ *Harrison v. Clifton*, 75 Iowa, 736, 38 N. W. 406; *Toler v. Seabrook*, 39 Ga. 14; *Caruthers v. Williams*, 58 Mo. App. 100; *Holt v. Licette*, 111 Ga. 810, 35 S. E. 703 (lease providing that rent to be paid "out of" crop); *Mouser v. Davis*, 11 Wkly. Law Bul. (Ohio) 249, and post, § 253 e (2). Presumably, this is the equivalent of statements that the crop rent is payable when the

crop is harvested or gathered. *Lamberton v. Stouffer*, 55 Pa. 284; *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135; *Brown v. Adams*, 35 Tex. 447.

²⁰² *Smith v. Tindall*, 107 N. C. 88, 12 S. E. 121. See post, § 253 e (2).

Under a provision that the rent shall be due "when the crop matures, or any portion of it shall be fit for market," it was held that the rent was due when the oats were in stack, the corn was ripe, and the tenant had gathered a part of it and was feeding it, and that the crop need not be ready for market, since otherwise the tenant could indefinitely postpone the time for payment. *Hull v. Stogdell*, 67 Iowa, 251, 25 N. W. 156.

²⁰³ *Warne v. Wagenor* (N. J. Eq.) 15 Atl. 307; *Byers v. Rothschild*, 11 Wash. 296, 39 Pac. 688; *Boehm v.*

to pay it on that day, in the absence of some controlling statutory provision.²⁰⁴ That the rent day falls on a Sunday does not, however, it has been decided, make the next day the day on which it is to be regarded as falling due, for purposes other than the enforcement of the tenant's liability for its payment.²⁰⁵

§ 173. Amount of the rent.

a. **Must be certain or capable of ascertainment.** The amount of rent payable for each portion of the term must be certain or capable of reduction to a certainty.²⁰⁶ In the absence of such certainty, no claim for rent, properly so called, can be asserted, though the landlord can usually, in such case, provided the lease is not under seal, recover the value of the use and occupation.

The amount need not be ascertainable at the time of the lease, provided it can be ascertained before the time for payment.²⁰⁷ As an ordinary instance of rent, the amount of which is ascertainable at the time for payment, though not at the time of the demise, may be mentioned a lease of land for agricultural purposes, the amount to be a certain proportion of the crop.²⁰⁸ So the rent of a brickyard may be dependent upon the amount of bricks made.²⁰⁹ And on a demise of land for mining pur-

Rich, 13 Daly (N. Y.) 62; Walton v. Stafford, 162 N. Y. 558, 57 N. E. 92, 76 Am. St. Rep. 349.

²⁰⁴ Walton v. Stafford, 162 N. Y. 558, 57 N. E. 92, 76 Am. St. Rep. 349.

²⁰⁵ Craig v. Butler, 83 Hun, 286, 31 N. Y. Supp. 963.

²⁰⁶ Co. Litt. 142 a; Gilbert, Rents, 9.

As to ascertainment of amount in case of holding over by consent, see post, § 210 c.

²⁰⁷ Co. Litt. 96 a; Selby v. Greaves. L. R. 3 C. P. 594; Walsh v. Lonsdale, 21 Ch. Div. 9; McFarlane v. Williams, 107 Ill. 33; Dutcher v. Culver, 24 Minn. 584.

²⁰⁸ See post, § 253.

When the reservation was of a bale of cotton of a certain number

of pounds for each twenty acres of land, it was held that distress would lie, the value of the cotton being ascertainable. Brooks v. Cunningham, 49 Miss. 108, distinguishing Briscoe v. McElween, 43 Miss. 556, where the reservation was of services of an undefined extent.

²⁰⁹ Daniel v. Gracie, 6 Q. B. 145; Reg. v. Westbrook, 10 Q. B. 78.

When the lease pledged the net profits of the premises for the rent, and declared that the lessee entered into no other stipulation in regard to rent, it was held that the lessee was not liable for any rent in the absence of net earnings. Lynch v. Onondaga Salt Co., 64 Barb. (N. Y.) 558.

poses, the compensation of the owner of the land is usually measurable by a royalty on the minerals extracted,²¹⁰ and on a demise for lumber purposes the rent may be determined by the amount of lumber cut.²¹¹ It has been decided that the amount of rent for each year, if not to exceed a sum named, may be made determinable by the lessor alone.²¹²

b. **May be fluctuating.** As appears from the above illustrations, the rent is sufficiently certain, although it fluctuates or varies from period to period.²¹³ So rent may, by the terms of the lease, be made to vary with the price of wheat,²¹⁴ with the income which the tenant may derive from the use of the premises,²¹⁵ with the amount of the products which he may obtain by a particular use thereof,²¹⁶ or with the various uses which he may make thereof.²¹⁷ And on a lease of a mill the rent may be made

²¹⁰ See *Daniel v. Gracie*, 6 Q. B. 145; *Edwards v. Rees*, 7 Car. & P. 340; *Higgins v. California Petroleum & Asphalt Co.*, 109 Cal. 304, 41 Pac. 1087; *Williams v. Summers*, 45 Ind. 532, 15 Am. Rep. 270; *Watson Coal & Min. Co. v. Casteel*, 73 Ind. 296; *Waters v. Griffith*, 2 Md. 326; *Reed v. Beck*, 66 Iowa, 21, 23 N. W. 159; *Lennox v. Vandalia Coal Co.*, 66 Mo. App. 560; *McIntyre v. McIntyre Coal Co.*, 105 N. Y. 264, 11 N. E. 645; *Genet v. Delaware & H. Canal Co.*, 58 Hun, 492, 12 N. Y. Supp. 572.

²¹¹ See *Baird v. Milford Land & Lumber Co.*, 89 Cal. 552, 26 Pac. 1084, 27 Pac. 296; *Stevens v. Haskell*, 70 Me. 202.

²¹² *Ocean Grove Camp Meeting Ass'n v. Sanders*, 67 N. J. Law, 1, 50 Atl. 449.

²¹³ See *Ex parte Voisey*, 21 Ch. Div. 442, per Jessel, M. R.

²¹⁴ *Kendall v. Baker*, 11 C. B. 842.

²¹⁵ So in *Rayburn v. Mason Lumber Co.*, 57 Mich. 273, 23 N. W. 811, the rent was to be half "of all tolls and money that may be earned by the uses of said dam for driving

logs or other purposes." This was held to include not only tolls but other earnings from log driving which could be traced to the dam. In *Hardy v. Briggs*, 96 Mass. (14 Allen) 473, rent was to be adjusted with reference to "income" to the lessee from furnishing power from the leased premises to adjoining buildings, and it was held that, in view of the circumstances, gross and not net income was evidently intended. In *Long v. Fitzimmons*, 1 Watts & S. (Pa.) 530, on a demise of a mill, a certain portion of the tolls was reserved as rent, and the lessee was held liable for such a proportion of the tolls as he would have received had he done the milling properly and received the full amount from his customers.

²¹⁶ As in the ordinary case of a rent consisting of a certain portion of the crops. Post, § 253. So the rent may consist of a certain portion of the products of a manufacturing plant on the premises. *Howland v. Forlaw*, 108 N. C. 567, 13 S. E. 173.

²¹⁷ See post, § 173 e.

to vary with the number of looms run.²¹⁸ Likewise, it may be stipulated by the lease that the rent shall be reduced in a certain contingency,²¹⁹ or that it shall be increased to a certain amount in case the lessor makes certain improvements.²²⁰

c. **Construction of reservation as to amount.** Occasionally the language of the lease, as regards the amount of the rent, is obscure, and calls for construction with reference to the surrounding circumstances, to determine the intention of the parties. This is particularly apt to be the case when the amount payable from time to time is to be determined by reference to extrinsic facts.²²¹ Or the lease may be obscure as regards the

²¹⁸ *Walsh v. Lonsdale*, 21 Ch. Div. 9. "of 10% yearly on their cost," and it was held that such additional

²¹⁹ *Lacy Bros. & Kimball v. Morton*, 76 Ark. 603, 89 S. W. 842. rent was not due until notice was given to the lessee of the cost of

In *Copeland v. Goldsmith*, 100 Wis. 436, 76 N. W. 358, a provision for the reduction, "for the term of the lease," of the rent of the offices leased, in case the rent of other offices was reduced, was held to apply only to rent accruing after the reduction of the rent of other offices, and not to entitle the lessee to recover from the lessor the amount of the reduction on account of rent previously paid by him. the additional buildings, such cost being exclusively within the lessor's knowledge.

As to an agreement for increase of rent in case of drainage of agricultural lands being done by the lessor, see *Ex parte Voisey*, 21 Ch. Div. 442, 456, where Jessel, M. R., says: "It very often happens that when the landlord does the drainage he puts in a stipulation that he shall receive a certain percentage on what he lays out, and he may be entitled to drain even without the consent of the tenant, and to cause the tenant to pay an increased rent."

In *McGill v. Proudfoot*, 4 U. C. Q. B. 33, it was held that a "covenant" as to the reduction of rent in case of fire was binding on a transferee of the reversion, assigns being named. It seems questionable, however, whether the fact that the reservation of rent names a less amount as to be paid upon a certain contingency can properly be regarded as a "covenant" by the lessor to reduce the amount.

²²¹ Where the lease provided for the ascertainment of the rent by reference to the number of acres in the tract leased "to be hereafter measured to ascertain amount of the same," noncultivable land between high and low-water mark was regarded as intended to be included, but not land previously condemned for a railroad right of way. *Williams v. Glover*, 66 Ala. 189.

²²⁰ *Weed v. Crocker*, 79 Mass. (13 Gray) 219. There the lease provided that the lessor should erect certain buildings for which the lessee agreed to pay an additional rent years, of water power at a certain

exact date at which rent is to begin.²²² A plain inconsistency or repugnancy in the statement of the amount of rent is to be corrected, as is any other inconsistency in any instrument.²²³

rate, provided that this rate should be kept on the premises. *Beadle v. Monroe*, 68 Hun, 323, 22 N. Y. Supp. 981.

"was asked of other persons renting" it was held that, if at the end of the seven years there were no "other persons renting," the rent should, in view of the extensive improvements made by the lessee, looking to a quasi permanent occupation, remain as before. *Lamb v. Constantine Hydraulic Co.*, 59 Mich. 597, 26 N. W. 785.

Where the rent was to be a certain per cent of the cost of a building to be erected by the lessor, it was held that payments for extra night work could not be considered in determining the cost. *Bradley v. Metropolitan Music Co.*, 89 Minn. 516, 95 N. W. 458.

A provision for a reduction of rent "for the term of one year only" in case the lessee failed to obtain a liquor license was construed as applying whether the failure was to obtain the license for the first or the second year. *Rea v. Ganter*, 152 Pa. 512, 25 Atl. 539.

Where one agreed to pay a specified sum for the occupancy of a store till another store was completed, he was held to be liable for that sum and no more, without reference to delays in the completion of the other store. *D'Arcy v. Martyn*, 63 Mich. 602, 30 N. W. 194.

An agreement to pay ten dollars for every boat kept on the premises and used for fishing was held to impose such liability irrespective of whether the boats belonged to the lessee or he merely allowed them to

be kept on the premises. *Beadle v. Monroe*, 68 Hun, 323, 22 N. Y. Supp. 981.

²²² Where a lease provided that it should begin thirty days after the completion of a building on the premises, and the lessee was to take possession thirty days after such completion, it was held that the rent did not begin to run till thirty days after completion, although he took possession immediately on completion, he doing this by direction of the lessor. *Patterson v. Glass Co.*, 63 Mo. App. 173. On the other hand, a provision that the rent should not begin till certain alterations were made was held to be waived by the tenant's taking of possession upon the landlord's statement that the alterations were finished and that rent would then begin to run. *O'Brien v. Jaffe*, 88 N. Y. Supp. 1009.

When it was provided that the rent should commence when the premises were "ready for occupancy," the building in which they were located being, as recited in the lease, in course of construction, it was held that "ready for occupancy" meant ready for entry by the lessee in order to fit them for his business, and did not mean fitted with fixtures necessary for the particular business. *Gerry v. Siebrecht*, 88 N. Y. Supp. 1034.

That the term named in the lease was to be computed from a date prior to the lease was held not to show, of itself, that the rent was to be calculated from that time. *Com. v. Contner*, 21 Pa. 266.

Questions as to the construction of particular provisions for the payment of rent in a share of the crops are elsewhere considered.²²⁴

d. **Determination by appraisalment.** Leases in this country quite frequently provide for a readjustment of the rent at certain intervals during the term, this usually taking the form of a stipulation for an appraisalment of the value of the premises, the rent to be a certain percentage of such value.

If an appraisalment is made by appraisers appointed as provided by the lease, and there is no violation of such provisions, and no fraud nor mistake other than a mere error of judgment, the appraisalment is conclusive on the parties, although the appraisers adopt an improper method of arriving at their conclusions.²²⁵

When the lease called for an appraisalment to be made on a certain day or as soon thereafter "as practicable," it was decided that an appraisalment was not "practicable" at a time when the lessor's interest had been sold on foreclosure, and the time of redemption had not expired, it appearing that such interest would probably be absolutely vested in some person within a month.²²⁶ One's right to call for an appraisalment is not, it has been held, lost by a failure to call for it promptly.²²⁷

The appraisers are ordinarily, by the terms of the lease, to be appointed by the parties thereto, but the covenant for appraisalment apparently runs with the land, and the parties who are to name the appraisers are those who are at the same time the holders of the reversion and leasehold respectively.²²⁸ Conse-

²²³ When the lease reserved in terms a rent of \$2,700 annually, a covenant to pay \$625 quarterly was regarded as being written by mistake for \$675. *Smith v. Blake*, 88 Me. 241, 33 Atl. 992. And in a lease for five years in which the lessees agreed "to pay \$4.50 per acre, the first payment to be due" on a date named, the word "yearly" being evidently omitted, the yearly rent was held to be \$4.50 per acre, and not 90 cents. *Dodd v. Mitchell*, 77 Ind. 388.

²²⁴ See post, § 253.

²²⁵ *Goddard v. King*, 40 Minn. 164, 41 N. W. 659; *Board of Education v. Frank*, 64 Ill. App. 367; *Stose v. Heissler*, 120 Ill. 433, 11 N. E. 161, 60 Am. Rep. 563. See, also, the cases bearing upon the fixing of rent for the purposes of a renewal lease by means of appraisalment, post, § 228.

²²⁶ *Spann v. Eagle Mach. Works*, 87 Ind. 474.

²²⁷ *Wright v. Hardy*, 76 Miss. 524, 24 So. 697.

²²⁸ *Worthington v. Hewes*, 19 Ohio

quently, the original lessee may be liable, by reason of his covenant to pay rent, for rent the amount of which is fixed by an appraisement in which he had no part,²²⁹ as may an assignee of the leasehold who expressly assumes liability for the rent and thereafter reassigns.²³⁰

The refusal of one of the parties to unite in appointing appraisers was considered to be a "disagreement" within a provision that the judges of a certain court should appoint the appraisers in case of disagreement of the parties.²³¹ It has been held that when the lease provides that each party is to select an appraiser, and that the two appraisers thus selected shall select a third, an award made by appraisers, one of whom is the business adviser of the party selecting him, is invalid.²³² But the amount of rent may, it seems, be fixed by parties interested, if this is in accordance with a stipulation in the lease, and the limits within which the rent must range are named.²³³

There is authority to the effect that the parties are not entitled to notice of the meeting of the appraisers, as in the case of an arbitration,²³⁴ while on the other hand it was decided in one case that each party was entitled to a hearing before the making of the appraisement, provided this was reasonably practicable.²³⁵ All the appraisers must unite in the appraisement, and an appraisement made by a majority only is insufficient.²³⁶

If the appraisers fail to agree, it is said, the lessor is not bound to seek other appraisers, but may recover reasonable rent.²³⁷

St. 66; *Young v. Wrightson*, 11 Ohio Dec. 104.

²²⁹ See *Worthington v. Hewes*, 19 Ohio St. 66, where, however, it was held that the covenant to pay rent was not to be construed as binding the lessee for rent after he had assigned, the lease being for ninety-nine years, renewable forever. See post, note 653.

²³⁰ See *Wilson v. Lunt*, 17 Colo. App. 48, 67 Pac. 627.

²³¹ *Worthington v. Hewes*, 19 Ohio St. 66.

²³² *Pool v. Hennessy*, 39 Iowa, 192, 18 Am. Rep. 44.

²³³ See *Ocean Grove Camp Meet-*

ing Ass'n v. Sanders, 67 N. J. Law, 1, 50 Atl. 449, where the stipulation was that the rent, termed an "assessment," should be fixed each year by resolution of the lessor association.

²³⁴ *Stose v. Heissler*, 120 Ill. 433, 11 N. E. 161, 60 Am. Rep. 563; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173.

²³⁵ *Worthington v. Hewes*, 19 Ohio St. 66.

²³⁶ *Stose v. Heissler*, 120 Ill. 433, 11 N. E. 161, 60 Am. Rep. 563; *Lowe v. Brown*, 22 Ohio St. 463.

²³⁷ *Stose v. Heissler*, 120 Ill. 433, 11 N. E. 161, 60 Am. Rep. 563.

If one party refuses to select an appraiser, as required by the lease, the other party may proceed in equity for appraisement, in which case the appraisement may be referred to a master.²³⁸ An action for use and occupation will not, however, lie, if the tenant offers to join in appointing appraisers as required by the lease,²³⁹ nor can the lessor, in such case, have the rent fixed by a court of equity.²⁴⁰

Where one of the parties was an infant at the time at which a new appraisement was called for by the lease, and hence could not appoint appraisers, the previous rent continued, it was held, till it was readjusted by a suit in equity.²⁴¹

A provision for the appraisement of the "real estate" for the purpose of determining the rent has been held, in view of the language of the whole lease, not to call for the inclusion of improvements erected by the lessee under an agreement that they should belong to the lessors at the end of the term.²⁴² And so a provision for the appraisement of the "ground" does not include the improvements.²⁴³ In determining the value of the premises for this purpose, their value as if they were owned in fee and were not subject to any lease is to be taken.²⁴⁴ Accretions to the land formed by the recession of a river constituting one of its boundaries should be, it has been held, considered in making the appraisement.²⁴⁵ The value or lack of value of the premises to the lessee for the residue of the term cannot be considered on the question of their value for the purpose of appraisement.²⁴⁶

²³⁸ *Lowe v. Brown*, 22 Ohio St. 463; *Springer v. Borden*, 154 Ill. 668, 39 N. E. 603; *Id.*, 210 Ill. 518, 71 N. E. 345; *Tobey Furniture Co. v. Rowe*, 18 Ill. App. 293; *Kelso v. Kelly*, 1 Daly (N. Y.) 419.

²³⁹ *Sherman v. Cobb*, 16 R. I. 82, 12 Atl. 232. In a previous decision in the same case, it was adjudged that, though the lease requires the assent of all the appraisers and a subsequent agreement requires the assent of two only, a submission to the appraisers named in the agreement is under the agreement and may be revoked prior to the award. See *Sherman v. Cobb*, 15 R. I. 570, 10 Atl. 591.

²⁴⁰ *Biddle v. McDonough*, 15 Mo. App. 532.

²⁴¹ *Holmes v. Shepard*, 49 Mo. 600.

²⁴² *Texas & P. R. Co. v. Society for Relief of Orphan Boys*, 56 Fed. 753.

²⁴³ *Lowe v. Brown*, 22 Ohio St. 463.

²⁴⁴ *Springer v. Borden*, 210 Ill. 518, 71 N. E. 345; *Columbia Theatre Amusement Co. v. Adsit*, 211 Ill. 122, 71 N. E. 868. See *Philadelphia Library Co. v. Beaumont*, 39 Pa. 43.

²⁴⁵ *Allen v. St. Louis, I. M. & S. R. Co.*, 137 Mo. 205, 38 S. W. 957.

²⁴⁶ *Springer v. Borden*, 210 Ill. 518, 71 N. E. 345.

e. **Additional or penal rent.** In England a lease, especially one of agricultural land, quite frequently, in connection with a provision that the tenant shall refrain from certain acts, such as ploughing up pasture,²⁴⁷ converting land into tillage,²⁴⁸ removing produce from the premises,²⁴⁹ sowing a particular crop,²⁵⁰ or doing so an excessive number of years in succession,²⁵¹ or taking hay without manuring,²⁵² contains a stipulation that, in case of the breach of such a provision, the lessee shall pay an increased rent. Such a stipulation may provide for an increase of rent proportioned to the extent of the breach, as when it is agreed that, if the lessee ploughs pasture land, he shall pay an increased rent proportioned to the amount ploughed,²⁵³ or it may provide for an additional rent without reference to the extent of the breach, as when the lessee covenants to reside on the land,²⁵⁴ or not to carry on a certain trade.²⁵⁵

Though such an increased rent, in case of a certain course of action on the part of the lessee, is frequently referred to as a "penal rent," the stipulation therefor is ordinarily regarded not as a provision for a penalty,²⁵⁶ nor even as one for liquidated damages,²⁵⁷ but as merely a provision for a possible variation in the amount of the rent. Sometimes there is an agreement, not for an increased rent, but for the payment of a specified lump sum upon the breach by the lessee of his covenant, and this has

²⁴⁷ Skipworth v. Green, 8 Mod. 311; Aldridge v. Howard, 4 Man. & G. 921. ²⁵⁴ Ponsonby v. Adams, 2 Brown Parl. Cas. 431.

²⁴⁸ Roulston v. Clarke, 2 H. Bl. 563; Farrant v. Olmius, 3 Barn. & Ald. 692; Denton v. Richmond, 1 (N. Y.) 58. ²⁵⁵ Weston v. Metropolitan Asylum Dist., 8 Q. B. Div. 387, 9 Q. B. Div. 404; People v. Bennett, 14 Hun (N. Y.) 58.

Crompt. & M. 734. ²⁵⁶ Gerrard v. O'Reilly, 3 Dru. & War. 414; Jones v. Green, 3 Younge & J. 298; Manice v. Brady, 15 Abb. Pr. (N. Y.) 173.

²⁴⁹ Legh v. Lillie, 6 Hurl. & N. 165; Pollitt v. Forrest, 11 Q. B. 949. ²⁵⁷ Jones v. Green, 3 Younge & J. Pr. (N. Y.) 173.

²⁵⁰ Jones v. Green, 3 Younge & J. Pr. (N. Y.) 173. ²⁵¹ Manice v. Brady, 15 Abb. Pr. (N. Y.) 173; Roulston v. Clarke, 2 H. Bl. 563; Pollitt v. Forrest, 11 Q. B. 949.

²⁵² Bowers v. Nixon, 12 Q. B. 558. ²⁵³ Skipworth v. Green, 8 Mod. 311; Aldridge v. Howard, 4 Man. & G. 921; Birch v. Stephenson, 3 Taunt. 469; Doe d. Darke v. Bowditch, 8 Q. B. 973. Consequently it is error to give the lessor, when suing on such a covenant, merely the amount of damages sustained. Farrant v. Olmius, 3 Barn. & Ald. 692.

been regarded as a provision for liquidated damages.²⁵⁸ A stipulation in the lease for an increased rent or for the payment of a lump sum may, however, be construed as undertaking to impose a penalty. The fact that it is so expressly termed by the parties is a strong though not a conclusive reason for such a construction,²⁵⁹ and the fact that the increase in rent or the lump sum named is out of proportion to the actual damage resulting from the action of the tenant is also a decided indication that such is its character.²⁶⁰ And so the fact that a single sum is named to secure the performance of various stipulations, the damages for the breach of which are necessarily different, tends to show that the provision is one for a penalty.²⁶¹ It has been decided that a provision of the lease in terms imposing "a penalty" of a certain sum, to be paid "in the nature of rent," in addition to the rent named, on a breach of a merely personal covenant not to engage in a certain business on the premises, was a provision for a penalty and not for an increased rent.²⁶²

If the lessee covenants not to do the act in question, "and if he does so" to pay the additional rent, he is entitled to do such act on paying the additional rent,²⁶³ and a like decision has been made when he covenanted not to do the act "under" the increased rent.²⁶⁴ But if he covenants expressly not to do the act, he has no right to do it even though he does pay the stipulated additional rent,²⁶⁵ and even though there is a clause giving the lessor the right to re-enter for a breach.²⁶⁶ And so if he ex-

²⁵⁸ *In re Mexborough*, 47 Law T. Jack v. Sinsheimer, 125 Cal. 563, 58 (N. S.) 516; *Elphinstone v. Monk-Pac.* 130. Compare *Dermott v. Wal-*
land Iron & Coal Co., 11 App. Cas. lach, 68 U. S. (1 Wall.) 61, post,
332. note 268.

²⁵⁹ *Wilson v. Love* [1896] 1 Q. B. 626; *Pollitt v. Forrest*, 11 Q. B. 962. ²⁶³ *Woodward v. Gyles*, 2 Vern. 119; *Attersol v. Stevens*, 1 Taunt. 183.

²⁶⁰ See *Manice v. Brady*, 15 Abb. Pr. (N. Y.) 173; *Elphinstone v. Munkland Iron & Coal Co.*, 11 App. 165. See *Doe d. Antrobus v. Jepson*, 3 Barn. & Adol. 402.

²⁶¹ *Willson v. Love* [1896] 1 Q. B. 626. ²⁶⁴ *City of London v. Pugh*, 4 Brown Parl. Cas. 395; *French v.*

²⁶² *Latimer v. Groetzinger*, 139 Pa. Macale, 2 Dru. & War. 269.

207, 21 Atl. 22. For the case of a ²⁶⁶ *Weston v. Metropolitan Asy-*
penalty imposed by the lease for va- lum Dist., 8 Q. B. Div. 387, 9 Q. B.
cation of the premises by the lessee, Div. 404.

invalid under the local statute, see

pressly covenants to do an act, with a stipulation that the rent shall be reduced if he does do it, he has no right not to do it though he pays the rent in full.²⁶⁷ If there is a right of re-entry on breach of the covenant, the lessor has the option either to re-enter or to demand payment of the increased rent.²⁶⁸

Where the lease authorized the lessor to terminate the tenancy by notice, and provided that, in such event, the lessee "or his assigns" might, on giving notice to the lessor, continue to hold at an increased rent, which increased rent the lessee covenanted to pay, the lessee was held to be liable for the increased rent, though the notice of intention to hold at such rent was given, not by him but by his assign.²⁶⁹

f. **Change of amount by subsequent agreement**—(1) **Reduction of rent.** The amount of the rent may, according to decisions in this country, be reduced by an agreement between the landlord and tenant made subsequently to the demise.²⁷⁰ Such an agreement must be supported by a sufficient consideration,²⁷¹ and there are quite a number of cases in which the sufficiency of the consideration has been a subject of discussion.

²⁶⁷ *Hanbury v. Cundy*, 58 Law T. (N. S.) 155.

²⁶⁸ *Weston v. Metropolitan Asylum Dist.*, 9 Q. B. Div. 405; *Doe d. Antrobus v. Jepson*, 3 Barn. & Adol. 402.

A provision that if the tenant should assign or underlet, or should remove his goods and chattels from the premises, then, at the option of the landlord, the term should cease and a re-entry on the premises be had, and moreover, in either of said cases, one whole year's rent, namely, \$3,000, over and above the rents that had already accrued, should be paid and should immediately become due, was construed not to call for \$3,000 rent in addition to the forfeiture in case of a breach of the covenant, since the provision so construed would have been invalid as calling for a penalty and not for an increased rent, but it was held to

give to the landlord the alternative of re-entry or of demanding that the next year's rent of \$3,000 be paid in advance. *Dermott v. Wallach*, 68 U. S. (1 Wall.) 61.

²⁶⁹ *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64.

²⁷⁰ That an agreement to reduce the rent was made under a mistake of law as to the right of redemption does not furnish grounds for relief in equity. *Norris v. Crowe*, 206 Pa. 438, 55 Atl. 1125, 98 Am. St. Rep. 733.

²⁷¹ *Wharton v. Anderson*, 28 Minn. 301, 9 N. W. 860; *Hoopes v. Meyer*, 1 Nev. 433; *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; *Id.*, 152 Ill. 594, 38 N. E. 1025; *Wheeler v. Baker*, 59 Iowa, 86, 12 N. W. 767; *Bowditch v. Chickering*, 139 Mass. 283, 30 N. E. 92; *Haseltine v. Ausherman*, 87 Mo. 410; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep.

A contract to reduce rent has been held to be valid in this respect when made in consideration of the tenant's furnishing further security for the rent.²⁷² Likewise, a contract to accept a certain proportion of the corn raised on the premises, instead of a certain number of bushels, as first agreed,²⁷³ and one to take a less annual sum, this, however, to be paid for the lessor's life instead of for the term of years named in the lease,²⁷⁴ are both supported by a sufficient consideration. A mere promise by the lessee not to "give up" the lease, provided the rent is reduced, is not, it seems, a sufficient consideration to support a promise to reduce the rent, since the tenant has no right to give up the lease. In one case, however, this seems to have been regarded as a sufficient consideration.²⁷⁵ There is, it would seem, on principle, a distinction between the case in which the tenant agrees to remain in actual occupancy of the property, and that in which he agrees merely not to give up the lease, since he is not under any obligation to do the former, and his remaining on and utilization of the premises may be a distinct advantage to the landlord, and that such an agreement will furnish a consideration for an agreement to reduce the rent has been more or less clearly recognized in several cases.²⁷⁶ An agreement on the part of the lessee to procure additional capital, provided the rent is reduced, has been regarded as a sufficient consideration

120. In *Jaffray v. Greenbaum*, 64 Iowa, 492, 20 N. W. 775, 52 Am. Rep. 449, it was held that the fact that the lessor anticipated that the lessee might fail if no reduction in rent was made constituted a consideration for the reduction. It is, however, difficult to see how a mere motive in making the reduction can constitute a consideration. In *Ossowski v. Wiesner*, 101 Wis. 238, 77 N. W. 184, such an agreement seems to be regarded as valid though no consideration is mentioned.

²⁷² *Lamb v. Rathburn*, 118 Mich. 666, 77 N. W. 268.

²⁷³ *Raymond v. Krauskopf*, 87 Iowa, 602, 54 N. W. 432.

²⁷⁴ *Holmquist v. Bavarian Star Brew. Co.*, 1 App. Div. 347, 72 N. Y. St. Rep. 443, 37 N. Y. Supp. 380.

²⁷⁵ See *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*, 9 Colo. App. 299, 48 Pac. 671. The authorities cited in this case do not support such a view.

²⁷⁶ *Doherty v. Doe*, 18 Colo. 456, 33 Pac. 165; *Raymond v. Krauskopf*, 87 Iowa, 602, 54 N. W. 432; *Ten Eyck v. Sleeper*, 65 Minn. 413, 67 N. W. 1026; *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; *Cooper v. Fretnoransky*, 42 N. Y. St. Rep. 472, 16 N. Y. Supp. 866. But see *Seymour v. Hughes*, 55 Misc. 248, 105 N. Y. Supp. 249, apparently to the contrary.

²⁷² *Lamb v. Rathburn*, 118 Mich. 666, 77 N. W. 268.

²⁷³ *Raymond v. Krauskopf*, 87 Iowa, 602, 54 N. W. 432.

²⁷⁴ *Holmquist v. Bavarian Star*

for the reduction, the additional capital being procured as agreed.²⁷⁷ The relinquishment of a right of action against the lessor will also support an agreement to reduce the rent,²⁷⁸ as will the making by the lessee of alterations on the premises not called for by the lease.²⁷⁹

The fact that the landlord has, after making an agreement to reduce the rent, accepted the reduced rent on a number of rent days, does not dispense with the necessity of a consideration to support the agreement, so far as concerns subsequent rent,²⁸⁰ though such acceptance of reduced rent will, it has been decided, prevent a recovery of the proper rent for the period for which the reduced rent was accepted.²⁸¹

It has been occasionally decided in effect that, while an agreement by the tenant to do certain things is sufficient, as a consideration to support the landlord's agreement to reduce the rent, provided the tenant carries out his agreement, if he fails so to do the agreement to reduce the rent ceases to operate, and rent is recoverable for the subsequent period at the rate named by the lease.²⁸²

It is usually assumed in the decisions, involving the validity of an agreement for the reduction of the rent, that the fact that the agreement is oral merely does not affect its validity.^{282a} There are, however, some difficulties in accepting this view. By

²⁷⁷ *Hastings v. Lovejoy*, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462. *Iowa*, 86, 12 N. W. 767; *Loach v. Farnum*, 90 Ill. 368.

²⁷⁸ *White v. Walker*, 31 Ill. 422. ²⁸¹ *Doherty v. Doe*, 18 Colo. 156, 33 Pac. 165; *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638. But to the contrary, see *Pusheck v. Frances E. Willard N. T. H. Ass'n*, 94 Ill. App. 192.

In Post v. Blankenstein, 30 Misc. 796, 63 N. Y. Supp. 218, where the lessee had requested a reduction of rent in view of the inconvenience suffered by him during the making of repairs, and the lessor agreed to allow a reduction, it was held that this agreement was supported by a consideration, the request and assent thereto being, in effect, "a settlement of a contest between the parties."

²⁸² *Watson v. Janion*, 6 Or. 137; *Staab v. Reynolds*, 4 N. M. 222, 17 Pac. 136; *Brown v. Cairns*, 63 Kan. 693, 66 Pac. 1033.

²⁷⁹ *Natelson v. Reich*, 50 Misc. 585, 99 N. Y. Supp. 327. ^{282a} That the rent reserved may be changed by oral agreement, see

²⁸⁰ *Fitzgerald v. Portarlington*, 1 Jones, 431; *Wheeler v. Baker*, 59 499, 89 Pac. 897; *Haight v. Cohen*,

the common-law authorities, it is conceived, such an agreement would be nugatory, not only if not in writing, but even if not under seal, since it constitutes, in effect, a partial release of the rent created by the reservation of the lease, and a release must at common law be under seal.²⁸³ There can be no difference in this respect between a release of the whole and a release of a part of the rent reserved. This view is not, however, suggested in any of the cases above referred to. If we view the provision as to rent, not as a reservation creating an interest in land, but merely as a contract to pay a periodic sum, it cannot, if contained in an instrument under the seal of the lessee, be modified by an instrument of a lower character, under the rule, accepted in some jurisdictions, as to the modification of contracts under seal.²⁸⁴ There are occasional decisions in which this rule has been applied to an unsealed agreement to reduce the rent named in an instrument under seal,²⁸⁵ while in at least one decision such rule has been repudiated in this connection.²⁸⁶ Apart from any question as to the necessity of a seal in order to validate a contract for the reduction of the rent, the question might be suggested whether such contract must not frequently be in writing, as involving the modification of a contract required by the statute of frauds to be in writing,²⁸⁷ this involving the ultimate question whether

123 App. Div. 707, 108 N. Y. Supp. 502.

²⁸³ Co. Litt. 264 b; Williams, Real Prop. (18th Ed.) 148.

There appears to be, in England, no case bearing upon the validity of an agreement to reduce the rent except *Crowley v. Vitty*, 7 Exch. 319, where the agreement was oral and no consideration passed. There the agreement for reduction was decided to be invalid, Parke, B., saying: "There is nothing to bind the plaintiffs to accept the reduced rent. The transaction really amounts to no more than an indulgence on the part of the landlords, which may be put an end to at any time."

²⁸⁴ Anson, Contracts (7th Ed.) 280; Hammon, Contracts, § 427.

²⁸⁵ See *Smith v. Kerr*, 33 Hun (N. Y.) 507; *Barnett v. Barnes*, 73 Ill. 216; *Loach v. Farnum*, 90 Ill. 368; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120. But it was decided that if the reduced sum agreed upon had been actually paid upon a series of rent days, the lessor was bound by his acceptance thereof, and could not claim that the amounts originally stipulated for should have been paid. *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638.

²⁸⁶ *Hastings v. Lovejoy*, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462. See *Wilgus v. Whitehead*, 89 Pa. 131.

²⁸⁷ See *Hammon, Contracts*, § 280; *Browne, Statute of Frauds* (5th

the contract sought to be modified, that is, the contract to pay periodic sums, would have been valid had it not been in writing.²⁸⁸ But any possible difficulty in the way of upholding such an agreement, arising from the statute of frauds, would be regarded as obviated by the fact that the reduced rent was actually paid and accepted,²⁸⁹ this according with the general rule that an oral modification of a contract within the statute is valid if fully carried out.

An agreement to reduce the rent does not constitute the making of a new lease, so as to effectuate a surrender of the original lease.²⁹⁰ The demise of the land remains the same, although a part of the compensation to be paid is relinquished. There are, however, occasional suggestions to the contrary.²⁹¹

(2) **Increase of rent.** Occasionally, instead of a subsequent agreement to reduce the rent, as in the cases above referred to, there is an agreement to increase the periodical payments, an agreement in form to increase the rent. Such an agreement does not, however, strictly speaking, have the effect of increasing the rent. The additional sum agreed to be paid is not rent, since it is not reserved upon the making of a lease. "If there be a power of re-entry for nonpayment of the rent, * * * there could be no ground for enforcing it in respect of the additional sum. The assignee of the term could not be charged with the increased rent; the assignee of the reversion could not claim it."²⁹² The only theory on which it could be regarded as rent would be by considering the agreement as a new demise, effecting a surrender of the original lease, but this would give to the agreement a force ordinarily never contemplated by the parties. It has in

Ed.) 409 a; *Goss v. Lord Nugent*, 5 Y. 31, 15 N. E. 70, 2 Am. St. Rep. Barn. & Adol. 58. 362; *Watson v. Janion*, 6 Or. 137.

²⁸⁸ See ante, § 53 b.

and post, § 190 b, at note 107.

²⁸⁹ It is so in effect decided in *Hyman v. Jockey Club Wine. Doherty v. Doe*, 18 Colo. 456, 33 Pac. 165; *Bowman v. Wright*, 65 Neb. 48 Pac. 671; *Cooper v. Fretuor-* 661, 91 N. W. 580, 92 N. W. 580. See *ansky*, 42 N. Y. St. Rep. 472, 16 N. McKenzie v. Harrison, 120 N. Y. 260, Y. Supp. 866. ²⁹² *Donellan v. Read*, 3 Barn. & Adol. 899. To the same effect. see

²⁹⁰ *Crowley v. Vitty*, 7 Exch. 319; *Hoby v. Roebuck*, 7 Taunt. 157; *Coit v. Hobby*, 72 N. Y. 141, 28 Am. v. Braunsdorf, 32 N. Y. Super. Ct. Rep. 120. See *Smith v. Kerr*, 108 N. (2 Sweeny) 74.

fact been decided that such an agreement does not of itself create a new demise.²⁹³

g. **Reduction apart from agreement.** As will be shown later, the tenant is, in certain cases, entitled to a reduction or "apportionment" of the rent, as having been deprived, without his fault, of the enjoyment of part of the premises demised.²⁹⁴ As a general rule, however, the fact that the premises are less valuable than anticipated for purposes of occupancy does not entitle the tenant to claim a reduction of rent, though according to some decisions he may in such case relinquish possession of the premises and thereby absolve himself from further liability.²⁹⁵ And occasionally a statute allows a reduction in case of the accidental destruction of improvements on the premises.²⁹⁶ It has been decided that the lessee cannot demand a reduction of rent because the land is less in quantity than as it was described in the lease, unless there was an agreement to reduce the rent in that case,²⁹⁷ nor because the landlord, by his use of adjoining land, made the possession of the leased land less valuable.²⁹⁸

It has been decided that where a tenant, a bank, agreed to pay a certain rent in consideration of the keeping by the lessor of a deposit in the bank to a certain amount, the rent continued the same, though the bank failed and so rendered it impossible longer to keep a deposit there, applying the principle that one who disables himself from performing a contract thereby waives the performance of acts by the other party which, but for such disability, the latter would be bound to perform, as conditions precedent to a recovery on the contract.²⁹⁹ It has on the other hand been decided that, where the lessee agreed to pay a certain rent for rooms on condition that the lessor would furnish board to him without extra charge, the lessee's executors were entitled, upon the lessee's death, to have the cost of such board deducted from the after-accruing rent.³⁰⁰

²⁹³ Doe d. Monck v. Geekie, 5 Q. B. 841; Inchiquin v. Lyons, 1 L. R. 20 Ir. 474.

²⁹⁴ See post, § 175.

²⁹⁵ See post, § 182 n. o.

²⁹⁶ See post, § 182 m (8).

²⁹⁷ Leavitt v. Murray, Wright (Ohio) 707. But see post, § 182 a.

²⁹⁸ Holmes v. Stockton, 26 N. J. Law, 93. Compare post, § 185 f (8).

²⁹⁹ Metropolitan Life Ins. Co. v. Standard Nat. Bank, 44 App. Div. 319, 60 N. Y. Supp. 666, affg. 57 N. Y. Supp. 797.

³⁰⁰ Oliver v. Moore, 53 Hun, 472. 6 N. Y. Supp. 413, affd., without opinion. 131 N. Y. 589, 30 N. E. 65.

The fact that the tenant has a valid claim against the landlord, even though it is one which he can assert by way of set-off in an action for rent, does not reduce the amount of rent due by him. So, though the tenant sublets to the landlord at a certain rent, the rent due by him to the latter remains the same,³⁰¹ nor can a tenant make a valid tender of rent by tendering only the net amount due by him, after deducting his claims against the landlord.³⁰² On the same principle the landlord can, apart from statutory changes in the law, distrain for the whole unpaid rent, without reference to any claims against him on the part of the tenant.³⁰³

h. **Oral evidence as to amount of rent.** The "parol evidence rule" has quite occasionally been applied, so as to exclude evidence that the actual contract of the parties as regards the amount of rent to be paid was different from that stated in the instrument of lease.³⁰⁴ But a contemporaneous agreement that, until certain alterations are completed, the lessee will pay less than the sum named, has been regarded as collateral in its nature, so as to render oral evidence thereof admissible.³⁰⁵ And it has been decided that a person not a party to the lease, nor a claimant under such party, can introduce oral evidence in this regard, the "parol evidence rule" applying only as between the parties to the instrument.³⁰⁶

§ 174. Interest on rent.

The question of the right of the landlord to interest upon rent in arrear, from the time at which it was payable, is one

³⁰¹ *Hilton v. Goodhind*, 2 Car. & N. D. 519, 97 N. W. 853. So it has been decided that it cannot be shown

³⁰² *Ely v. Spiero*, 28 App. Div. 485, orally that rent was to be paid partly in board to be furnished the lessor. *Stull v. Thompson*, 154 Pa. 43.

³⁰³ See post, chapter XXXII.

³⁰⁴ *Preston v. Morceau*, 2 Wm. Bl. 25 Atl. 890.

1249; *Williams v. Kent*, 67 Md. 350. ³⁰⁵ *Sire v. Rumbold*, 39 N. Y. St. Rep. 85, 14 N. Y. Supp. 925.

10 Atl. 228, 1 Am. St. Rep. 390; *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.) 58; *Delamater v. Bush*, 63 Barb. (N. Y.) 168; *Liebeskind v. Moore Co.*, 84 N. Y. Supp. 850; *Kaven v. Chrystie*, 84 N. Y. Supp. 470; *Merchants' State Bank v. Ruettell*, 12 of Anne. See post, § 183.

on which the cases are not in accord. It seems that such interest was not recoverable at common law, interest being ordinarily refused if not expressly contracted for, and the same view has been occasionally taken in this country. One reason which has been asserted for the nonallowance of interest in such case is that since rent is but remuneration for the use of land, as interest is for the use of money, the allowance of interest thereon would be equivalent to the allowance of interest on interest,³⁰⁷ and another reason which has been given is that the landlord, having an immediate remedy by distress, cannot refrain from making use thereof, and so allow interest to accumulate.³⁰⁸ Occasionally, with reference to the allowance of such interest in equity, it has been said to be a matter within the discretion of the chancellor.³⁰⁹

Statutes providing for interest upon money due on an instrument in writing, or on one under seal, have been regarded as applying to rent due under such an instrument,³¹⁰ and presumably, at the present day, in most jurisdictions, without reference to any express statute on the subject,³¹¹ interest would be allowed on arrears of rent, in accordance with the rule, usually adopted by the later decisions, that one who fails to pay his debt when due should be made liable for interest, as indemnity to the creditor for the loss resulting from the delay in payment,³¹²

³⁰⁷ Breckenridge v. Brooks, 9 Ky. (2 A. K. Marsh.) 335.

³⁰⁸ Skipwith v. Clinch, 2 Call (Va.) 213, 2 Am. Dec. 546; Cooke v. Wise, 3 Hen. & M. (Va.) 463.

³⁰⁹ Graham v. Woodson, 2 Call (Va.) 209; Howcott v. Collins, 23 Miss. 398.

³¹⁰ Walker v. Hadduck, 14 Ill. 399; Heissler v. Stose, 131 Ill. 393, 23 N. E. 347; Downing v. Palmateer, 17 Ky. (1 T. B. Mon.) 64. But it was held that the lessor was entitled to interest only from the time of his demand for rent if the delay in payment was owing to an agreement for such delay, although such agreement was invalid. White v. Walker, 31 Ill. 422.

In England, interest on rent is recoverable, it seems, under St. 3 & 4 Will. 4, c. 42, § 28, allowing interest on a debt payable at a certain time. See Woodfall, Landl. & Ten. (16th Ed.) 568; Foa, Landl. & Ten. (2d Ed.) 131.

³¹¹ Occasionally a statute expressly provides for interest on rent. Florida Gen. St. 1906, § 2235; Georgia Code 1895, § 3128; Kentucky St. 1903, § 2299; Virginia Code 1904, § 2787; West Virginia Code 1906, § 3400.

³¹² See, to this effect, Stockton v. Guthrie, 5 Har. (Del.) 204; Van Rensselaer v. Jewett, 5 Denio, 135, 2 N. Y. (2 Comst.) 135, 51 Am. Dec. 275; Livingston v. Miller, 11 N. Y.

though, it seems, interest might be refused when its allowance would, under the circumstances, result inequitably.³¹³

§ 175. Apportionment as to amount.

a. **General considerations.** Rent may be apportioned as regards the amount thereof, that is, a person may become entitled to, or liable for, a portion only of the rent originally reserved.^{313a} Either one of three different cases of such apportionment may arise, that is: (1) a right to a distinct portion of the rent, and to such portion only, may be vested in each of two or more persons; (2) a liability for a distinct portion of the rent, and for such portion only, may be imposed on one person, another being liable for the balance; or (3) the rent may be extinguished or suspended as to a portion, and a portion only.

Apportionment of rent, as regards the right thereto or the liability therefor, between two or more persons, ordinarily occurs by reason of the transfer of portions of the reversion or of the leasehold to distinct persons. In such case the rent is apportioned between such persons upon the basis of the values of their respective portions of the land and not of the extent of such por-

(1 Kern.) 80; *Newman v. Keffer*, ces rendered the charge of interest 33 Pa. 442, note; *Dennison v. Lee*, 6 improper, it appearing that the ten- Gill & J. (Md.) 383; *Dorrill v. Hop-* ant was willing to do justice. And kins, 4 McCord (S. C.) 59; *Honore* in *McQuesney v. Hiester*, 33 Pa. 435, v. Murray, 33 Ky. (3 Dana) 31; *El-* 75 Am. Dec. 612, it was held that kin v. Moore, 45 Ky. (6 B. Mon.) 462. interest was recoverable on rent ac- It was allowed even when the rent cru- ing after the time of the pur- was payable, not in money, but in chase by the the defendant of the commodities, it being calculated on premises subject to the rent, but the value of the commodities. *Van* not on rent due before his purchase, *Rensselaer v. Jewett*, 5 Denio, 135, since he was justified in presuming 2 N. Y. (2 Comst.) 135, 51 Am. Dec. that such rent was paid. 275.

³¹³ In *In re Gregg*, 11 Misc. 153,

In *Obermyer v. Nichols*, 6 Bin. 32 N. Y. Supp. 1103, interest was re- (Pa.) 159, 6 Am. Dec. 439, it was fused by the surrogate in favor of held that interest should be allowed a son who was his mother's tenant, unless from the landlord's conduct he claiming that no rent was to be it might be inferred that he meant paid under the lease, and the mother not to insist on interest, or unless not having demanded rent. he acted in an oppressive manner by ^{313a} As to apportionment of rent demanding more than was due, or on lease of land and chattels, see unless other equitable circumstan- ante, § 169 c.

tions.³¹⁴ If, however, the value of the respective portions of the land is not shown, the apportionment will, it seems, be according to their extent.³¹⁵

The fact that, in a particular case, a tenant of the whole or a part of the land is entitled to demand an apportionment in his favor, that is, to assert a liability for an apportioned part only, does not render it incumbent upon the owner of the reversion in a part or the whole of the land, when suing for rent, to demand merely what he is entitled to upon the apportionment, but he may sue for the whole rent, and recover so much thereof as the jury may find him entitled to.³¹⁶

If rent is in its nature insusceptible of apportionment, as when it consists of the yearly render of a single chattel, which cannot be divided without destroying it, a purchase by the landlord of the leasehold in part of the land will extinguish the rent.³¹⁷ On the other hand, a severance of the leasehold by the voluntary act of the tenant, as when he transfers parts thereof to different persons, will multiply such a rent, each tenant of part becoming liable for the whole.³¹⁸

b. **On severance of reversion.** (Considering first the apportionment of the rent as regards the right thereto, it is well settled that if the reversion is severed, so that part is vested in one person and part in another, the rent incident to the reversion is apportioned between such persons according to the respective values of their parts of the reversion, and a portion of the rent is payable to one of such persons and a portion is payable to the other. Such severance of the reversion occurs when the landlord grants the reversion in part of the land to another,

³¹⁴ Litt. § 224; Co. Litt. 149 b; portionment (E) 2; 2 Platt, Leases, Pallet's Case, Brownl. & G. 186; 146; Worthington v. Cooke, 56 Md. Hodgkins v. Robson, 1 Vent. 276; 51; Dreyfus v. Hirt, 82 Cal. 621, 23 Biddle v. Hussman, 23 Mo. 597; Pac. 193; Van Rensselaer v. Gallup, Reed v. Ward, 22 Pa. 144; Doyle v. 5 Denio (N. Y.) 454.

Longstreth, 6 Pa. Super. Ct. 475; ³¹⁷ Litt. § 222; Co. Litt. 149 a; Gribbie v. Toms, 70 N. J. Law, 522, Bruerton's Case, 6 Coke, 1; Talbot's 57 Atl. 144; Id., 71 N. J. Law, 338, 59 Case, 8 Coke, 105.

Atl. 1117. ³¹⁸ Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135, 45 Am. Dec. 451; Barb. (N. Y.) 643. See argument in Van Rensselaer v. Gifford, 24 Barb. White v. West, Noy, 10. (N. Y.) 349; Bruerton's Case, 6

³¹⁶ 2 Co. Inst. 503; Vin. Abr. Ap- Coke, 1; Com. Dig., Suspension (G).

retaining that in the balance,³¹⁹ and also when he grants the reversion in different parts of the land to different persons, not retaining any part thereof.³²⁰ And the case is the same when he severs the reversion by devise.³²¹ An apportionment also takes place if the reversion is severed by act of the law, as when, on the death of the landlord, it passes to two or more heirs,³²² or when it passes to the heir, and, as to one-third, to the widow.^{322a} If a person seized in fee of one tract, and possessed of a term of twenty years in another, leases both together for ten years, reserving rent, and dies, whereupon the reversion in one tract goes to his heir, and in the other tract to his executor, the rent will be apportioned accordingly.³²³

In any such case of severance of the reversion by the transfer of a part or parts thereof, the apportionment of rent cannot be made by the landlord without the concurrence of the tenant, and, unless the latter consents to an apportionment made by the former, he may demand that the jury determine, in an action for the rent, the respective values of the different portions of the land, and the consequent extent of his obligation to each owner of a part of the reversion.³²⁴ The apportionment in such a case is, however, for the benefit of the persons entitled to the various parts of the reversion, and the tenant cannot demand that such persons make an apportionment, if they prefer to treat the rent as an entire one, payable jointly to all and not partly to each.³²⁵

³¹⁹ Co. Litt. 148 a; (2 Co. Inst. 504; West v. Lassels, Cro. Eliz. 851; Bliss v. Collins, 5 Barn. & Ald. 876; Linton v. Hart, 25 Pa. 193, 64 Am. Dec. 691; Worthington v. Cooke, 56 Md. 51; Biddler v. Hussman, 23 Mo. 597; Grubbie v. Toms, 70 N. J. Law, 522, 57 Atl. 144; Id., 71 N. J. Law, 338, 59 Atl. 1117.

³²⁰ Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 404; Cole v. Patterson, 25 Wend. (N. Y.) 456; Crocsby v. Loop, 13 Ill. 625; Leitch v. Boyington, 84 Ill. 179, 25 Am. Rep. 442.

^{322a} 1 Rolle, Abr. 237, pl. 5.

³²³ Moody v. Garnon, 1 Rolle, Abr. 237, pl. 3.

³²⁴ Fish v. Champion, 1 Rolle, Abr. 237, pl. 1; Bac. Abr., Rent (M. 3); Bliss v. Collins, 5 Barn. & Ald. 876; Hare v. Proudfoot, 6 N. C. Q. B. (O. S.) 617; Biddle v. Hussman, 23 Mo. 597.

³²⁵ Gilbert, Rents, 173; Ehrman v. Mayer, 57 Md. 612, 40 Am. Rep. 448; Crosby v. Loop, 13 Ill. 625, 14 Ill. 320; Reed v. Ward, 22 Pa. 144.

³²¹ Ewer v. Moyle, Cro. Eliz. 771; Hare v. Proudfoot, 6 U. C. Q. B. (O. S.) 617.

³²⁵ People v. Dudley, 58 N. Y. 323.

Not only is the rent apportioned upon the severance of the reversion, but it may be apportioned by act of the landlord without reference to the reversion, this being retained by him or transferred to another. Thus, when one who has demised land for years, reserving a rent of a certain sum yearly, grants to each of several persons, or to one person, a portion of the rent, such grant is perfectly good, whatever disposition the grantor may make of the reversion.³²⁶ So tenants in common of land, after making a lease thereof, reserving one entire rent, may apportion the rent between them, each taking a certain portion thereof.³²⁷ It would seem that, in the latter case, the apportionment can properly be made only by an exchange of conveyances, as in the case of the partition of other interests in land,³²⁸ unless the period for which the rent is still to run is within an exception in the local statute requiring a conveyance of such an interest to be in writing, or unless, perhaps, the actions of the parties in accordance with such oral apportionment can be re-

³²⁶ *Ards v. Watkins*, Cro. Eliz. 637, 651; *Bliss v. Collins*, 5 Barn. & Ald. 876, 882; *Rivis v. Watson*, 5 Mees. & W. 255. Furthermore, there seems to have been no evidence of an intention to make a new lease. In *Woolsey v. Lasher*, 35 App. Div. 108, 54 N. Y. Supp. 737,

³²⁷ *Powis v. Smith*, 5 Barn. & Ald. 850; *Woolsey v. Lasher*, 35 App. Div. 108, 54 N. Y. Supp. 737. it was decided, on the authority of the above case, that "if there was a severance of the ownership of the rent, understood and acted upon by all parties," it was not necessary for the parties to sue jointly. There

³²⁸ Such necessity is not, however, suggested in the two cases last cited. In *Powis v. Smith*, 5 Barn. & Ald. 850, it was held to be a question for the jury whether, the lessors having notified the lessee to pay a moiety to each, and the rent being so paid and separate receipts given, "the parties thereby meant to enter into a new contract, with a separate reservation of rent to each, or whether they meant to continue the old reservation of rent, each of the plaintiffs receiving his own moiety," and that consequently it was error to nonsuit the lessors suing jointly. If by "a new contract" is meant a new lease, such would have been void, apparently, because not in writing. Furthermore, there seems to have been no evidence of an intention to make a new lease. In *Woolsey v. Lasher*, 35 App. Div. 108, 54 N. Y. Supp. 737, it was decided, on the authority of the above case, that "if there was a severance of the ownership of the rent, understood and acted upon by all parties," it was not necessary for the parties to sue jointly. There the lessors and lessee had together agreed that in future one moiety of the rent should be paid to each lessor. Apart from any question of apportionment, each lessor can, in an action of debt, though ordinarily not, it seems, in an action of covenant, sue for his undivided share of the rent. Post, § 291 c, at notes 77-81. Whether he can do so in use and occupation has not been decided, but it would rather seem not, as this would involve an inference of a promise to pay to each tenant in common a separate sum for the enjoyment of the premises.

garded as validating it, as is sometimes the case when there is an oral apportionment between joint owners of land.³²⁹

c. **On severance of leasehold.** In case the leasehold interest in different parts of the premises becomes vested in different persons, each part, or the owner of each part, may be, for certain purposes, liable for a proportioned part only of the rent.³³⁰

There are, in one jurisdiction, decisions to the effect that if a landlord, for many years, collects only a certain part of the rent from each of several parts into which the premises have, by assignment or sublease, been subdivided, this fact, with other circumstances, may furnish ground for a presumption that the rent has, with the landlord's assent, been so apportioned as between the various parts of the property, so as to make each of such parts liable only for the apportioned part of the rent.³³¹

d. **On partial extinction or suspension of rent.** Cases of the apportionment of rent by reason of the extinction or suspension of a portion of the rent occur upon the termination of the tenant's use and enjoyment of part of the premises, by reason of matters other than the transfer of the leasehold in such part to a third person. Thus, if the tenant of the whole premises surrenders the leasehold interest in a part thereof, or such leasehold is otherwise in part merged in the reversion, the rent is apportioned, and is extinguished in an amount proportioned to the value of the portion as to which the lease is no longer outstanding, while still existent as regards the balance.³³² And so if the

³²⁹ See 1 Tiffany, Real Prop. § 285; Van Rensselaer v. Gifford, 24 Barb. (N. Y.) 349; Leitch v. Boyington, 84 Ill. 179, 34 L. R. A. 55, 57 Am. St. Rep. 396; Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304, 41 Pac. 1087.

³³⁰ See post, § 181 b, notes 669, 677-679.

³³¹ Speed v. Smith, 4 Md. Ch. 299; Barnitz v. Reddington, 80 Md. 622, 24 Atl. 409; Connoughton v. Bernard, 84 Md. 577, 591, 36 Atl. 265. Compare Smith v. Heldman, 93 Md. 343, 48 Atl. 946; Jones v. Rose, 96 Md. 483, 54 Atl. 69.

³³² Litt. § 222; Co. Litt. 148 a; Fishe v. Campion, 1 Rolle, Abr. 234, pl. 5; Smith v. Malings, Cro. Jac. 160; Ehrman v. Mayer, 57 Md. 612, 40 Am. Rep. 448; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. and appor-
tioned. (See Co. Litt. 148 b; Rawlyns' Case, 4 Coke, 52 b; Ascough's Case, 9 Coke, 134). But this view, based on a theory that while rent may be extinguished in part and apportioned as to the residue, it cannot be suspended in part and apportioned as to the residue,

tenant is evicted by paramount title from part of the premises, the rent is apportioned, and the tenant is thereafter liable only for an amount of rent proportioned to the value of the portion of the premises of which he still retains possession,³³³ though if the partial eviction is by the act of the landlord of the whole premises, and not under paramount title, no apportionment takes place in favor of the landlord, but he loses the entire rent so long as the eviction continues.³³⁴ In certain cases apportionment will take place owing to the lessee's inability to obtain possession of the whole of the demised premises.³³⁵ Apportionment also takes place when the landlord re-enters upon a part of the premises for breach of a condition in the lease or for other act involving a right of forfeiture, and thereafter the tenant is liable for rent only in proportion to the part retained by him.³³⁶

As an apportionment of the rent, upon a severance of the reversion, is to be made by the jury,³³⁷ so the apportionment in the case of a partial extinction or suspension of the rent is to be so made.³³⁸ That is, it is for the jury to determine to what extent the tenant's liability is diminished by his loss of a part of the premises by eviction, by title paramount, by surrender, or by forfeiture, as the case may be.

c. **In action on covenant for rent.** It is stated, in a case not

has been repudiated, Lord Hale saying that the adoption of such a rule "would shake abundance of rents, it being a frequent thing for a lessor to hire a room or other part of the thing demised for his conveniency." *Hodgkins v. Robson*, 1 Vent. 276. See *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337, 355. But if rent is reserved on the redemise to the lessee, there is no apportionment, "for the parties, by the reservation, have ascertained what rent shall be allowed for that part." *Hodgkins v. Robson*, supra. See *Comyn, Landl. & Ten.* 218; 2 *Platt, Leases*, 134. It is perhaps on the theory of such a redemise to the landlord that *Calhoun*

v. Atchison, 67 Ky. (4 Bush) 261, 96 Am. Dec. 299, is to be explained, it being there said that if the lessees fail to cultivate a part of the land and the landlord cultivates such part, the lessees are entitled to credit for the pro rata value of such portion.

³³³ See post, § 182 e (2) (b).

³³⁴ See post, § 182 (e) 1 (b).

³³⁵ See post, § 182 a.

³³⁶ *Co. Litt.* 148 a; *Walker's Case*, 3 Coke, 22; 1 Rolle, Abr. 235, pl. 13; *Collins v. Harding*, 13 Coke, 58.

³³⁷ See ante, at note 314.

³³⁸ See *Fish v. Champion*, 1 Rolle, Abr. 237, pl. 1; *Hodgkins v. Robson*, 1 Vent. 276; *Cuthbert v. Kuhn*, 3 Whart. (Pa.) 357, 31 Am. Dec. 513.

infrequently referred to,³³⁹ that "in covenant as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory as any other personal contract is, the rent is not apportionable." This, however, was a *dictum* merely, the actual decision being that where the action of covenant for rent is brought against the assignee of the lessee, and is therefore maintainable by reason of the privity of estate,³⁴⁰ such assignee is entitled to an apportionment of the rent upon a partial eviction by title paramount.³⁴¹ This *dictum*, it seems clear, is not correct in so far as it is in terms applicable to an action by the lessor, who has disposed of the reversion in part of the premises, upon the lessee's covenant for rent, to recover a part of the rent proportioned to the land retained by him, he being entitled to recover such part and no more,³⁴² this being in accordance with the apparent intention of the statute of 32 Henry 8, c. 34.³⁴³ Whether the *dictum* is correct as applied to a case in which the rent is in part extinguished or suspended, as upon a surrender or eviction by title paramount, it is difficult to say. In one case in this country an action at law on the covenant for rent was enjoined in order that the lessee might have the rent apportioned by reason of a partial eviction under paramount title, the decision being, however, based, in part at least, on the fact that the pleadings in the action of law did not show that the covenant was one for the payment of rent;³⁴⁴ and in an English case the court refused to decide the question whether the surrender of the leasehold in part of the premises by the lessee's assignee was a defense in part to an action for rent by the lessor against the lessee on the latter's covenant.³⁴⁵ In a Canadian case it was held that there

³³⁹ *Stevenson v. Lambard*, 2 East, 575; *Linton v. Hart*, 25 Pa. 193, 64 Am. Dec. 691.

³⁴⁰ See post, 181 b.

³⁴³ See ante, § 149 b (1).

³⁴¹ See post, § 182 e.

³⁴⁴ *Poston v. Jones*, 37 N. C. (2

³⁴² *Swansea v. Thomas*, 10 Q. B. Div. 48, citing *Twynam v. Pickard*, 2 Barn. & Ald. 105; *Pyot v. St. John*, Cro. Jac. 329, and questioning *Stevenson v. Lambard*, 2 East, 575; *Worthington v. Cooke*, 56 Md. 51, citing various cases not in point; it could be asserted as a partial de-

³⁴⁵ *Baynton v. Morgan*, 22 Q. B. Div. 74. It was decided that the lessee could not assert such surrender for rent, and the question whether

could, in an action of covenant, be no apportionment by reason of the partial eviction of the tenant.³⁴⁶

This question of the original lessee's right, in an action of covenant by the lessor, to allege a partial surrender, forfeiture, or eviction under paramount title, and to obtain an apportionment of rent on account thereof, might, it seems, frequently be determined in his favor by construing the lessee's covenant as one to pay the rent that may become due, rather than to pay the amount of the rent as reserved, in which case he could be held for no greater amount under his covenant than under the mere reservation of rent, and a loss of the enjoyment of part of the premises, which would be ground for a *pro tanto* reduction of recovery in an action of debt, would have the same effect in an action on the covenant.³⁴⁷⁻³⁴⁹ So far as the covenant may not be susceptible of this construction, and can be regarded only as one for the payment of a certain periodical sum, it is difficult to find a satisfactory ground on which to entitle the covenantor to a reduction of liability in case of such partial loss of enjoyment of the premises. The courts might possibly apply the doctrine of "failure of consideration" in such case in order to relieve the lessee. But this doctrine, whatever may be its exact scope, does not seem applicable to the case of a covenant for rent entered into in consideration of the grant of an estate by way of lease, since the consideration is executed and not executory.

f. **Of rent charge.** A rent charge, as distinguished from rent service, could not, at common law, be apportioned by the act of a party, so as to exonerate part of the land from the rent, such charges on the land not being favored by the courts as were rents service, which were regarded as a necessary part of the feudal constitution of the realm.³⁵⁰ Consequently, if the ownership of the rent and of a portion of the land became vested in one person,³⁵¹ or if the owner of the rent purchased or released a part of the land,³⁵² the whole rent was extinguished. A rent charge

fense did not arise, since the lessor was satisfied to accept an apportioned part of the rent.

³⁴⁶ *Shuttleworth v. Shaw*, 6 U. C. Q. B. 539.

³⁴⁷⁻³⁴⁹ See *Baynton v. Morgan*, 22 Q. B. Div. 81, per Fry, J.

³⁵⁰ Gilbert, Rents, 153. A rent seck, likewise, is not apportionable by act of a party. Vin. Abr., Apportionment (A) 2; Rent (G a) 12.

³⁵¹ Litt. § 222; Co. Litt. 147 b,

³⁵² Co. Litt. 147 b.

might, however, be apportioned by the act of the owner of the rent, in releasing part thereof,³⁵³ or by the act of the law, as when the owner of the rent acquired a part of the land by descent.³⁵⁴ And it might be done by agreement between the owner of the land and the owner of the rent, this in effect resulting in a new rent charge.³⁵⁵ Such an agreement has been inferred from the long continued payment and acceptance of an apportioned part of the rent.³⁵⁶ And when joint owners of the land subject to the rent, on making partition, agreed that a specific portion of the rent should be paid by each, it was held that if thereafter the owner of the rent purchased one portion of the land as divided,³⁵⁷ or if he released to one owner all his interest in the land,³⁵⁸ he became a party to the agreement for apportionment. The right to receive the rent, as distinguished from the liability therefor, may be apportioned by a transfer by the owner of the rent of a part or parts thereof to a stranger.³⁵⁹

§ 176. Apportionment as to time.

a. **Generally not allowable.** Rent is not, at common law, regarded as accruing from day to day, as interest does, but it is only upon the day fixed for payment that any part of it becomes due.³⁶⁰ The result of this principle is that, ordinarily, the person who is on that day the owner of the reversion is entitled to the entire installment of rent due on that day, though he may have been the owner of the reversion or rent but a part of the time which has elapsed since the last rent day. Conversely, one who has been the owner of the reversion or rent during a part of that period can claim no portion of the installment unless he is such

³⁵³ Co. Litt. 148 a; Bac. Abr., Rent (m) 1.

³⁵⁴ Litt. § 224; Co. Litt. 194 b; *Cruiger v. McLaury*, 41 N. Y. 219.

³⁵⁵ Co. Litt. 147 b, and note; *Van Rensselaer v. Chadwick*, 22 N. Y. 32.

³⁵⁶ *Church v. Seeley*, 110 N. Y. 457, 18 N. E. 117; *Farley v. Craig*, 11 N. J. Law (6 Halst.) 262.

³⁵⁷ *Van Rensselaer v. Gifford*, 24 Barb. (N. Y.) 349.

³⁵⁸ *Van Rensselaer v. Chadwick*, 24 Barb. 333, 22 N. Y. 32.

³⁵⁹ Co. Litt. 148 a; *Gilbert, Rents*, 163; *Farley v. Craig*, 11 N. J. Law (6 Halst.) 262; *Ryerson v. Quackenbush*, 26 N. J. Law (2 Dutch.) 236.

³⁶⁰ *Clun's Case*, 10 Coke, 126 b; *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 261; *Anderson v. Robbins*, 82 Me. 422, 19 Atl. 910, 8 L. R. A. 568; *Marshall v. Moseley*, 21 N. Y. 280; *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493; *Bank of Pennsylvania v. Wise*, 3 Watts (Pa.) 394.

owner at the time at which the installment is payable by the terms of the lease. The general rule in this regard is ordinarily expressed by saying that rent cannot be apportioned as to time.

An important application of the rule is seen in case a tenant for his own or for another's life makes a lease for years, and the lease comes to an end by reason of his death or of that of the *cestui que vie*. In such case the lessee entirely escapes liability for the installment of rent next falling due.³⁶¹ The lessor or his executor cannot recover the whole installment, since the life interest has ceased before the installment falls due, and he cannot, under the rule against apportionment, recover a portion calculated up to the time of the cessation of his interest. Nor can the remainderman recover any portion of the rent, since the lease by which the rent was reserved is no longer operative, and also because he is a stranger to the lease.³⁶²

When the life tenant has a power of leasing, and consequently the lease is valid for the full term named therein, the life tenant, as in the previous case, cannot claim an apportioned part of the rent, but in this case it all goes to the remainderman, as being the owner of the reversion at the time the installment falls due.³⁶³ And so if one devises property, which he has previously

³⁶¹ *Clun's Case*, 10 Coke, 127 a; *Vallery*, 51 Neb. 824, 71 N. W. 734, 66 Jenner v. Morgan, 1 P. Wms. 391; *Ex Am. St. Rep.* 475. But it is not perceived how the lessee, holding over notes; *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493; *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424; *Watson v. Penn*, 108 Ind. 21, 8 N. E. 636, 58 Am. Rep. 26; *Gee v. Gee*, 22 N. C. (2 Dev. & B. Eq.) 103. after the termination of his lease by his lessor's death, could thus be held liable in use and occupation to the remainderman, with whom he is in no privity, and towards whom his continued possession is adverse.

³⁶² It is stated in the recitals to the apportionment act of 11 Geo. 2, c. 19, § 15 (post, § 176 b) that in such case the only remedy of the reversioner (remainderman) was by a recovery for the lessee's use and occupation from the time of the life tenant's death. That such an action would lie in favor of the remainderman if he did not object to the continued possession by the life tenant's lessee was decided in *Hoagland v. Crum*, 113 Ill. 365; *Guthmann v. See Noble v. Tyler*, 61 Ohio St. 432, 56 N. E. 191, 48 L. R. A. 735. The mere fact that a remainderman does not object to the wrongful possession of his land by one who has entered under the life tenant cannot make such other his tenant, so as to be liable in use and occupation. Post, § 302. A remainderman cannot even confirm a lease made by the life tenant. Post, at note 397.

³⁶³ *Strafford v. Wentworth*, Fin. Prec. 555; *Clarkson v. Scarborough*, 1

demised, to one person for life with remainder to another, the executor of the tenant for life can demand no part of the installment of rent falling due after the death of such tenant, but it all goes to the remainderman.³⁶⁴

The rule of law, forbidding an apportionment in favor of the life tenant in the case first above stated, is followed in equity.³⁶⁵ But where the lessee, claiming under a lease made by a life tenant, not under a power, did in fact continue in the occupation of the premises after the legal termination of the tenancy, and paid a sum of money as rent, though not strictly due as such, the money so paid was considered in equity as apportionable between the several persons under whom the occupancy occurred, and the remainderman, having received the whole amount, was required to account for a proportionate part to the life tenant or his representative.³⁶⁶

Other applications of the rule against apportionment of rent as to time occur as follows: If a tenant in fee simple, having made a lease for years, dies between two rent days, the entire installment of rent next falling due belongs to his heir or devisee, as being the owner of the reversion at the time the installment falls due, and the executor or administrator can assert a claim to no portion thereof.³⁶⁷ And when the landlord makes a conveyance of the reversion, the grantee is entitled, in the absence of a contrary stipulation, to all the rent which falls due at the next rent day, and the grantor can claim no part thereof.³⁶⁸

Swanst. 354; Ex parte Smyth, 1 Wms. 391, the tenant was required, in equity, to account to the remainderman for the profits from the time of the life tenant's death.

³⁶⁴ Marshall v. Moseley, 21 N. Y. 280.

³⁶⁵ Jenner v. Morgan, 1 P. Wms. 392; Hay v. Palmer, 2 P. Wms. 502.

³⁶⁶ Hawkins v. Kelly, 8 Ves. Jr. 308. See Marshall v. Moseley, 21 N. Y. 280. And so, where a tenant in tail died without issue, after having made a lease for years, the remainderman was required to account to the former's executors for a proportionate part of the sum received by him as rent. Paget v. Gee, 1 Amb. 198; Vernon v. Vernon, 2 Brown Ch. 659. In Jenner v. Morgan, 1 P.

³⁶⁷ Clun's Case, 10 Coke, 127 a; Duppa v. Mayo, 1 Wms. Saund. 287; Marshall v. Moseley, 21 N. Y. 280; Anderson v. Robbins, 82 Me. 422, 19 Atl. 910, 8 L. R. A. 568; Bloodworth v. Stevens, 51 Miss. 475; Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 394; Allen v. Van Houton, 19 N. J. Law (4 Har.) 47; Dorsett v. Gray, 98 Ind. 273.

³⁶⁸ English v. Key, 39 Ala. 113; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Bank of Pennsylvania v.

So when the tenant is evicted by title paramount between rent days, the landlord cannot claim any portion of the installment next falling due,³⁶⁹ and this is *a fortiori* the case if the landlord himself evicts the tenant.³⁷⁰ If the tenant surrenders his leasehold, the landlord cannot assert a claim to a proportionate part of the rent as compensation for the tenant's occupancy from the next preceding rent day to the date of the surrender, in the absence of an agreement in this regard.³⁷¹

If the landlord himself terminates the tenancy, either by force of an express option so to do,³⁷² or in accordance with the nature of the tenancy, as being one at will,³⁷³ or for breach of a condition subsequent,^{373a} he cannot recover any part of the rent falling due at the next rent day. And so a tenant under a lease at will, reserving rent periodically, cannot, by the weight of authority, by terminating the tenancy between rent days, apportion the rent in his favor, but in such case he is liable for the

Wise, 3 Watts (Pa.) 394; *Hearne v. Y.*) 161; *Nicholson v. Munigle*, 88 Lewis, 78 Tex. 276, 14 S. W. 572; *Mass.* (6 Allen) 215. But see *Hull v. Stevenson*, 58 How. Pr. (N. Y.) 135, note.

³⁶⁹ *Clun's Case*, 10 Coke, 127 a; *English v. Key*, 39 Ala. 113; *Anderson v. Robbins*, 82 Me. 422, 19 Atl. 910, 8 L. R. A. 568; *Fitchburg Cotton Manufactory Corp. v. Melven*, 15 Mass. 270; *Knowles v. Maynard*, 54 Mass. (13 Metc.) 352; *Adams v. Bigelow*, 128 Mass. 365; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; *Russell v. Fabyan*, 28 N. H. 543, 61 Am. Dec. 629.

³⁷⁰ See post, § 182 e (1).

³⁷¹ *Grimman v. Legge*, 8 Barn. & C. 324.

In *Blake v. Sanderson*, 67 Mass. (1 Gray) 332, it was held that the fact that the lessee left the premises and authorized the lessor to enter and fit them for a new tenant supported a finding of a contract to apportion the rent.

³⁷² *Zule v. Zule*, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600; *City of New York v. Ketchum*, 67 How. Pr. (N.

Y.) 161; *Nicholson v. Munigle*, 88 Lewis, 78 Tex. 276, 14 S. W. 572; *Mass.* (6 Allen) 215. But see dictum in *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493, to the effect that a lease providing for termination on a contingency should be construed as providing for apportionment.

³⁷³ *Robinson v. Deering*, 56 Me. 357; *Cameron v. Little*, 62 Me. 550; *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137; *Emmes v. Feeley*, 132 Mass. 346; *Leighton v. Theed*, 2 Salk. 413.

In *Cornelius v. Rosen*, 111 Mo. App. 619, 86 S. W. 500, it was held that in the case of a tenancy from month to month, if the tenant, upon receiving a notice to quit at the end of the month, relinquished possession before that time, he was liable for such portion only of the rent as might be regarded as accruing before such relinquishment. No reason for the decision is given.

^{373a} *Hall v. Joseph Middleby*, 197 Mass. 485, 83 N. E. 1114. See post § 182 j.

whole of the next accruing installment.³⁷⁴ This question as to the rights of a tenant at will is not likely to arise, in most jurisdictions, since, if the lease calls for a periodic rent, the lessee ordinarily becomes a periodic tenant.³⁷⁵

Occasionally, even when there had been no change of title to the reversion and the lease was still outstanding, the landlord has attempted, before the day fixed for payment, to recover a part of the rent. This, in view of the prohibition of apportionment as to time, he is obviously unable to do.³⁷⁶

The doctrine that rent shall not be apportioned as to time finds an application in determining the liability for rent as well as in determining the right to rent. For instance, if a tenant assigns the leasehold interest, the assignee is liable for the whole installment of rent next falling due, and he cannot assert a liability on the part of his assignor for a portion calculated up to the time of the assignment. Each assignee of the leasehold is liable for the entire rent which falls due during his ownership of the leasehold.^{376a}

b. **Statutory provisions for apportionment.** The rule above referred to, by which the tenant under a lease from a life tenant is relieved from liability for rent upon the death of the life tenant, was changed in England by Stat. 11 Geo. 2, c. 19, § 15, which provided that if any tenant for life should die before the day for the payment of rent reserved on a lease which terminated on such death, his executors or administrators might recover from the under tenant a proper proportion of the rent, according to the length of time between the last rent day and the death of the tenant for life. This statute did not allow any apportionment when the lease was made by a life tenant in execution of a power, since in such case his death did not terminate the lease,³⁷⁷ nor, for the same reason, did it apply to the case of the death of a

³⁷⁴ *Bowe's Case*, Aleyn, 4; *Anon- Ind. 476; Indianapolis, D. & W. R. mous*, Keilw. 65; *Kightly v. Bulky*, 1 Co. v. First Nat. Bank, 134 Ind. 127, Sid. 338; *Leighton v. Theed*, 2 Salk. 33 N. E. 679.

413. There is a dictum contra by ^{376a} *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917; *Graves v. Porter*, 11 Barb. (N. Y.) 592. And see *Richardson, C. J.*, in *Wentworth v. Abraham*, Het. 53, Litt. 61.

³⁷⁵ See ante, § 14 b (2) (b) (c). cases cited post, note 382.

³⁷⁶ *Earle v. Kingsbury*, 57 Mass. 268; *Ex parte Smyth*, 1 Swanst. 337. (3 Cush.) 206; *Garvey v. Dobyns*, 8 Mo. 213; *Raymond v. Thomas*, 24

life tenant of a reversion created before the creation of his estate.³⁷⁸ Likewise, it did not, apparently, apply to the case of a lease by a tenant *pur auter vie*, when the lease was terminated by the death of the *cestui que vie*.³⁷⁹ By the subsequent act of 4 & 5 Wm. 4, c. 22, the previous act was in express terms made applicable to the case of leases made by tenants *pur auter vie*, and to all leases which terminated on the death of the person making the same, though not strictly tenant for life. This act also contained a provision for the apportionment of rent when, upon the death of any person interested in the rent, another person succeeded to the rent, the representative of the deceased person being given an apportioned part of the rent, as when a tenant for life made a lease for years under a power, his representative, upon his death, taking a part of the rent calculated to the time of his death.³⁸⁰ But it did not authorize apportionment between the real and personal representatives of a tenant in fee.³⁸¹ By the latest English statute on the subject, that of 33 & 34 Vict. c. 35, the common-law rule has been greatly changed, it being provided that, in the absence of express stipulation, all rents are, like interest on money lent, to be considered as accruing from day to day and are to be apportionable accordingly, with the proviso that the apportioned rent shall not be regarded as due and payable before the time stipulated for the payment of rent, that is, before the next rent day. The effect of this act is not only to apportion the rent as between persons entitled thereto in succession one after the other, but also to apportion the liability for rent, as when an assignee of a leasehold reassigns to another, so as to render him liable for a portion of the installment next becoming payable, calculated from the time of his acquisition of the leasehold to the time of his reassignment, and to render his assignee liable for the balance.³⁸²

³⁷⁸ Botheroyd v. Woolley, 5 Tyrw. 522.

³⁷⁹ Perry v. Aldrich, 13 N. H. 343, 38 Am. Dec. 493; Wykham v. Wykham, 3 Taunt. 316.

³⁸⁰ Plummer v. Whiteley, Johns. 585, 29 Law J. Ch. 247; Wardroper v. Cutfield, 33 Law J. Ch. 605; Llewellyn v. Rous, L. R. 2 Eq. 27.

³⁸¹ Browne v. Amyot, 3 Hare, 173; In re Clulow's Estates, 3 Ky. & J. 689.

³⁸² See Swansea Bank v. Thomas, 4 Exch. Div. 94; In re Howell [1895] 1 Q. B. 844; In re South Kensington Co-operative Stores, 17 Ch. Div. 161; Glass v. Patterson [1902] 2 Ir. 660.

In a number of states there are statutes corresponding to the earliest of the English statutes above referred to, authorizing the recovery of a proportionate part of the rent by the executor or administrator of a life tenant who has died after making a lease for years.³⁸³ And in several, the benefit of such an apportionment is also given to one entitled to rent which is dependent on the life of another person, upon the death of such other person, as in the case of the second English statute.³⁸⁴ Occasionally the statute, after expressly providing for the recovery of a proportionate part of the rent by the personal representative of the life tenant, expressly authorizes the recovery of the "residue" by the remainderman,³⁸⁵ while a few of the statutes provide that, if the rent is paid in advance, the tenant shall recover back from his landlord, or his landlord's representative, a proportioned part of the rent paid.³⁸⁶

There is in New York a statute³⁸⁷ substantially similar to the English statute of 4 & 5 Wm. 4, c. 22. It has been held in that state, following the construction placed on the English statute, that the language of the provision does not authorize apportionment of the rent between the personal representative and the

³⁸³ See Kirby's Dig. St. Arkansas 1904, § 4688; *Delaware Rev. Code* 1893, p. 867; Hurd's Rev. St. Illinois 1905, c. 80, § 35; Burns' Ann. St. Indiana 1901, § 7104; *Iowa Code* 1897, § 2988; *Kentucky St.* 1903, § 3865; *Mississippi Code* 1906, § 2881; *Missouri Rev. St.* 1899, § 4098; 2 *New Jersey Gen. St.* p. 1915, § 2; *New York Real Prop. Law*, § 102; *South Carolina Civ. Code* 1902, § 2408; Shannon's Code, *Tennessee*, § 4184; *Wisconsin Rev. St.* 1898, § 2193.

In *Gudgel v. Southerland*, 117 Iowa, 309, 90 N. W. 623, the representative of the life tenant brought an action for an apportioned part of the rent against the remainderman, and it was held that he could not recover without showing how the rent was to be paid and what the *pro rata* share would be.

³⁸⁴ *Delaware Rev. Code* 1893, p. 867; *Iowa Code* 1897, § 2298; *Mississippi Code* 1906, § 2881; *North Carolina Revisal* 1905, § 1987; *Virginia Code* 1904, § 2810; *West Virginia Code* 1906, § 3419. This may be the purpose of occasional provisions (Kirby's Dig. St. Arkansas 1904, § 4689; Burns' Ann. St. Indiana 1901, § 7101; *Missouri Rev. St.* 1899, § 4099) that one entitled to rent dependent on the life of another may recover arrears thereof unpaid at the death of such other.

³⁸⁵ Hurd's Rev. St. Ill. c. 80, § 35; Burns' Ann. St. Ind. 1901, § 7104.

³⁸⁶ *Delaware Rev. Code* 1893, p. 867; *Massachusetts Rev. Laws* 1902, c. 129, § 9; *Rhode Island Gen. Laws* 1896, c. 269, § 21.

³⁸⁷ *Code Civ. Proc.* § 2720. 2674
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heir or devisee of a tenant in fee dying during the rent period.³⁸⁸ And a decision that the statute authorizes an apportionment, as between the parties to a conveyance of the reversion during a rent period,³⁸⁹ has been disapproved in subsequent decisions,³⁹⁰ and rightly so, it would seem.

The Massachusetts statute³⁹¹ provides that if the lessor has an estate terminable on a life or on a contingency, and such estate terminates before the end of a period for which rent is payable, or if an estate created by written lease, or an estate at will, is terminated by surrender, by notice to quit for nonpayment of rent, or by the death of any party, the landlord or his executor or administrator may recover a proportional part of the rent. This statute, it has been held, does not authorize an apportionment upon an eviction by a mortgagee having the legal title, this not involving the termination of the estate by "any contingency," which expression, as used in the act, refers to "the happening of some event affecting the nature and character of the estate itself, and an essential and necessary part of it, upon which the continuance of the estate depends."³⁹² Nor does it apply when the tenancy is one at will and it is terminated by the landlord's conveyance to a third person.³⁹³ But it has been held to apply when the lessor's estate came to an end by reason of the exercise by the lessee of an option to purchase the property.³⁹⁴

The two later English statutes, and likewise the New York statute, provide that the persons liable to pay the rents reserved by the lease or demise, or the land which was the subject thereof, shall not be resorted to for such apportioned parts, but the entire rents of which such portions form part shall be collected and recovered by the person or persons who, had the statute not been

³⁸⁸ *In re Weeks*, 5 Dem. Sur. (N. Y.) 194; *Miller v. Crawford*, 26 Abb. N. C. (N. Y.) 376. The Rhode Island statute (Gen. Laws 1896, c. 269, § 12) is almost exactly similar.

³⁸⁹ *In re Eddy*, 10 Abb. N. C. (N. Y.) 396; s. c. sub. nom., *People v. Globe Mut. Life Ins. Co.*, 65 How. Pr. 81. ³⁹² *Adams v. Bigelow*, 128 Mass. 365. ³⁹³ *Emmes v. Feeley*, 132 Mass. 346; *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137.

³⁹⁰ *In re Weeks*, 5 Dem. Sur. (N. Y.) 194; *Miller v. Crawford*, 26 Abb. N. C. (N. Y.) 376. ³⁹⁴ *Withington v. Nichols*, 187 Mass. 575, 73 N. E. 855.

³⁹¹ Rev. Laws 1902, c. 129, § 8.

passed, would have been entitled to such entire rents; and such portion shall be recoverable from such person or persons by the parties entitled thereto. Such a provision has been held to prevent recovery by the lessor of any portion of an installment of rent if the land is sold, before such installment falls due, under a lien prior to the lease, there being in such case no person entitled, apart from the statute, to the entire installment.³⁹⁵ And its effect would appear to be to prevent any recovery, under such a statute, of an apportioned part of the rent, by the representative of a life tenant lessor dying before the rent day, for the same reason, that there is no person entitled to recover the entire rent. The remainderman is not such a person, it is conceived, since a lease by a tenant for life, not acting under a power, is, after his death, absolutely void as regards the remainderman,³⁹⁶ and is incapable even of confirmation by the latter, he being an utter stranger thereto.³⁹⁷ Such a possible effect of this particular provision of the statutes has, however, never been suggested. An apportionment in such a case could still be supported, presumably, under the earlier statute applying in terms to that particular case.

Occasionally the language of a statute, not primarily dealing with the apportionment of rent, may have the effect of authorizing such apportionment in a particular case. Thus, a provision that a purchaser at execution sale shall have the rents till a resale or redemption has been regarded as entitling him to the rent from leased premises only until redemption or resale, though it is payable in advance and becomes due during such time.³⁹⁸ And in another case a provision that the purchaser shall "from the time of sale" receive from "the tenant in possession, the rents of the property sold" was held to give the purchaser a share of the installment next coming due, proportioned to the unexpired part of the rent period.³⁹⁹

³⁹⁵ *O'Neill v. Morris*, 28 Misc. 613, *James v. Jenkins*, Bull. N. P. 96 b. 59 N. Y. Supp. 1075.

³⁹⁶ *Byers v. Rothschild*, 11 Wash.

³⁹⁶ *Doe d. Simpson v. Butcher*, 1 296, 39 Pac. 688.

Doug. 50; *Doe d. Potter v. Archer*, ³⁹⁹ *Clarke v. Cobb*, 121 Cal. 595, 54 1 Bos. & P. 531; *Roe d. Jordan v. Ward*, 1 H. Bl. 96. It appears to be assumed in the opinion, wrongly, it is submitted, that, apart from the statute,

³⁹⁷ *Ludford v. Barber*, 1 Term R. 90; *Jenkins v. Church*, Cowp. 482; the purchaser under a lien prior to

c. **Express stipulations for apportionment.** Rent may be apportioned as to time by virtue of a stipulation to that effect, without reference to any statute upon the subject.⁴⁰⁰ The most frequent instance of such a stipulation occurs, no doubt, in the case of a contract for the sale of land which is subject to a lease, the rent being in terms made apportionable as of the date either of the contract or of the conveyance.

§ 177. Payment of rent.

a. **Presumptions.** The burden of showing payment of an installment or installments of rent, as of any debt, is ordinarily upon the person asserting such payment.^{400a}

The lapse of twenty years since the time for payment raises a presumption of payment, it has been held, even though the statute of limitations does not apply,⁴⁰¹ this being an application of a doctrine asserted by English decisions in the case of a bond or note,⁴⁰² and freely applied in this country in other cases.⁴⁰³

The giving of a written receipt for any particular installment of rent raises a presumption that all previous installments have

the lease would have the whole rent next to fall due. See post, at notes 623, 637. 102 N. W. 367, 110 Am. St. Rep. 349.

⁴⁰⁰ *Blake v. Sanderson*, 67 Mass. (1 Gray) 332; *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493; *Hecht v. Heerwagen*, 14 Misc. 529, 35 N. Y. Supp. 1090. 401 *Lyon v. Odell*, 65 N. Y. 28; *Central Bank of Troy v. Heyedorn*, 48 N. Y. 260; *Cole v. Patterson*, 25 Wend. (N. Y.) 457; *Jackson v. Davis*, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451.

Where by agreement the tenant, under a lease reserving an annual rent payable quarterly, held over "at the same rate," either party to have the right, by a month's notice, to terminate the lease, the tenant was regarded as liable only for a proportional part of the rent for the time during which he held over, this being construed as an agreement for apportionment. *May v. Rice*, 108 Mass. 150, 11 Am. Rep. 328. In *Bailey v. Jackson*, 16 Johns. (N. Y.) 210, 8 Am. Dec. 309, it was held that where a lease was made in England of land in this country, the subsequent removal of the lessee to this country, the lessor's ignorance of his residence, and the lessee's denial that he had ever paid rent or executed the instrument of lease, were sufficient to rebut this presumption of payment arising from the lapse of twenty years.

^{400a} *Jones v. Hausmann*, 23 N. Y. Super. Ct. (10 Bosw.) 168; *Montgomery v. Leuwer*, 94 Minn. 133. ⁴⁰² *Anonymous*, 6 Mod. 22; *Oswald v. Legh*, 1 Term R. 270. ⁴⁰³ See cases cited 22 Am. & Eng. Enc. Law (2d Ed.) 593.

been paid, a presumption which is, however, rebuttable.⁴⁰⁴ The acceptance of an installment, without the giving of a receipt, will, it seems, have the same effect.⁴⁰⁵ The giving of a receipt for an installment will not, it has been held, raise a presumption of the payment of installments which had become due from and during the tenancy of a person other than the one to whom the receipt is given.⁴⁰⁶

b. **Giving note, bill, or bond for amount.** Rent is regarded as a debt of a high nature, as high as one upon a sealed instrument,⁴⁰⁷ and consequently the claim for rent is not extinguished by the fact that the tenant gives such an instrument for the amount of the rent, as would ordinarily be the case if rent were regarded as an ordinary simple contract debt, and the landlord has thereafter the same remedies for the collection of the rent as he had before.⁴⁰⁸ And *a fortiori* it is not extinguished by the giving of a note for the rent,⁴⁰⁹ or a bill of exchange.⁴¹⁰ If, however, a

⁴⁰⁴ *Brewer v. Knapp*, 18 Mass. (1 Pick.) 332, 11 Am. Dec. 183; *Ottens v. Fred. Krug Brew. Co.*, 58 Neb. 331, 78 N. W. 622; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Jenkins v. Calvert*, 3 Cranch, C. C. 216. Fed. Cas. No. 7,623.

⁴⁰⁵ See *Terry v. Bale*, 1 Dem. Sur. (N. Y.) 452.

⁴⁰⁶ *Wills v. Gibson*, 7 Pa. 154.

⁴⁰⁷ *Smith, Landl. & Ten.* (3d Ed.) p. 177; *Willett v. Earle*, 1 Vern. 490; *Gage v. Acton*, Carth. 511; *Vincent v. Godson*, 4 De Gex, M. & G. 546.

⁴⁰⁸ *Bates v. Nellis*, 5 Hill (N. Y.) 651; *Cornell v. Lamb*, 20 Johns (N. Y.) 407; *Bailey v. Wright*, 3 McCord (S. C.) 484; *Smith, Landl. & Ten.* (3d Ed.) 177; 1 Rolle, Abr., Dett, *Extinguishment* (A), pl. 2, p. 605. In *Howell v. Webb*, 2 Ark. 360, however, it is decided that if one of two tenants under an oral lease gives his individual bond for the rent, the claim for rent is extinguished, and consequently he may

recover a proportionate part of the rent from the other tenant.

⁴⁰⁹ *Snyder v. Kunkleman*, 3 Pen. & W. (Pa.) 487; *Judge v. Eager*, 2 Speer Law (S. C.) 436, 42 Am. Dec. 380; *Bailey v. Wright*, 3 McCord Law (S. C.) 484; *Hilley v. Perrin*, 3 Ga. App. 143, 59 S. E. 342; *Hornbrooks v. Lucas*, 24 W. Va. 493, 49 Am. Rep. 277; *Giles v. Ebsworth*, 10 Md. 333; *Sutliff v. Atwood*, 15 Ohio St. 186; *Atkins v. Byrnes*, 71 Ill. 326; *Dorrance v. Jones*, 27 Ala. 630.

So the giving of a note does not affect the right of the landlord to a year's rent as against an execution creditor, under the statute of *Anne*. *Fife v. Irving*, 1 Rich. Law (S. C.) 226 (post, § 183).

The fact that the note is secured by a chattel mortgage is immaterial. *Atkins v. Byrnes*, 71 Ill. 326; *Lofsky v. Maujer*, 3 Sandf. Ch. (N. Y.) 69.

⁴¹⁰ *Loux v. Fox*, 171 Pa. 68, 33 Atl. 190 (bank check); *Arguelles v. Wood*, 2 Cranch, C. C. 579, Fed. Cas.

bond or note is accepted in satisfaction of the rent, it operates as an absolute payment, and thereafter the landlord has no remedy for the collection of the rent as such, but must proceed upon the bond or note.⁴¹¹

In this country it has been held that, by the giving of a note, bill, or bond for the rent, the remedy for nonpayment of the rent is postponed until the maturity of the instrument thus given, apparently on a presumption to the effect that such was the intention of the parties.⁴¹² In England there is, it seems, no such presumption, but the giving of the note or bond is to be considered by the jury as evidence, together with the circumstances under which it was given, to determine whether such was the intention.⁴¹³

c. **Payment before rent due.** At common law a payment of the amount of the rent before the day on which the rent became

No. 520 (tenant accepting landlord's draft).

⁴¹¹ *Drake v. Mitchell*, 3 East, 251; *Columbia Iron Co.'s Appeal*, 114 Pa. 66.

In *Howland v. Coffin*, 26 Mass. (9 Pick.) 52, it was regarded as properly a question for the jury whether a note was accepted as payment of the rent.

In *Mulligan v. Hollingsworth*, 99 Fed. 216, where the lease provided that the lessee should give his note, at one year, and should pay the taxes "as additional rent," and there was no other stipulation as to rent, it was held that the execution of the note was payment of the rent, and hence that payment of the note was not payment of the rent, so as to involve a waiver of a previous forfeiture for waste.

In *Parrott v. Anderson*, 7 Exch. 93, where a tenant gave to the landlord's agent a bill of exchange for the amount of rent due, and the agent endorsed the bill over to a third person, and afterwards gave

credit to the landlord on his account as if the tenant had paid the rent in money, it was held to be a question for the jury whether the transaction constituted a discount of the bill by the agent for the tenant, in which case the rent was paid, and a distress was improper, or was a mere advance of the rent by the agent to the landlord, in which case the landlord could still distrain.

⁴¹² *Judge v. Eager*, 2 Speer Law (S. C.) 436, 42 Am. Dec. 380; *Bailey v. Wright*, 3 McCord Law (S. C.) 484; *Fife v. Irving*, 1 Rich. Law (S. C.) 226; *Hornbrooks v. Lucas*, 24 W. Va. 493, 49 Am. Rep. 277 (suspends right of distress).

⁴¹³ *Palmer v. Bramley* [1895] 2 Q. B. 405, distinguishing *Davis v. Gyde*, 2 Adol. & E. 623, as having been decided on the pleadings. This case is followed in *Colpitts v. McCullough*, 32 Nova Scotia, 502. See, also, *Simpson v. Howitt*, 39 U. C. Q. B. 610.

due did not operate as a discharge,⁴¹⁴ and it did not even prevent a re-entry for nonpayment of the rent on such subsequent day,⁴¹⁵ a distinction in this respect being taken between such a payment on account of rent and on account of a sum in gross.⁴¹⁶ Such a payment on account of rent to become due, was, however, sufficient in equity, no doubt, as against the person to whom it was made.⁴¹⁷ And there are probably but few, if any, jurisdictions in which at the present day it would be regarded as insufficient as against such person even at law, in view of the statutes authorizing equitable defenses.

Though a premature payment on account of rent would thus be sufficient as a defense against the beneficiary of the payment, it is not, according to the common-law authorities above referred to, a payment of the rent, until the rent day has actually arrived. Such a payment, it is said by a distinguished English judge, "is not a fulfillment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due, such advance shall be treated as a fulfillment of the obligation to pay the rent,"⁴¹⁸ and, accordingly, in that jurisdiction, a payment of rent before it is due, while good as against the person to whom it is made, is not good as against one to whom the reversion is transferred before the rent falls due.⁴¹⁹ In this country, however, a different view has been occasionally asserted, to the effect that such a payment is effective as against a subsequent transferee of the reversion,⁴²⁰ the result of which

⁴¹⁴ Co. Litt. 315 a; Clun's Case, 10 Coke, 127 a.

⁴¹⁵ Cromwel v. Andrews, Cro. Eliz. 15.

⁴¹⁶ Littleton v. Pernes, 1 Leon. 136, where it is said: "If the lessee covenant to pay his rent to the lessor, and he payeth it before the day, the same is not any performance of the covenant, *causa patet*, contrary of a sum in gross."

⁴¹⁷ See Rockingham v. Penrice, 1 Swansf. 345. note; Nash v. Gray, 2 Fost. & F. 391, and remarks of Kenyon, C. J., in Sturdy v. Arnaud, 3 Term R. 599.

⁴¹⁸ Per Willes, J., in De Nicholls v. Saunders, L. R. 5 C. P. 589.

⁴¹⁹ De Nicholls v. Saunders, L. R. 5 C. P. 589. And see Cook v. Guerra, L. R. 7 C. P. 132.

⁴²⁰ David Bradley & Co. v. Peabody Coal Co., 99 Ill. App. 427; Stone v. Patterson, 36 Mass. (19 Pick.) 476, 31 Am. Dec. 156. The latter case cited Farley v. Thompson, 15 Mass. 18, where it was decided that a parol agreement, made at the time of the lease, that the installments of rent should be paid by installments of interest to accrue under a loan by the lessee to

doctrine is that a person who buys the reversion on the supposition that, as owner of the reversion, he will receive an installment of rent which is due at a subsequent date, may be deprived of the rent by a prior transaction between the tenant and his vendor, of which he has no notice.

The ordinary rule is that a purchaser for value of the legal title to land takes free from equities of which he has no notice, and it is not apparent why the purchaser of a reversion to which rent is incident should not be entitled to the benefit of this rule. Rent which is not due is not a chose in action,⁴²¹ and, consequently, there is no room for the application, in this connection, of the rule that an assignee of a chose in action takes subject to the equities existing between the original parties. The English rule, placing upon the tenant the risk of deviation from the terms prescribed by the lease in this respect, is the only safeguard, it would seem, against collusion between a landlord and his tenant, to defraud one about to purchase the former's interest. If such fraudulent collusion should be shown, the purchaser would no doubt be

the lessor, was a good defense to an action for rent by one to whom the lessor had transferred the reversion for a valuable consideration; this case in turn citing *Sturdy v. Arnaud*, 3 Term R. 599, where it was decided that an agreement as to the payment of a personal annuity by sums to become due from the grantor of the annuity was binding on the annuitant's assignees in bankruptcy. This seems but an application of the doctrine that such assignees take the bankrupt's property subject to all equities.

In *Hovey v. Walker*, 90 Mich. 527, 51 N. W. 678, also, there is in effect a decision contrary to the English rule, it being there held that a transferee of the reversion was bound by an agreement, of which he was ignorant, made at the time of the lease, that payments to be made by the lessee in behalf of the lessor

to the latter's creditors should be applied in extinguishment of rent. If the statements of counsel in this case are correct, the lessee made such payments to third persons after the transfer of the reversion and after he, the lessee, knew of the transfer. Under such a decision, a lessor, it would seem, need merely make an agreement with the lessee at the time of the lease that the installments of rent are to be paid to third persons, and a purchaser of the reversion, though he has no reason to suspect the existence of such an agreement, and though he immediately notifies the lessee of his purchase, can merely stand by and allow the rent to be paid to others in accordance with the agreement.

⁴²¹ Co. Litt. 292 b; *Patten v. Deshon*, 67 Mass. (1 Gray) 325; *Van Wicklen v. Paulson*, 14 Barb. (N. Y.) 654.

given relief,⁴²² but to prove that an advance payment was made with such a purpose would ordinarily be difficult, if not impossible. One purchasing land is ordinarily charged with notice of a lease thereof, either by the tenant's possession thereunder, or the record of the lease, but to impose on him in addition the obligation of acquainting himself with the state of accounts between his vendor and the tenant under the lease calls for a degree of vigilance not ordinarily required of a purchaser of property. If the tenant chooses to make advances to the landlord on the strength of subsequently accruing liabilities for rent, he himself should assume the risk thereof and not cast them upon an innocent third person.

There are occasional decisions in this country to the effect that a payment of rent before it is due, made by a tenant to his landlord, is invalid as against one claiming as purchaser at a sale under a mortgage or judgment constituting a lien upon the reversion.⁴²³ These decisions, while according in result with the English rule above referred to, are based on a different theory, that is, that the tenant is charged with notice of the mortgage or judgment, this being of record, and consequently cannot thereafter pay rent, before it is due, without considering the possible rights thereto of one claiming under the mortgage or judgment. But it does not seem that the right of the tenant to pay in advance should be based upon the state of the records at the time of the payment, since the records are intended for other purposes, that is, to protect subsequent purchasers, and it is a general rule that one who has acquired an interest in the land previous to the recording of an instrument is not affected with notice by such record.⁴²⁴ Under the English rule, which, it is conceived,

⁴²² It has been held that if the cases the claimant of the rent was tenant fraudulently pays rent in a purchaser under a lien prior to advance in order to prevent an execution purchaser of the reversion properly in the position of one as from obtaining his proportion of setting paramount title, and not the rent, such purchaser may still of a purchaser of the reversion. *Baker v. Burton*, 3 Houst. Ante, §§ 73 c, 147. The decisions distrain. (Del.) 10. assume, however, that he was a

⁴²³ *Harris v. Foster*, 97 Cal. 392, purchaser of the reversion.
⁴²⁴ *Webb*, Record of Title, § 163;
 32 Pac. 246, 33 Am. St. Rep. 198;
Martin v. Martin, 7 Md. 368, 61 Am. 2 *Pomeroy*, Equity Jurisprudence,
 Dec. 364; *Henshaw v. Wells*, 28 §. 657.
 Tenn. (9 Humph.) 568. In these

asserts the preferable view in this regard, a payment of rent to a landlord, if made in advance, is invalid as against one claiming under a mortgage of the reversion, even though the mortgage is not made till after the payment, that is, though notice of the mortgage at the time of payment is impossible.⁴²⁵

In any jurisdiction, it seems, if the tenant under the lease is not notified of the transfer of the reversion until after the day for payment of rent has arrived, his premature payment will stand as if made on that day, and he will be protected against any claim for the installment on the part of the transferee.⁴²⁶

d. Payment to person not entitled. We consider elsewhere the question of who is the person entitled to receive the rent due by the tenant,⁴²⁷ such person being ordinarily the owner of the reversion, or one to whom the rent has been transferred without the reversion. A payment to one other than the person entitled to the rent is usually invalid,⁴²⁸ unless made to one authorized as agent to receive it for such person.⁴²⁹ And it has been held that even when the instrument of lease named the person to whom rent was to be paid during the term for the account of the landlord, the latter could, unless such stipulation was for the benefit of the tenant, revoke such person's authority to receive the rent, so as to render a subsequent payment to him invalid.⁴³⁰ Likewise, if one of several colessors, who have named an agent to whom the lessee is to pay the rent, revokes the authority of that agent, and so notifies the lessee, subsequent payments to him of rent are invalid as regards the share of that particular lessor.⁴³¹

⁴²⁵ *Cook v. Guerra*, L. R. 7 C. P. 132. Since the person entitled may sue at law for the rent in spite of such

⁴²⁶ See *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. 193. payments to a third person, he cannot proceed in equity. *Merrell v. Atkin*, 29 Ill. 469. Compare *Davenport v. Haynie*, 30 Ill. 59.

⁴²⁷ See post, § 180. ⁴²⁹ *Eyles v. Ellis*, 4 Bing. 112; *White v. Mandeville*, 72 Ga. 705 (payment to officer levying distress, valid).

⁴²⁸ *Merrell v. Atkin*, 29 Ill. 469. So a payment to the lessor of rent due to his transferee is invalid. *Willard v. Tillman*, 19 Wend. (N. Y.) 358; *Thomas v. Judy* (Tex. Civ. App.) 44 S. W. 890. And a payment of rent due the lessor is invalid if made to a transferee of the lessor. ⁴³⁰ *Venning v. Bray*, 2 Best & S. 502.

Mohr v. Quigley, 30 Misc. 753, 63 N. Y. Supp. 149. ⁴³¹ *Barrett v. Bemelmans*, 163 Pa. 122, 29 Atl. 756.

Even the fact that the landlord acquiesces in a payment to a person not entitled to receive it, under the mistaken impression that such person is so entitled, has been held not to preclude the landlord from afterwards collecting it from the tenant.⁴³² But the circumstances may be such that the landlord's assent to the payment of rent to a third person will estop him from afterwards asserting a claim to the rent so paid.⁴³³

A payment of the rent to one of two or more tenants in common entitled thereto has been held to be a good payment as to all,⁴³⁴ a view which accords with the ordinary rule that payment may be made to one of two or more joint payees.⁴³⁵

e. **Payment by discharge of landlord's obligations.** In certain cases payments made to a person, other than the landlord or the landlord's agent, may be regarded as payments *pro tanto* on the rent. The general principle underlying these cases is that "the immediate landlord is bound to protect his tenant from all paramount claims; and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or accruing due."⁴³⁶ Accordingly it is held that a subtenant may pay to the head landlord rent due to the latter by the sublessor, and deduct the amount of his payment from the rent to be paid to the sublessor,⁴³⁷ and it is immaterial whether such payment was in any way constrained or even demanded by the head landlord.⁴³⁸ And the same principle has been applied when the tenant paid taxes due by the landlord,⁴³⁹ or an annuity charged on the land.⁴⁴⁰ It would

⁴³² Williams v. Bartholomew, 1 Bos. & P. 326.

⁴³³ Winterink v. Maynard, 47 Iowa, 366; Campbell v. Heflin (Tex.) 16 S. W. 539.

⁴³⁴ Grossman v. Lauber, 29 Ind. 618. See Robinson v. Hofman, 4 Bing. 562.

⁴³⁵ See authorities cited 22 Am. & Eng. Enc. Law (2d Ed.) 618.

⁴³⁶ Per Rolfe, B., in Graham v. Allsopp, 3 Exch. 186.

⁴³⁷ Taylor v. Zamira, 6 Taunt. 524; Sapsford v. Fletcher, 4 Term R. 511; Collins v. Whilldin, 3 Phila. (Pa.) 102; Thompson v. Commercial Guano Co., 93 Ga. 282, 20 S. E. 309.

⁴³⁸ Carter v. Carter, 5 Bing. 406; Peck v. Ingersoll, 7 N. Y. (3 Seld.) 528; Raubitscheck v. Semken, 4 Abb. N. C. 205, note.

⁴³⁹ See ante, § 142.

⁴⁴⁰ Taylor v. Zamira, 6 Taunt. 524.

likewise apply, it seems, in favor of a tenant paying the principal or interest of a mortgage prior to the lease, upon the demand of the mortgagee.⁴⁴¹ But it has been decided that the tenant thus making a payment to a third person to protect his possession can deduct it only from rent then due, or the installment next becoming due, and he cannot pay the next installment of rent in full and seek to deduct the payment made to a third person from an installment subsequently falling due.⁴⁴² A payment to a third person, thus to operate as a payment *pro tanto* on the rent, must, it is said, be made in order either to relieve the tenant of an incumbrance on the premises or to discharge a debt due by the landlord, and consequently a payment of the amount of the rent to one who claims merely by paramount title is not sufficient for this purpose.^{443, 444}

If the instrument of lease expressly authorizes the tenant to make certain payments to a third person on account of the rent, the making of such payments will discharge the rent *pro tanto*.⁴⁴⁵ A provision authorizing the lessee to withhold from the landlord a sufficient part of the rent to pay a third person for work and material furnished in erecting the house on the premises, "as the parties shall hereafter agree or shall hereafter be determined is due," was held to authorize the lessee to retain a reasonable sum for the purpose, if the amount due such creditor had not been determined when the rent fell due.⁴⁴⁶

A provision of the lease for the "allowance" to the lessee of a certain amount off the rent on account of certain things to be done by the lessee or certain payments to be made by him does not, it has been decided, decrease the amount of the rent reserved.⁴⁴⁷

⁴⁴¹ Johnson v. Jones, 9 Adol. & E. 809; Underhay v. Read, 20 Q. B. Div. 209. ⁴⁴⁶ Hunt v. Thompson, 84 Mass. (2 Allen) 341.

⁴⁴² Carter v. Carter, 5 Bing. 406; 34; s. c., sub. nom., Chambers v. Andrew v. Hancock, 1 Brod. & B. Mason, Yel. 42, 47; Burroughs v. 37; Stubbs v. Parsons, 3 Barn. & Hays, Comb. 21; Davies v. Stacey, Ald. 516; Dawes v. Thomas [1892] 12 Adol. & E. 506. But in Johnson v. Carre, 1 Lev. 152, it was held, in debt for rent on a lease for years, that a covenant by the lessor that the lessee might deduct so much for charges was pleadable in bar.

^{443, 444} Boodle v. Campbell, 7 Man. & G. 386.

⁴⁴⁵ Taylor v. Beal, Cro. Eliz. 222; Roper v. Bumford, 3 Taunt. 70.

f. **Payment in commodities or labor.** As before stated, rent may, by the terms of the lease, be payable in money, in specific articles, or in the performance of services, and, even if a money rent is named by the lease, particular installments of rent may, by agreement, be paid in commodities or by the rendition of services.⁴⁴⁸ Where the lease provides for the payment of rent in specific articles, the fact that money to an equivalent value has been received for many years does not, it has been held, show an agreement thereafter to receive money in place of the articles named.⁴⁴⁹ But a stipulation for the payment of a certain sum as rent in specific articles at prices named has been regarded as leaving it optional with the tenant whether to pay the sum named or to deliver the articles,⁴⁵⁰ this corresponding with the general rule as to a contract in that form.⁴⁵¹

A lessee agreeing to pay rent in money or in a particular improvement on the premises, to be completed by the end of the term, cannot, it has been decided, claim credit for work done on the improvement, this having been washed away before completion.⁴⁵²

Where rent is to be paid in commodities, the title to such commodities passes to the landlord when delivered to him personally or at the place named,⁴⁵³ and the fact that they are not delivered at the place named is immaterial if they are accepted by the landlord.⁴⁵⁴ But if the landlord has an option whether to accept money rent or to take an equivalent amount of the products

it being in the same deed, and that the tenant was not "put to circuity of action and to bring an action on the covenant."

⁴⁴⁸ In *Dills v. Stobie*, 81 Ill. 202, it was held that if the tenant, on quitting the premises, offered certain chattels on the premises, exceeding in value the amount of the rent due, in payment of the rent, and the landlord made no objection, but retained them for a considerable time, he might be regarded as having accepted them in payment.

⁴⁴⁹ *Lilley v. Fifty Associates*, 101 Mass. 432. But such long con-

tinued receipt of money may prevent a forfeiture for failure to furnish the specific articles promptly. *Id.* See post, § 194 1 (2), note 341.

⁴⁵⁰ *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277.

⁴⁵¹ See 22 Am. & Eng. Enc. Law (2d Ed.) 542.

⁴⁵² *Clayton v. McKinney*, 57 Tenn. (10 Heisk.) 72.

⁴⁵³ *Burns v. Cooper*, 31 Pa. 426; *Fordyce v. Hathorn*, 57 Mo. 120.

⁴⁵⁴ *Houglund v. Dent*, 52 Mo. App. 237.

of the leased premises, he has no title, it has been said, to any part of such products, until he takes possession thereof.⁴⁵⁵

g. **Payment by means of repairs.** Upon the question whether, when the landlord is under an obligation to make repairs, the tenant can make them and treat the sums so expended as payments on account of rent, is a question on which the authorities are not in accord. In case it is expressly agreed that sums expended by the tenant on repairs shall be applied on the rent, such expenditures constitute a payment *pro tanto*,⁴⁵⁶ in accordance with a general rule that payments made by a debtor to a third person, in accordance with an agreement with the creditor, and on account of the debt, are a discharge *pro tanto* of the debt. There are also authorities to the effect that an agreement by the lessor that the lessee may make repairs at the lessor's expense has a like effect, of constituting the expenditures made by the lessee for repairs a payment in whole or in part of the rent.⁴⁵⁷ But a modern English case appears to adopt a contrary view.⁴⁵⁸

⁴⁵⁵ *In re Wait*, 24 Mass. (7 Pick.) 100, 19 Am. Dec. 262. In this case the lease was construed as giving the landlord the right to take a part of the products of the premises only so long as the lessee was alive, so that on the lessee's death the title thereto became absolutely vested in the administrator.

⁴⁵⁶ *Dallman v. King*, 4 Bing. N. C. 105; *Woods v. Rock*, Alc. & N. 57; *Fillebrown v. Hoar*, 124 Mass. 580; *Stanley v. Turner*, 68 Vt. 315, 35 Atl. 321. See *Clayton v. McKinney*, 57 Tenn. (10 Heisk.) 72. But in *Y. B. 14 Hen. 4*, 27, there is a dictum by Hankeford, J., that if the lease was by deed, a parol agreement by the lessor that such payments might be applied on the rent could not be shown.

⁴⁵⁷ In *Fitzherbert's Abr.*, Barre, 242; s. c., *Bellewe's Cases temp. Rich. 2* (reprint 1869) p. 137, the defendant in an action of debt for rent alleged that the plaintiff lessor "granted us that we might re-

pair the said lands at the time they were ruinous at the expense of the plaintiff," and alleged the making of repairs, and upon the statement by plaintiff's counsel that it was not shown that the repairs ought to be made with the rent, Bealknap, J., remarked: "He has said that the messuage was ruinous and defective, and that he has expended the money in repairs; by which payment," and the plaintiff's counsel then said that the expenditures for repairs were a part only of the rent. This case is translated in a learned article on the point under discussion in 17 *Law Quart. Rev.*, at p. 26, by Arthur E. Hughes, Esq.

In *Bro. Abr.*, Dette, pl. 236, it is said: "Debt upon a lease by indenture which allowed that the lessee should repair the house at the cost of the lessor. It is a good plea in debt for the rent that he had expended it upon the repairs."

⁴⁵⁸ *Graham v. Tate*, 1 Maule & S. 609, where, in assumpsit by the ten-

There are at least *dicta* among the older authorities to the effect that a mere covenant by the lessor to make repairs will of itself authorize the lessee to make them, and assert his expenditure in this regard as a payment upon the rent when sued in debt therefor.⁴⁵⁹ And there is a case in this country to the same effect.⁴⁶⁰ There is, however, a modern English decision to the contrary.^{461, 462}

h. Excusing payment of rent by way of gift. It has been held that a liability for particular installments of rent cannot be extinguished by the voluntary gift of the debt to the tenant, unless there is a delivery of a written receipt for the rent, or of some equivalent instrument,⁴⁶³ this being in conformity with the general rule that the gift of a debt, made by the creditor to the debtor, must be evidenced by writing, or by the surrender of the evidence of indebtedness.⁴⁶⁴

ant for money laid out and expended on behalf of the defendant landlord, it appeared that the tenant was, by the terms of the lease, to pay all taxes except the landlord's property tax, which the "latter agreed to allow," and the tenant also agreed to lay out twenty pounds in repairs, which the landlord also "agreed to allow," and it was held that the landlord having distrained for the whole amount of the rent, without allowing for repairs or for the property tax, the tenant could not recover "upon the question of repairs," though he might recover as to the taxes. It is not stated why he could not recover as to the repairs.

⁴⁵⁹ *Taylor v. Beal*, Cro. Eliz. 222; s. c., sub. nom., *Beale & Taylor's Case*, 1 Leon. 237. In *Y. B. 12 Hen. 8, 1*, Brudnel, J., says that "if the lessor covenants to repair the house and does not do it, the lessee can repair it and stop so much money in his hand in spite of his deed, and if he has any trees growing upon the place, he can cut them down and re-

pair (quod fuit concessum)." In Chief Baron Gilbert's work on the Action of Debt, it is said, at p. 442 (as quoted in 17 Law Quart. Rev. at p. 30): "If a man declares for rent upon a deed indented, and the lessor covenants to repair, there, if the lessee lays out any part of the rent in repairs, he must plead the lessor's covenant to repair and that he laid out the rent in pursuance of the covenant, but cannot give the rent in evidence on the general issue. * * * And this must be pleaded as well where the lessor covenants to repair as where the lessor covenants that the lessee shall repair out of the rents. For in the first case if the lessor do not repair, the lessee may do it in preservation of his own estate."

⁴⁶⁰ *Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. 751.

^{461, 462} See *Graham v. Tate*, 1 Maule & S. 609, supra, note 458.

⁴⁶³ *In re Gregg*, 11 Misc. 153, 32 N. Y. Supp. 1103.

⁴⁶⁴ See cases cited 14 Am. & Eng. Enc. Law (2d Ed.) 1031.

i. **Application of payments on rent.** The rule ordinarily recognized in this country, that, if a debtor in making a payment fails to state to which of one or more claims the payment shall be applied, the creditor may make such application as he may please, applies in connection with claims for rent as in other cases. Thus the landlord may, in such case, apply the payment upon an unsecured claim rather than upon the rent, which is secured,⁴⁶⁵ even though this results in a forfeiture of the leasehold for nonpayment of rent.⁴⁶⁶ And he may apply it on later installments of rent as against one who is surety for the earlier installments,⁴⁶⁷ or he may apply it on earlier installments, which accrued before an assignment of the leasehold, as against the assignee.⁴⁶⁸ If no application of payments is made by either the tenant or landlord, they will be applied upon the installments of rent which first become due.⁴⁶⁹

If colessees direct the application of a payment made by them upon the rent, the landlord cannot apply it upon an individual debt of one of them,⁴⁷⁰ and, necessarily, if a single tenant directs a payment to be applied on rent, the landlord cannot apply it otherwise.⁴⁷¹

j. **Pleading payment.** At common law, in an action of debt for rent, that the rent has been paid might be shown under a plea of *nil debet*, of *rien in arrear*, or of payment, while if the rent had been satisfied by distress the plea was *levie per distress*. In assumpsit, evidence of payment could be given under the general issue. In covenant, payment was a proper plea, provided the payment was made upon the day on which the rent became due, but, if made subsequently, this itself involving a breach of the covenant, accord and satisfaction was the proper plea.⁴⁷² In this country the admissibility of evidence of payment under the

⁴⁶⁵ Soluble Pac. Guano Co. v. Harris, 78 Ga. 20; Aderholt v. Embry, 78 Ala. 185; Thatcher v. Tillory (Tex. Civ. App.) 70 S. W. 782. The law will make such application, it has been decided, if the landlord fails to do so. Garrett's Appeal, 100 Pa. 597.

⁴⁶⁶ Brown v. Larry (Ala.) 44 So. 841.

⁴⁶⁷ Brewer v. Knapp, 18 Mass. (1 Pick.) 332, 11 Am. Dec. 183.

⁴⁶⁸ Collender v. Smith, 20 Misc. 612, 45 N. Y. Supp. 1130.

⁴⁶⁹ Reed v. Ward, 22 Pa. 144.

⁴⁷⁰ Kahler v. Hanson, 53 Iowa. 698, 6 N. W. 57.

⁴⁷¹ Atkinson v. Cox, 54 Ark. 444, 16 S. W. 124. See Avera v. McNeill, 77 N. C. 50.

⁴⁷² Comyn, Landl. & Ten. 535-538.

general issue plea, the equivalent of the *non debet* or the *non assumpsit* of the common law, would presumably be determined, in connection with an action of rent, by the general rule in this regard which may, by reason of statute, or otherwise, apply to actions of contract generally.⁴⁷³ while satisfaction by distress would presumably be required to be pleaded specially.⁴⁷⁴

§ 178. Tender of rent.

a. **Effect of tender.** A tender of rent on the day on which it is due, if kept good, is a defense to a subsequent action for rent, relieving the tenant from any liability for interest or costs.⁴⁷⁵ It also prevents a forfeiture for nonpayment of the rent so tendered,⁴⁷⁶ and a valid tender of the rent at any time will render a subsequent distress illegal, unless the landlord demands the rent before distraining.⁴⁷⁷ A valid tender of rent payable in crops has been held to pass the title to the crops tendered, and to place upon the landlord the risk and expense of their subsequent keeping.⁴⁷⁸

b. **Time of tender.** A tender made before the day on which the rent is payable is insufficient for any purpose, if not accepted by the landlord,⁴⁷⁹ the same rule being applicable to a tender of rent as of any other debt.⁴⁸⁰

A personal tender of the rent after the day for payment, with interest and costs, is ordinarily sufficient to prevent a subsequent distress, unless the landlord thereafter demands the rent.⁴⁸¹ At common law it is not sufficient for other purposes, it seems,⁴⁸²

⁴⁷³ See 16 Enc. Pldg. & Prac. 170 et seq.; Hubbard v. McCormick, 33 Ill. App. 486; Russell v. Fabyan, 28 N. H. 543, 61 Am. Dec. 629. But if the landlord denies the relation of tenancy, the tender need not, it has been said, be repeated. Parker v. Gortatowsky, 129 Ga. 623, 59 S. E. 286.

⁴⁷⁴ See Lear v. Edmonds, 1 Barn. & Ald. 157. ⁴⁷⁷ See post, chapter XXXII.

⁴⁷⁵ Remsen v. Conklin, 18 Johns. (N. Y.) 447; Walter v. Dewey, 16 Johns. (N. Y.) 222; Livingston v. Miller, 11 N. Y. (1 Kern.) 80; Parker v. Gortatowsky, 129 Ga. 623, 59 S. E. 286; Crouche v. Fastolfe, T. Raym. 418. ⁴⁷⁸ Fordyce v. Hathorn, 57 Mo. 120.

⁴⁷⁹ Illingworth v. Miltenberger, 11 Mo. 80.

⁴⁸⁰ See 22 Am. & Eng. Enc. Law (2d Ed.) 530; 28 Am. & Eng. Enc. Law (2d Ed.) 20.

⁴⁸¹ See post, chapter XXXII. ⁴⁸² That it is not, at common law, sufficient to prevent a forfeiture

but it would, ordinarily, at the present day, if kept good, be sufficient to prevent a forfeiture.⁴⁸³ In most states, presumably, a tender, after the day for payment, of rent, as of most other debts, is sufficient to exclude liability for subsequent interest and costs.⁴⁸⁴

c. **Place of tender.** If a particular place is named for the payment of rent, a tender elsewhere is insufficient.⁴⁸⁵ The lessee's right to make tender at the particular place named by the lease is, however, waived, it has been decided, if, when called on for the rent on the premises, he promises to pay it the next day at the lessor's office, and refuses to pay it the next day when called on for it on the premises, and then tenders it at the place named by the lease, at which place there is no person to receive it.⁴⁸⁶

If no place for payment is named, the tenant may make tender at any place at which he may find the landlord,⁴⁸⁷ unless, it seems, the rent to be paid consists of grain or other bulky articles, in which case it is his duty to deliver them on the land.⁴⁸⁸

d. **Person to whom tender to be made.** The tender must ordinarily be made to a person entitled to receive the rent, that

would seem to follow from the fact that even acceptance of the rent after it is due is not sufficient to prevent a forfeiture for its nonpayment. See post, § 194 i (1) (b), at note 214. That tender after the date for payment is not sufficient in actions for a personal debt, see *Dixon v. Clark*, 5 C. B. 379; *Hume v. Peploe*, 8 East, 163; *Poole v. Tumbridge*, 2 Mees. & W. 223. *v. Le Conte*, 6 Cow. (N. Y.) 728; Co. Litt. 210 b. ⁴⁸⁸ *Fordyce v. Hathorn*, 57 Mo. 120; *Remsen v. Conklin*, 18 Johns. (N. Y.) 450. But if the articles are to be delivered in a certain city, the tenant must ascertain at what place in the city the landlord wishes them delivered. *Lush v. Druse*, 4 Wend. (N. Y.) 313.

⁴⁸³ See post, § 194 l (3).
⁴⁸⁴ See 28 Am. & Eng. Enc. Law (2d Ed.) 12; *Hunt, Tender*, §§ 281, 363, 364; 11 *Cyclopedia Law & Proc.* 71, 77; 22 *Cyclopedia Law & Proc.* 1555, 1557.

⁴⁸⁵ *Bac. Abr., Tender (C); Start-up v. Macdonald*, 6 Man. & G. 623, opinion of Parke, B.

⁴⁸⁶ *Fisher v. Smith*, 48 Ill. 184.

⁴⁸⁷ *Bac. Abr., Tender (C); Cropp v. Hambleton*, Cro. Eliz. 48; *Hunter*

In *Holt v. Miller* (Tex. Civ. App.) 32 S. W. 823, it is decided that the fact that the landlord had asked the tenant where he should deliver his share of the crop rent, and that the landlord had refused to tell him, did not justify the tenant in removing a part of the crop, though enough was left to pay the rent, the landlord having in the meanwhile notified him of the place for delivery, but no delivery having been made.

is, either to the landlord himself,⁴⁸⁹ or to the agent of the landlord,⁴⁹⁰ as, for instance, the officer charged with the levy of a distress warrant.⁴⁹¹

e. **Tender in landlord's absence.** There are cases to the effect that, if no place of payment is named, the land being regarded as the place for tender in such case, the presence of the tenant on the land, upon the day fixed for payment, prepared to pay the rent, is equivalent to a personal tender for the purpose of an action of debt, provided he keeps the tender good,⁴⁹² though it was held otherwise on a plea by plaintiff in replevin, it being decided that the fact that the tenant was ready on the land, prepared to pay, without any tender, did not oblige the landlord to demand the rent before distraining.⁴⁹³ In this country such a tender on the land has been regarded as sufficient as a defense to an action on a covenant for rent.⁴⁹⁴ It has been suggested in two cases that such a tender on the land is sufficient, even though the lease stipulates that the rent shall be paid at a place to be named by the landlord, if the landlord fails to name such place,⁴⁹⁵ though it was actually decided merely that a tender of some sort is not excused under such circumstances by the fact that the landlord fails to name the place.⁴⁹⁶ The view that a tender is

⁴⁸⁹ *Smith v. Goodwin*, 4 Barn. & Adol. 413; *Browne v. Powell*, 4 Bing. 230.

⁴⁹⁰ *Bennett v. Bayes*, 5 Hurl. & N. 391.

⁴⁹¹ *Hatch v. Hale*, 15 Q. B. 10; *Howell v. Listowell Rink & Park Co.*, 13 Ont. 476; *Hilson v. Blain*, 2 Bailey Law (S. C.) 168.

⁴⁹² *Crouche v. Fastolfe*, T. Raym. 418; *Brownlow v. Hewley*, 1 Ld. Raym. 82. Contra, *semble*, *Osborn v. Beversham*, 1 Vent. 322, 3 Keb. 800, 2 Lev. 209.

⁴⁹³ *Horne v. Lewin*, 1 Ld. Raym. 639, Saik. 583; *Cranley v. Kingswell*, Hob. 207; Vin. Abr., Rent (I). There is a dictum, apparently to the contrary, in *Remsen v. Conklin*, 18 Johns. (N. Y.) 448.

⁴⁹⁴ *Walter v. Dewey*, 16 Johns. (N. Y.) 222.

⁴⁹⁵ See opinions of Spencer, C. J., in *Remsen v. Conklin*, 18 Johns. (N. Y.) 448, and of Selden, J., in *Livingston v. Miller*, 11 N. Y. (1 Kern.) 80.

Where the payment was to be made at such a place, within a city distant from the land, as the landlord should designate, it was held that the tenant must, if the landlord failed to designate a place, seek out the landlord to inquire as to the place, and that if he could not find the landlord, probably any suitable place in the city would be sufficient. *Lush v. Druse*, 4 Wend. (N. Y.) 313.

⁴⁹⁶ *Livingston v. Miller*, 11 N. Y. (1 Kern.) 80; *Remsen v. Conklin*, 18 Johns. (N. Y.) 447.

sufficient if made on the premises, when no place for payment of rent is named by the lease, has been repudiated in England, so far as tender may be asserted as a defense to an action on a covenant, as distinguished from debt, for rent, it being decided that the mere presence of the tenant on the premises, with the amount of the rent, on the day fixed for payment, is not a good defense, if the landlord was not there to receive it, and that a covenant to pay rent "is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid, and pay or tender him the money, and for the simple reason that he has contracted so to do."⁴⁹⁷ The requirement, imposed by this latter case, that the tenant seek out the landlord in order to make a valid tender, seems to be restricted to cases in which the landlord is within the jurisdiction,⁴⁹⁸ and it has been decided in this country that when the landlord is a nonresident of the state, with no resident agent, he cannot claim a forfeiture because the tenant failed to seek him out, and that it is to be presumed that payment was to be made in the city where the premises were located.⁴⁹⁹

Conceding that, without any personal tender, the tenant's presence on the land, prepared to pay, is equivalent to a tender, this must be during daylight, and at the most convenient time before sunset to count the money or examine the articles tendered,⁵⁰⁰ such being the rule ordinarily applicable to a tender to be made at a particular place.⁵⁰¹ But a personal tender is good at any time during the day.⁵⁰²

⁴⁹⁷ *Haldane v. Johnson*, 8 Exch. 689.

⁴⁹⁸ *Haldane v. Johnson*, 8 Exch. 689. And see *Co. Litt.* 211 a.

⁴⁹⁹ *Burnes v. McCubbin*, 3 Kan. 222, 87 Am. Dec. 468.

⁵⁰⁰ *Tinckler v. Prentice*, 4 Taunt. 549. And see *Startup v. Macdonald*, 6 Man. & G. 623, opinion of Parke, J.

In *Crouche v. Fastolfe*, T. Raym. 418, a plea of tender was regarded as sufficient when the defendant alleged that he was on the premises "by the space of an hour before sunrise until sunset, ready to pay the

rent." In *Walter v. Dewey*, 16 Johns. (N. Y.) 222, a plea of readiness to pay on the land for three hours before sunset and at sunset was regarded as sufficient. In *Furser v. Prowd*, Cro. Jac. 423, it is said that, conceding that the tender on the land is sufficient, it must be pleaded to be made "the last instant."

⁵⁰¹ *Bac. Abr.*, Tender (D). See cases cited 28 Am. & Eng. Enc. Law (2d Ed.) 22.

⁵⁰² *Wade's Case*, 5 Coke, 114a; *Keating v. Irish*, 1 Lutw. 227.

The sufficiency of a tender upon the land in the landlord's absence, on the day for payment, in order to prevent a forfeiture for nonpayment, would seem to be involved in the requirement of a demand of the rent upon the land on that day, as a prerequisite to a forfeiture for this cause,⁵⁰³ since the landlord, so demanding the rent, is necessarily present. The effect of the statutes dispensing with the requirement of such a demand⁵⁰⁴ might be to make a tender on the land in the landlord's absence, on the day on which the rent becomes due, insufficient to prevent a forfeiture for nonpayment, if the tenant fails to pay upon a subsequent demand. The statutes dispensing with the necessity of the landlord's presence on the land to make the demand would be in great part nugatory if a tender on the land in his absence would exclude the forfeiture.

f. **Tender must be unconditional.** A tender of rent, as of any other debt, must be unconditional, and consequently a tender is insufficient if it is such as to require the landlord to admit that no more than is tendered is due.⁵⁰⁵ But the fact that, at the time of the tender, the tenant makes a statement that this is all the rent due, does not necessarily preclude the landlord from thereafter denying the truth thereof,⁵⁰⁶ and consequently a tender may be good though the tenant at the same time states that it is "to settle one year's rent,"⁵⁰⁷ or that "here is your quarter's rent."⁵⁰⁸

§ 179. Recovery of money paid as rent.

The general rule that a payment voluntarily made, with knowledge of the existing facts, cannot be recovered back by the person making it, applies in the case of a payment intended to be on account of rent, which is made when no rent is due, or to a person not entitled to the rent.⁵⁰⁹ The fact that the landlord, in the *bona fide* belief that rent is due, has threatened to dis-

⁵⁰³ See *Hill v. Grange*, 1 Plowd. 164; *Wade's Case*, 5 Coke, 114 b. 13.

As to demand, see post, § 149 f (1).

⁵⁰⁴ See post, § 194 f (2).

⁵⁰⁵ *Finch v. Miller*, 5 C. B. 428.

⁵⁰⁶ *Bowen v. Owen*, 11 Q. B. 130.

⁵⁰⁷ *Jones v. Bridgman*, 39 Law T. (N. S.) 500.

⁵⁰⁸ *Manning v. Lunn*, 2 Car. & K.

⁵⁰⁹ *McCardell v. Miller*, 22 R. I. 96, 46 Atl. 184; *Emmons v. Scudder*,

115 Mass. 367; *Lewis v. Hughes*, 12

Colo. 208, 20 Pac. 621. So it was

held that the tenant, knowingly paying an excessive amount, could not

train,⁵¹⁰ or has threatened to eject the tenant,⁵¹¹ has been held not to be such duress as entitles the tenant to recover back money so paid.

If a tenant pays the rent to the wrong person under the mistaken impression that the title to the reversion is in such person, the payment is under a mistake of fact, entitling him to recover back the payment.⁵¹² But if the tenant is chargeable with notice of a transfer of the reversion, as when it is by proceedings to which he is a party, he cannot, it has been held, claim that payments of rent to the former owner were under mistake of fact.⁵¹³ And the tenant cannot recover rent paid to his lessor or his lessor's transferee on the ground that the lessor had no title when he made the lease, if he, the tenant, has enjoyed the premises for the full period for which such rent is paid,⁵¹⁴ this being a corollary of the rule that such defect of title is no defense to an action for the rent.⁵¹⁵

The tenant has in a few cases been regarded as entitled to recover back payments of rent made in advance as stipulated by the lease, when, without being himself in fault, he has not enjoyed the possession of the demised premises for the period for which the rent was paid. So it has been decided that rent paid in advance might be recovered back by the tenant when the term came to an end upon a sale by the landlord, as stipulated by the lease,⁵¹⁶ and upon a "subsequent abandonment of the lease by the mutual consent of both parties,"⁵¹⁷ and when the building in which the apartment let was situated was not completed at the time possession was to commence.⁵¹⁸ And it has been said

recover the excess. *Connerly v. In-* part of the premises had been con-
man, 79 Ark. 629, 95 S. W. 138. demned by proceedings to which he

⁵¹⁰ *Colwell v. Peden*, 3 *Watts* was a party.
(Pa.) 327; *Knibbs v. Hall*, 1 *Esp.* ⁵¹⁴ *Dwinell v. Brown*, 65 Ga. 438.
84. 38 Am. Rep. 792.

⁵¹¹ *Emmons v. Scudder*, 115 Mass. ⁵¹⁵ See ante, § 78.
367. ⁵¹⁶ *Weeks v. Hunt*, 13 Vt. 144.

⁵¹² *Barber v. Brown*, 1 C. B. (N. ⁵¹⁷ *Barth v. Jones*, 7 Colo. 464, 4
S.) 121; *Newsome v. Graham*, 10 *Pac.* 781.

Barn. & C. 234; *Egan v. Abbett*, 74 ⁵¹⁸ *Meyers v. Liebeskind*, 46 Misc.
N. J. Law, 49, 64 Atl. 991 (semble). 272, 91 N. Y. Supp. 725; *Fallis v.*

⁵¹³ *McCardell v. Miller*, 22 R. I. *Gray*, 115 Mo. App. 253, 91 S. W.
96, 46 Atl. 184, where the tenant 175.

paid the full rent to the lessor after

that rent paid in advance may be recovered back by the tenant if he is evicted by the landlord.⁵¹⁹ These cases do not state the theory on which they are to be regarded as based. It may be remarked that the view that a tenant under a lease, which requires the payment of each installment of rent in advance, may, upon the occurrence, during the rent period, of a contingency which deprives him of the right of possession, recover back such portion of the installment so paid as corresponds to the portion of the period during which he is deprived of enjoyment of the premises, involves a clear infringement of the rule forbidding the apportionment of rent as to time,⁵²⁰ since it could hardly be contended that he is entitled to recover back the whole installment when he has enjoyed the use of the premises for part of such period. Ordinarily, if the tenant is deprived of possession without his fault, whether by the landlord, or one claiming under paramount title, he may obtain full satisfaction in an action for damages,⁵²¹ and the fact that rent has been paid for a period greater than that during which he was allowed to enjoy possession might be considered, it seems, in fixing the *quantum* of recovery. In cases in which the loss of possession is due to the stipulations of the lease, he may lose his advance payment, but this is merely a natural and legal result of the stipulation for payment in advance. One who agrees to pay in advance cannot well complain if, as a result of the agreement, he is in a position different from that in which he would be had he not so agreed. The decision above referred to, that the lessee may recover the rent paid by him in advance in case of the "abandonment of the lease by the mutual consent of both parties,"⁵²² by which is meant, presumably, a surrender of the leasehold,⁵²³ seems most questionable. The tenant, if he is unwilling to surrender without being repaid his advance payment, should obtain such repayment, or an express stipulation therefor, before making the surrender.

One cannot, after recovering damages on account of injury caused by concealed defects in the premises, recover back the

⁵¹⁹ *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117; *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*, 9 Colo. App. 299, 48 Pac. 671.

⁵²⁰ See ante. § 176 a.

⁵²¹ See ante, §§ 79, 81; post, § 185 i.

⁵²² See ante, note 517.

⁵²³ See post, chapter XVIII.

payments of rent made by him during his occupancy under the lease.⁵²⁴

§ 180. Persons entitled to the rent.

a. **Lessors.** The lessor or lessors who made the lease, and in favor of whom the rent is reserved, are the persons entitled to each installment of rent as it falls due, unless and until the right thereto has become divested out of them by a transfer, voluntary or involuntary.

The question whether one of two or more joint lessors should or may sue alone to recover rent is subsequently discussed.⁵²⁵

b. **On transfer of the reversion—(1) Rent ordinarily passes.** Upon the transfer of the reversion by the lessor, the right to rent thereafter to become due is no longer vested in him.⁵²⁶ The transferee for the time being becomes the landlord, and as such is entitled, by reason of his privity of estate with the tenant, to the rent reserved by the lease,⁵²⁷ and such right he may enforce at common law by an action of debt.⁵²⁸ He has also the right to sue upon the covenant for rent, the benefit of which passes to him under the statute of 32 Hen. 8, c. 34, or state statutes to a like effect.^{529, 530} Occasionally a state statute provides in terms for the recovery of rent by a transferee of the reversion or of the rent.⁵³¹ As against the original lessee, after the latter has

⁵²⁴ *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006.

⁵²⁵ See post, § 293 c.

⁵²⁶ *Walker's Case*, 3 Coke, 22 a; *Peck v. Northrop*, 17 Conn. 217; *Grundin v. Carter*, 99 Mass. 15; *Perrin v. Lepper*, 34 Mich. 292; *Allen v. Hall*, 66 Neb. 84, 92 N. W. 171; *Abbott v. Hanson*, 24 N. J. Law (4 Zab.) 493; *West Shore Mills Co. v. Edwards*, 24 Or. 475, 33 Pac. 987, and cases cited post, note 533.

⁵²⁷ A crop rent passes with the reversion as well as a money rent. *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Beach v. Barons*, 13 Barb. (N. Y.) 305; *Schell v. Simon*, 66 Cal. 264, 5 Pac. 238; *Townsend v.*

Isenberger, 45 Iowa, 670; *Page v. Culver*, 55 Mo. App. 606; *Burns v. Cooper*, 31 Pa. 426.

⁵²⁸ *Walker's Case*, 3 Coke, 22 a; *Ards v. Watkin*, Cro. Eliz. 637, 651; *Thursby v. Plant*, 1 Wms. Saund. 237, 1 Lev. 259; *Allen v. Bryan*, 5 Barn. & C. 512; *Howland v. Coffin*, 29 Mass. (12 Pick.) 125; *Patten v. Deshon*, 67 Mass. (1 Gray) 325; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134.

^{529, 530} See ante, § 149 b (1).

⁵³¹ See e. g., *Kentucky St.* 1903, § 2304; *Missouri Rev. St.* 1899, § 4126; *Virginia Code* 1904, § 2788; *West Virginia Code* 1906, § 3401.

version, for the period named in such lease.⁵³⁷ Occasionally the second lease expressly provides that the rent under the first lease shall be paid to the second lessee,⁵³⁸ but it does not seem that such a provision adds anything to its effect, except as it may serve to show that it is a concurrent lease and not a lease in reversion.

(3) **Lease of land and chattels.** It has been decided that, in the case of a lease of land and personal chattels together, if the lessor transfers the land alone, the transferee is entitled to but an apportioned part of the rent reserved,⁵³⁹ and it has been suggested that if, in such a case, the land and chattels pass into the hands of different persons, the rent might possibly be apportioned between them.⁵⁴⁰ There are decisions, however, that an executor of the lessor, though entitled to the chattels, has no right to any portion of the rent reserved on a lease of land and chattels.⁵⁴¹ This question of the apportionment of rent on a lease of land and chattels is elsewhere discussed.⁵⁴²

(4) **Notice of transfer.** As before stated,⁵⁴³ the statutes, dispensing with attornment by the tenant to a transferee of the reversion, almost invariably provide that the tenant shall not be damaged by his payment of rent to the transferor before he has notice of the transfer, that is, the transferee cannot collect again rent which the tenant has, before notice of the transfer, paid to the person whom he supposed still to be the landlord, the effect being to impose on every transferee of a reversion the

⁵³⁷ *Harmer v. Bean*, 3 Car. & K. 307; *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861; *Morris v. Niles*, 12 Abb. Pr. (N. Y.) 103; *Russo v. Yuzolino*, 19 Misc. 28, 42 N. Y. Supp. 482; *Logan v. Green*, 39 N. C. (4 Ired. Eq.) 370. one having title paramount, and the question was whether the tenant, continuing in under an attornment by him to the paramount owner, and using the chattels, could refuse to pay the lessor, who was the rightful owner of the chattels, for their use.

⁵³⁸ See *Harmon v. Flanagan*, 123 Mass. 288; *Root v. Trapp*, 10 Kan. App. 575, 62 Pac. 248; *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266. Upon the attornment to the paramount owner, the tenancy as to the land came to an end.

⁵³⁹ *Buffum v. Deane*, 70 Mass. (4 Gray) 385. ⁵⁴¹ *Armstrong v. Cummings*, 58 How. Pr. (N. Y.) 332; *Fay v. Holloran*, 35 Barb. (N. Y.) 295.

⁵⁴⁰ *Salmon v. Matthews*, 8 Mees. & W. 827. In this case, however, ⁵⁴² See ante, § 169 c.

there was a constructive eviction by ⁵⁴³ See ante, § 146 f.

necessity of notifying the tenant of the transfer in order to protect his own interests. After he receives such notice, however, the tenant must pay to the transferee all rent which became due after the transfer and which is yet unpaid, though it became due before the giving of the notice.⁵⁴⁴

The notice must, by the English statute, be given by the grantee, in order to charge the tenant with the duty of paying the rent to the latter. The statutes in this country dispensing with attornment ordinarily provide merely that the tenant shall not be damnified by payments made without notice of the transfer, thus imposing the same obligation on the tenant, however he may obtain notice.⁵⁴⁵

The question whether a tenant, paying rent in advance of the day on which it is due, is protected, as against the claim therefor of one to whom the reversion is transferred between the day of payment and the rent day, has previously been discussed.^{546, 547}

(5) **Rent already due.** By a transfer of the reversion the right to rent still to become due alone passes, and it does not in any way affect the transferor's right to the rent which has already become due,⁵⁴⁸ unless there is an express provision in this

⁵⁴⁴ Moss v. Gallimore, 1 Doug. Thornton v. Strauss, 79 Ala. 164; 279; Pelton v. Place, 71 Vt. 430, 46 Bordereaux v. Walker, 85 Ill. App. Atl. 63, 76 Am. St. Rep. 782. 86; Damren v. American Light &

⁵⁴⁵ See ante, § 146 f. The South Carolina Statute (Civ. Code, § 2426), without in terms dispensing with attornment, adopts the language of the statute of Anne providing that the tenant shall not be prejudiced by payment of rent to the grantor before notice is given to him of the grant by the grantee. Outtoun v. Dulin, 72 Md. 536, 20 Atl. 134; Wise v. Pfaff, 98 Md. 576, 56 Atl. 815; Burden v. Thayer, 44 Mass. (3 Metc.) 76, 37 Am. Dec. 117; Farmers' & Mechanics' Bank v. Ege, 9 Watts (Pa.) 436, 36 Am. Dec. 130; Jones v. Laturnus (Tex. Civ. App.) 40 S. W. 1010; Wittrock v. Hallinan, 13 U. C. Q. B. 135.

In Gray v. Rogers, 30 Mo. 258, it seems to be thought that the tenant cannot defend against the lessor's claim for rent, on the ground that the lessor has transferred the reversion, unless the transferee has notified the tenant to pay rent to him.

^{546, 547} See ante, § 177 c.

⁵⁴⁸ Flight v. Bentley, 7 Sim. 149;

On a like theory it was held that a mortgagor, redeeming from a sale under the mortgage, acquired no right to rent which became due before the redemption, but the purchaser was entitled thereto. Perkerson v. Snodgrass, 85 Ala. 137, 4 So. 752.

regard.^{549, 550} The landlord may assign rent already due,⁵⁵¹ but the assignee will take subject to the restrictions existent in that jurisdiction upon the right of an assignee of a chose in action to sue thereon in his own name or otherwise.⁵⁵²

(6) **Change of title on rent day.** Since the tenant, though he may pay the rent at any time of the day on which the rent is payable by the terms of the lease, has the whole of that day in which to pay it,⁵⁵³ a question may arise as to the right to rent when the title to the reversion passes from one person to another in the course of that day. This question the courts have undertaken to solve by regarding the installment of rent as not due till the end of that day, and it has consequently been held that, if a tenant in fee simple, after making a lease, dies on the rent day, the installment of rent falling due on that day belongs, not to his personal representative, but to his heir or devisee, as having become due after his death.⁵⁵⁴ And on the same theory it was decided that if a tenant for life, with power to make leases, made a lease in conformity with the power, and subsequently

^{549, 550} See post, note 551.

⁵⁵¹ *United States v. Hickey*, 84 U. S. (17 Wall.) 9; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134; *O'Brien v. Smith*, 37 N. Y. St. Rep. 41, 13 N. Y. Supp. 408; *Id.*, 129 N. Y. 620, 29 N. E. 1029 (semble); *Ramsey v. Johnson*, 8 Wyo. 476, 58 Pac. 755, 80 Am. St. Rep. 948. See ante, § 149 b (9).

A transfer by a lessor of all his "right, title and interest in and to the lease," with authority to the assignee to sue for and recover the rents as fully as the assignor could do, and stating that it was the purpose to put the assignee in the assignor's place and stead, was held to transfer the right to rent previously due. *United States v. Hickey*, 84 U. S. (17 Wall.) 9.

Where the lease reserved as rent \$5,000 per year, and all taxes and water rents which might become a lien on the premises, an assignment

of "rent due up to" a date named was held to include such unpaid taxes and water rents which had become a lien before that date. *Woolsey v. Abbott*, 65 N. J. Law. 253, 48 Atl. 949. Presumably, this means that the lessor had a claim to be paid the amount of such taxes and water rents, which claim passed by the assignment. There is no discussion of the subject. See ante, § 169 h, as to taxes and water rents as "rent."

⁵⁵² *Damren v. American Light & Power Co.*, 91 Me. 334, 40 Atl. 63; *Burden v. Thayer*, 44 Mass. (3 Metc.) 76, 37 Am. Dec. 117; *Ryerson v. Quackenbush*, 26 N. J. Law (2 Dutch.) 236.

⁵⁵³ See ante, § 172 h, at notes 195, 196.

⁵⁵⁴ *Duppa v. Mayo*, 1 Wms. Saund. 287; *Rockingham v. Penrice*, 1 P. Wms. 177.

died on a rent day, the rent belonged to the person in remainder, and not to the executor of the life tenant.⁵⁵⁵ Likewise, it seems, in the case of a conveyance of the reversion made upon that day, the transferee is entitled to the installment of rent then coming due.⁵⁵⁶ The courts have, however, refused to apply such a theory in the case of a life tenant, who, after leasing, not under a power, dies on a rent day, owing, presumably, to an unwillingness that the tenant should thus entirely escape liability,⁵⁵⁷ and the rent has, in such a case, been decided to belong to the personal representative of the life tenant.⁵⁵⁸

c. **Severance of rent from reversion—**(1) **Retention of rent on transfer of reversion.** Though the rent to accrue *prima facie* passes on a transfer of the reversion, this is not the case if the transferor, by the terms of the instrument of transfer, retains the rent, thus effecting a "severance" of the rent from the reversion.⁵⁵⁹

A conveyance of the land "subject to" the lease does not, it is evident, effect such a severance.⁵⁶⁰ On the other hand, a provision for the retention of possession by the transferor has apparently been construed, in connection with the conduct of the parties, as vesting the rent in him to the exclusion of the transferee,⁵⁶¹ as has a provision, on a transfer of the reversion by a concurrent lease,⁵⁶² that "all rents received on account of" the prior lease should "be credited as part payments on the" concurrent lease.⁵⁶³

The cases do not discuss the theory on which such a provision, excluding the rent from the operation of the transfer, takes effect, that is, whether it is to be regarded as in the nature

⁵⁵⁵ *Strafford v. Wentworth*, Fin. Spring Co., 125 Mass. 157, 28 Am. Prec. 555, 1 Swanst. 343, note. Rep. 216; *Steed v. Hinson*, 76 Ala.

⁵⁵⁶ See *Hammond v. Thompson*, 298; *Bennett v. Austin*, 81 N. Y. 168 Mass. 531, 47 N. E. 137. 308.

⁵⁵⁷ See ante, § 176 a.

⁵⁶⁰ *Gale v. Edwards*, 52 Me. 363;.

⁵⁵⁸ *Rockingham v. Penrice*, 1 P. Biddle v. Hussman, 23 Mo. 597; Wms. 177; *Southern v. Bellasis*, 1 P. Disselhorst v. Cadogan, 21 Ill. App. Wms. 179, note; *Strafford v. Went-* 179.

worth, Fin. Prec. 555. See note ⁵⁶¹ *Goodwin v. Hudson*, 60 Ind. (17) to *Duppa v. Mayo*, 1 Wms. 117.

Saund. 287.

⁵⁶² See ante, § 146 d.

⁵⁵⁹ *Co. Litt.* 143 a; *Crosby v. Loop*, ⁵⁶³ *Shea v. McCauliff*, 186 Mass. 13 Ill. 625; *Beal v. Boston Car* 509, 72 N. E. 69.

of an "exception" from the grant, a "reservation," or a "grant back," by the transferee of the reversion, of the rent which has passed to him by the transfer. In favor of the view that it constitutes a "grant back" is the fact that it does not answer to the common-law definition of an "exception," the office of which is to exclude from the operation of the conveyance some part of the things covered by the general words of description, nor to that of a "reservation," the office of which is to reserve to the grantor a thing "not *in esse* but newly created."⁵⁶⁴ That such a clause operates as a grant back to the transferor has been apparently asserted in an English case.⁵⁶⁵ But it seems doubtful whether this view would be ordinarily adopted in this country, as it would involve the necessity, in most cases at least, that the instrument of transfer should be executed by the transferee of the reversion, since a rent is an interest in land not ordinarily transferable otherwise than by signed writing.⁵⁶⁶ It is more likely that the courts would regard it as a reservation, extending for this purpose the common-law theory of a reservation, as they have done in the case of the "reservation" of an easement.⁵⁶⁷

The fact that notes, given for the amount of the installments of rent to accrue, are retained by the lessor on making a transfer of the reversion, has, in two states, been held insufficient in itself to preclude the passing of the rent.⁵⁶⁸ But a different view has, apparently, been taken elsewhere.⁵⁶⁹

Accepting the theory that a provision excluding the rent from the operation of the transfer of a reversion is in its nature a

⁵⁶⁴ See Co. Litt. 21 a, 47 a, and 7 Mees. & W. 63; Corporation of other authorities cited 2 Tiffany, London v. Riggs, 13 Ch. Div. 798. Real Prop. § 383.

⁵⁶⁵ Southwell v. Scotter, 49 Law J. Q. B. 357. That is, Baggallay, Bramwell and Thesiger, J. J., refer to it as an assignment of the rent; which must mean an assignment or grant back.

⁵⁶⁶ As is in England required in the case of a "reservation" of an easement on a conveyance in fee. See Durham & S. R. Co. v. Walker, 2 Q. B. 940; Wickham v. Hawker,

⁵⁶⁷ See Tiffany, Real Prop. §§ 316, 383.

⁵⁶⁸ Watkins v. Duvall, 69 Miss. 364, 13 So. 727; Beebe v. Coleman, 8 Paige (N. Y.) 392, 35 Am. Dec. 717.

⁵⁶⁹ Steed v. Hinson, 76 Ala. 298. In Wilcoxon v. Donelly, 90 N. C. 245, there is a *dictum* that the taking of a note for the rent in itself constitutes a severance. And Kimball v. Walker, 71 Ill. App. 309, is to the same effect.

reservation,⁵⁷⁰ it would, as such, constitute an integral part of the conveyance of the reversion, and an extrinsic agreement, whether written or oral, that the transfer should not have its usual effect of passing the rent as an incident to the reversion would, it seems, be inoperative. Such a stipulation could hardly, on such a theory, be regarded as a "collateral agreement" within the parol evidence rule.⁵⁷¹ On the other hand, on the theory that such a provision is not a part of the act of transfer, but is, as being a "grant back,"⁵⁷² a separate legal act, it seems that an extrinsic stipulation to that effect would be effectual, as being a "collateral agreement," provided it is executed with such formality as the local law would require in any case of the grant of rent apart from the reversion. That an extrinsic oral stipulation, reserving the rent upon a transfer of the reversion, is ineffectual, has been judicially recognized,⁵⁷³ and the same view has, apparently, been taken of a separate written stipulation,⁵⁷⁴ though there is elsewhere a contrary *dictum*.⁵⁷⁵

(2) **Transfer of rent without reversion.** A severance of the rent from the reversion takes place not only when the landlord transfers the reversion without the rent, but also when he transfers the rent without the reversion.⁵⁷⁶

⁵⁷⁰ See ante, at note 567.

⁵⁷¹ See 4 Wigmore, Evidence, § 2430.

⁵⁷² See ante, at notes 565, 566.

⁵⁷³ Russell v. Allen, 84 Mass. (2 Allen) 42.

⁵⁷⁴ Hansen v. Prince, 45 Mich. 519, 8 N. W. 584, 40 Am. Rep. 479.

⁵⁷⁵ Allen v. Hall, 66 Neb. 84, 92 N. W. 171. And see cases cited ante, note 569, as to the effect of the retention of a note given for rent.

⁵⁷⁶ Litt. § 228; Co. Litt. 151 b; Ards v. Watkins, Cro. Eliz. 637; Marle v. Flake, 3 Salk. 118; Williams v. Hayward, 1 El. & El. 1040; Clarke v. Coughlan, 3 Ir. Law R. 427; Allen v. Bryan, 5 Barn. & C. 512; Wineman v. Hughson, 44 Ill. App. 22; Willard v. Tillman, 2 Hill

(N. Y.) 274; Demarest v. Willard, 8 Cow. (N. Y.) 206; Hunt v. Thompson, 84 Mass. (2 Allen) 341; Beal v. Boston Car Spring Co., 125 Mass. 157, 28 Am. Rep. 216; Watson v. Hunkins, 13 Iowa, 547; Moffatt v. Smith, 4 N. Y. (4 Comst.) 126; Gates v. Max, 125 N. C. 139, 34 S. E. 266; Brownson v. Roy, 133 Mich. 617, 95 N. W. 710. So it was held that a grantee of the reversion, who thereafter takes an assignment of the leasehold, is liable as such assignee for rent to one to whom the rent had been assigned before he acquired the reversion. Childs v. Clark, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164.

The owner of the reversion may thus transfer the rent as security. Thomson v. Erskine, 36 Misc. 202.

Rent, that is, the right to the payment of the successive installments as they become due, is, by the common-law authorities, an incorporeal thing of a real character, and, as such, is transferable only by grant, that is, by an instrument under seal.⁵⁷⁷ That it was not, at common law, a chose in action, is apparent from the fact that it was so transferable.^{577a} But the common-law view that rent, as an incorporeal thing real, can be transferred only by grant, that is, by an instrument under seal, is frequently ignored at the present day, there being a tendency on the part of the courts to treat it as a chose in action, assignable as such by any signed writing.⁵⁷⁸

A mere order, drawn by the landlord upon the tenant, to pay the rent to a third person, accepted by the tenant, has been regarded as constituting an assignment,⁵⁷⁹ or at least an "equitable assignment" of the rent,^{579a} and such an order would, in most jurisdictions, presumably, be effective at least as an equitable assignment, though not accepted by the tenant.^{579b} Likewise, the effectiveness, for the purpose of transferring the rent, of the transfer of a note, given by the lessor to the lessee as evidence

73 N. Y. Supp. 166; Thomson v. Ludlum, 36 Misc. 801, 74 N. Y. Supp. 601, 38 So. 129.

875.

In Swan v. Inderlied, 187 N. Y. 372, 80 N. E. 195, it was held that an assignment of the rent to accrue under a certain lease which was in terms for one, two, or three years, at the option of the lessee, covered rent accruing during the whole three years.

⁵⁷⁷ See Co. Litt. 9 a, 49 a, 172 a; Sheppard's Touchstone, 228; 2 Blackst. Comm. 317; Williams, Real Prop. (18th Ed.) 31; Dove v. Dove, 18 U. C. C. P. 424.

^{577a} Co. Litt. 292 b.

⁵⁷⁸ See cases cited ante, note 576.

It has been held in Alabama, having reference to a statute expressly authorizing the assignment of rent, that it may be "by parol," meaning thereby, apparently, by word of

mouth. Bennett v. McKee, 144 Ala. 50; Knill v. Prowse, 33 Wkly. Rep. 163 (under Judicature Act).

^{579a} Abrams v. Sheehan, 40 Md. 446; Dennis v. Twitchell, 51 Mass. (10 Metc.) 180; Morton v. Naylor, 1 Hill (N. Y.) 583. In Crosby v. Loop, 13 Ill. 625, 14 Ill. 330, it was held that such an order, for the payment of a part of the rent, did not amount even to an equitable assignment.

^{579b} See, as to the transfer of a fund by an order without acceptance thereof by the debtor, Pomeroy, Eq. Jur. § 1280; 4 Cyclopedic Law & Proc. 54.

That an unaccepted order is sufficient to transfer the rent, see Egan v. Abbott, 74 N. J. Law, 49, 64 Atl. 991.

of the indebtedness for rent, has been quite frequently recognized.^{579c}

Rent already due was, even at common law, regarded as a chose in action, but the view referred to, that rent still to become due is such, and consequently may be transferred by a mere assignment, as distinguished from a common-law grant, appears to involve a departure from the original conception of rent as an interest in land. There is perhaps no impropriety in regarding the transfer of an installment of rent to become due in the future, or even of a number of such installments, as an assignment of a chose or choses in action,^{579d} but there is more difficulty in thus regarding the transaction when the transfer is in terms of the "rent," without specific reference to the installments to be paid. This should, *prima facie* at least, it would seem, be construed as a transfer of an interest in land, of an "incorporeal hereditament" as expressed by Blackstone, and an incorporeal hereditament is transferable, by the common-law authorities, only by writing under seal. The question here suggested does not appear to have been judicially discussed.

A transfer of the rent alone is quite frequently effected by a transfer by the reversioner in terms of "the lease," and occasionally the courts thus speak of a "transfer of the lease," meaning thereby a transfer of the rent to accrue under the lease.⁵⁸⁰ Since such an expression has a well understood significance as meaning the transfer of the leasehold interest, the interest created by the lease, and since, furthermore, a transfer of the rent is

^{579c} See post, at notes 596a-603.

^{579d} But such future installments were not so regarded at common law. See Co. Litt. 392 b. And the question suggests itself whether a transfer of all the installments of rent still to become due under a lease having a long time to run, a hundred years for instance, can be regarded as a transfer of a chose or choses in action rather than of an interest in land.

⁵⁸⁰ See e. g., Thorn v. Sutherland, 123 N. Y. 236, 25 N. E. 362; Allen v. Wooley, 1 Blackf. (Ind.) 148; Carr v. Waugh, 28 Ill. 418, 81 Am. Dec.

292; Thacker v. Henderson, 63 Barb. (N. Y.) 271; Hunt v. Thompson, 84 Mass. (2 Allen) 341; Steele v. De May, 102 Mich. 274, 60 N. W. 684; Jones v. Smith, 14 Ohio, 606; Bordeaux v. Walker, 85 Ill. App. 86; Griffith v. Burlingame, 18 Wash. 429, 51 Pac. 1059. In Some Illinois cases it is decided that the "assignment of a lease" by indorsement thereon operates merely as an equitable assignment. Chapman v. McGrew, 20 Ill. 101; Dixon v. Buell, 21 Ill. 203; Buxbaum v. Dunham, 51 Ill. App. 240; Hefling v. Van Zandt, 60 Ill. App. 662.

properly not a transfer of the lease, but merely of one particular right created thereby, its use as referring to a transfer of the rent is to be deprecated.⁵⁸¹

Upon a transfer of the rent, apart from the reversion, the benefit of a covenant for rent passes to the transferee, it has been held, so as to authorize an action by him upon the covenant, against the lessee or an assignee of the leasehold,⁵⁸² though the benefit of covenants concerning the condition of the premises merely does not pass in such case.⁵⁸³ Apart from any question as to whether the benefit of a covenant to pay rent thus passes with a transfer of the rent to accrue, the transferee can assert a claim to the rent on the ground of privity of estate, without reference to the covenant.⁵⁸⁴

In this country it has been held that the benefit of a covenant to pay rent will run upon the transfer of rent reserved on a conveyance in fee, a "perpetual lease," as it is sometimes termed,⁵⁸⁵ In England a different rule in this regard apparently prevails.⁵⁸⁶ But according to the modern decisions in that jurisdiction, an action in the nature of one for debt will lie in such case in favor of the transferee, as the owner of a rent charge, against the owner of the land.⁵⁸⁷

⁵⁸¹ See *Potts v. Trenton Water Fisher*, 1 Rawle (Pa.) 155, 18 Am. Power Co., 9 N. J. Eq. (1 Stockt.) Dec. 604; *Trustees of St. Mary's* 592; *Demarest v. Willard*, 8 Cow. Church v. Miles, 1 Whart. (Pa.) (N. Y.) 206. And see ante, § 146 b. 229; *Cook v. Brightly*, 46 Pa. 439.

⁵⁸² *Willard v. Tillman*, 2 Hill (N. Y.) 274; *Wineman v. Hughson*, 44 Ill. App. 22. But see *Irish v. Johnston*, 11 Pa. 488.

⁵⁸³ *Demarest v. Willard*, 8 Cow. See, further, the discussion in notes to *Spencer's Case*, 1 Smith's Leading Cases (8th Am. Ed.) 187-193. (N. Y.) 206. In *Wright v. Hardy*, 76 Miss. 524,

⁵⁸⁴ *Ards v. Watkin*, Cro. Eliz. 637, 24 So. 697, the right of the grantee 651; *Williams v. Hayward*, 1 El. & of a rent reserved on a conveyance El. 1040; *Allen v. Bryan*, 5 Barn. & in fee simple to sue on the covenant C. 512; *Ryerson v. Quackenbush*, 26 to pay rent was based chiefly on N. J. Law (2 Dutch.) 236; *Kendall v. Carland*, 59 Mass. (5 Cush.) 74, the statute authorizing assignees of 51 Am. Dec. 44. See *Willard v. Tillman*, 2 Hill (N. Y.) 274. choses in action to sue thereon in their own name.

⁵⁸⁵ *Milnes v. Branch*, 5 Maule & S. 411; *Randall v. Rigby*, 4 Mees. (7 Pet.) 596; *Van Rensselaer v. & W.* 130, 135.

Read, 26 N. Y. 558; *Van Rensselaar v. Barringer* 39 N. Y. 9; *Streaper v. Q. B.* 537; *Searle v. Cooke*, 43 Ch.

⁵⁸⁷ *Christie v. Barker*, 53 Law J.

One to whom a transfer is made of the rent, apart from the reversion, presumably takes, as does any other transferee of an interest in land, subject to any equities in favor of another of which he has notice, and consequently his claim for rent would be subject to any defenses known to him at the time of the transfer, and which would have been available against the transferor.⁵⁸⁸ On the other hand, the transferee of the rent, if a purchaser for value, would take free from any equities of which he had no notice, actual or constructive.^{589, 590}

(3) **Rights of subsequent transferee of reversion.** The question how far, after the rent has become severed from the reversion, either by its reservation on a transfer of the reversion, or by its transfer without the reversion, the owner of the reversion can, by any subsequent action on his part, affect the rights of the owner of the rent, has been discussed but seldom. If the owner of the reversion has transferred the rent to another, one to whom he subsequently transfers the reversion clearly acquires no right to the rent as incident to the reversion, if he has notice of the previous transfer of the rent.⁵⁹¹ If he has no such notice, actual or constructive, he may, it has been decided, claim the rent as against the prior transferee thereof,⁵⁹² and this would seem to be the proper view, provided he is a purchaser for value.⁵⁹³ Rent being an interest in land, a conveyance there-

Div. 519; *In re Herbage Rents* [1896] 2 Ch. 811.

⁵⁸⁸ *In Hamaker v. Manheim Light, Heat & Power Co.*, 25 Pa. Super. Ct. 484, it was held that where it was provided by the lease that the expense of repairs should be borne equally by the parties thereto, the lessee could deduct half of such expense in making payment to a transferee of the rent.

^{589, 590} See *Juvenal v. Patterson*, 10 Pa. 282.

⁵⁹¹ *Gross v. Chittim* (Tex. Civ. App.) 18 Tex. Ct. Rep. 906, 100 S. W. 1006; *Leonard v. Burgess*, 16 Wis. 41. See *Egan v. Abbott*, 74 N. J. Law, 49, 64 Atl. 991.

⁵⁹² *Steel v. De May*, 102 Mich. 274,

60 N. W. 684. There are suggestions to the same effect in *Leonard v. Burgess*, 16 Wis. 41; *Kimball v. Pike*, 18 N. H. 419.

⁵⁹³ *In Brownson v. Roy*, 133 Mich. 617, 95 N. W. 710, it was held that a receiver to whom, by order of court, the landlord had conveyed the reversion, was not entitled to claim the rent as against a prior transferee of the rent. The decision may well be rested on the language of the opinion of the lower court that "the receiver appointed by the court, having only the title which was given him by deed executed under the court's order, can only claim such rights as (the landlord) himself could have enforced," that is,

of would appear ordinarily to be within the meaning and purpose of the recording laws, and, assuming that such is the case, the subsequent purchaser of the reversion would be affected by the previous transfer of the rent to a purchaser for value, if such transfer were recorded, and, in the absence of notice from other sources, only then. If, however, owing to the fact that the interest in the rent is for a brief period only, or for some other reason, the conveyance thereof is not within the recording law of the particular jurisdiction, the innocent purchaser of the reversion would take subject to the rights of the prior grantee of the rent.⁵⁹⁴

In the case of a transfer of the reversion, reserving the rent, a subsequent transferee of the reversion would, it seems clear, be charged with notice of such reservation contained in the transfer to his transferor, as being in his chain of title, provided the first transfer were recorded, and, even if it were not recorded, he could not claim the rent if he had notice otherwise of its severance from the reversion.⁵⁹⁵ And so a transferee of the reversion, taking with notice of a previous transfer of the rent to another, would take subject thereto.⁵⁹⁶

(4) **Rights of transferee of rent notes.** In some parts of this country it is a quite frequent usage for one taking a lease for

he was not a purchaser for value, whether a local statute gave the and the statement that the trans- rent to the purchaser in such case. feree of the rent was protected be-⁵⁹⁴ In *Trulock v. Donahue*, 76 cause she had notified the tenants Iowa, 758, 40 N. W. 696, it is de- to pay her the rent seems uncalled cided that rent is not "real estate," for. The *dictum*, moreover, that and that record of a transfer thereof rent is not an interest in land, is in the land records is not effective not in accordance with the common- for the purpose of notice. law authorities.

In *Griffith v. Burlingame*, 18 Ala. 588, 34 So. 813, 97 Am. St. Rep. Wash. 429, 51 Pac. 1059, it is held 59, it was held that one to whom an that a purchaser of the reversion at administrator, after making a lease, execution sale cannot claim the rent transferred the rent reserved there- as against the prior assignee of the on, could not claim it as against the rent. This decision may well be widow, to whom the land was sub- rested on the ground that such a purchaser acquires only the execu- sequently assigned as dower, the theory being that the widow's title tion defendant's actual interest, and related back to the time of her hus- not his apparent interest. 3 Free- band's death. man, *Executions* (3d Ed.) § 335. The⁵⁹⁶ *Abrams v. Sheehan*, 40 Md. court only discusses the question 446.

a brief term to give notes evidencing his subsequent liability for the installments of rent.^{596a} When this is done, a question may readily arise as to the rights of an assignee of such notes as against one to whom the lessor transfers the reversion. It has been stated that one to whom notes so given are assigned by the lessor, after he has transferred the reversion to another, cannot assert a claim to the rent as against the transferee of the reversion,⁵⁹⁷ and it has been decided, in effect, that he cannot assert such claim as against one claiming under an incumbrance on the reversion existing at the time of the assignment of the notes.⁵⁹⁸ On the other hand, there are decisions to the effect that, if the lessor has assigned the notes to another before transferring the reversion, the transferee of the reversion cannot claim the rent, it having, by the previous assignment of the notes, been severed therefrom.⁵⁹⁹ These latter decisions suggest the question, before referred to,^{599a} whether a purchaser for value of the reversion, without notice, actual or constructive, of a previous transfer of the rent to another, should take subject to that transfer, and they seem to be to the effect that he must so take. The result of this view is to put the purchaser of a reversion in a precarious position, as regards the right to the rent under the outstanding lease. It is unquestionable that a *bona fide* purchaser for value of such notes should, provided they are negotiable in character,⁶⁰⁰ not be precluded from their collection as against the maker by the fact that the reversion has been transferred to another, who purchased in ignorance of the existence of the

^{596a} In *Houston v. Smythe*, 66 Miss. 118, 5 So. 520, the fact that rent notes were given by a lessee and possible purchaser of land, payable to the lessor bearer, with the intention that they should be transferred to the holder of a deed of trust on the land, and that they were so transferred, was held to make the latter the landlord, for the purpose of an attachment by him for rent. The theory of the decision is that the nominal lessor was acting as agent for the holder of the deed of trust.

⁵⁹⁷ *Alabama Gold Life Ins. Co. v.*

Oliver, 78 Ala. 158, citing *Westmoreland v. Foster*, 60 Ala. 448.

⁵⁹⁸ *Tubb v. Fort*, 58 Ala. 277; *Dunton v. Sharpe* (Miss.) 11 So. 168.

⁵⁹⁹ *Alabama Gold Life Ins. Co. v. Oliver*, 78 Ala. 158; *Kimball v. Walker*, 71 Ill. App. 309; *Beebe v. Coleman*, 8 Paige (N. Y.) 392, 35 Am. Dec. 717.

^{599a} See ante, at notes 593, 594.

⁶⁰⁰ That the notes show on their face that they are given for rent does not, it has been decided, impair their negotiability. *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077. *Adoue v. Tanskersley* (Tex. Civ. App.) 28 S. W. 346 is

notes. But the fact that such notes have been given by the lessee, even though they are utilized by the lessor in a way not anticipated by him, does not seem ground for imposing a loss on the innocent purchaser of the reversion. If necessary to protect both innocent purchasers, the lessee should be subject to a double liability, as having been the cause of the conflict of rights.⁶⁰¹ That is, the lessee, having by his act in unnecessarily executing a note to evidence the liability for rent which was otherwise evidenced by the stipulation for rent embodied in the lease, and having thereby enabled the lessor to transfer in effect separate evidences of one liability to different persons, should suffer any possible loss, as against either of such persons, in accordance with the rule that whenever one of two innocent parties must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it.⁶⁰² Though an innocent purchaser for value of the rent notes may be entitled to enforce them as personal obligations of the maker, the lessee, he cannot properly, since he purchased them as such personal obligations only, complain that he is not allowed to enforce them as representing rent to the detriment of the innocent purchaser of the reversion. If, on the other hand, he did not purchase the notes as merely personal obligations of the maker, but sought by the purchase to obtain the rent, then he cannot well claim to stand in the posi-

cited. The former case is cited in making of the lease by the payee. 1 Daniel, Negotiable Instruments, In *Bettis v. McNider*, 137 Ala. 588, §§ 790, 797, to the point that the negotiability of an instrument is not affected by the fact that it names the consideration, the theory on which the case was decided. It might, however, be suggested that an indebtedness for rent is necessarily of such a future and contingent character that the recital in the note that the sum named to be paid represents rent necessarily precludes the possibility of regarding the note as "payable unconditionally and at all events," as it must be to be negotiable. The statement that the note represents rent is only inferentially a statement of the consideration. The consideration for the note is the

court regards the purchaser of a "rent note," reciting that it was given for rent, as charged with notice of the payee's inability to make a lease. This, however, was an obligation for the delivery of cotton as rent, though the court does not particularly refer to this point. In almost every jurisdiction an instrument payable in merchandise is not negotiable. See 1 Daniel, *Negot. Instr.* §§ 55, 59.

⁶⁰¹ This is perhaps involved in the decision in *Howland v. White*, 48 Ill. App. 236.

⁶⁰² *Lickbarrow v. Mason*, 2 Term R. 63. See *Ewart, Estoppel*, c. 14; 2 *Pomeroy, Eq. Jur.* 803.

tion of an innocent purchaser of a negotiable instrument. In other words, he should not be allowed to assert that, by one and the same legal act, the acquisition of the notes, he is constituted both a purchaser of negotiable instruments and a transferee of an interest in land. It is, indeed, not readily conceivable that an interest in land, such as rent, can be transferred by the mere transfer of a note given for the amount of the possible payments upon the rent. Such a case, it seems unnecessary to say, bears not the slightest analogy to that of a mortgage or other lien, which, as being merely an accessory or incident of the debt secured, and having no separate existence, is held to pass upon a transfer of the debt.⁶⁰³ Rent is not a mere accessory or incident of notes given for the amounts of the payments to be made, as is apparent from the fact that ordinarily such notes are not given.

This whole matter of conflicting claims to rent, arising from the severance of the rent from the reversion, may be most equitably adjusted, it is submitted, by applying the ordinary rules determining priorities as between *bona fide* purchasers. If one purchases a reversion without notice, actual or constructive, that the rent has been transferred to another, he has ordinarily a right to the rent, and it is the duty of a transferee of the rent, desiring to protect himself against such subsequent transfer of the reversion, to record the transfer of the rent. The fact that notes were given for the rent would seem to have no bearing on the matter, unless this is known to the transferee of the reversion, or unless, perhaps, the giving of notes for the rent is, in that neighborhood, so usual that the purchaser of the land may be charged with notice of their existence by reason of his knowledge of the lease.

d. **Mortgagors and mortgagees.** In those jurisdictions in which a mortgage vests the legal title and the right of possession in the mortgagee,⁶⁰⁴ one claiming under a mortgage subsequent to a lease, that is, under a mortgage of the reversion, may at any time notify the tenant under the lease to pay rent to him instead of to the mortgagor, and after such notice the tenant is liable to him for all rent, accrued since the date of the mortgage, which is as yet unpaid, and also for all rent yet to accrue.⁶⁰⁵ Until

⁶⁰³ Pomeroy, Eq. Jur. § 1210.

⁶⁰⁵ Moss v. Gallimore, 1 Doug.

⁶⁰⁴ See 1 Jones, Mortgages, c. 1, 279; King v. Housatonic R. Co., 45 Conn. 226; Scheidt v. Belz, 4 Ill.

and ante, § 146 c.

such notice from the mortgagee, however, the tenant may, by the express terms of the statute of Anne as to attornment,⁶⁰⁶ safely pay rent, as it becomes due, to the mortgagor, that statute providing that the tenant shall not be damaged by payment of rent to the grantor of the reversion before notice of the grant is given him by the grantee, and that the tenant may so pay rent to the mortgagor, until notified by the mortgagee to do otherwise, has also been recognized without reference to any statute.⁶⁰⁷ If, however, the tenant pays rent before it is due, and, while it is yet not due, receives notice from the mortgagee to pay it to the latter, he is properly liable therefor in spite of his previous payment, since he has no right to make payments in advance to the prejudice of the mortgagee.⁶⁰⁸ Usually the mortgagee asserts no claim to the rent, since he is himself accountable for all rent received by him, and there is no advantage to be obtained from the making of such claim, but rather a trouble and responsibility.

In states where the statute protects the tenant in paying to the transferor of the reversion, not, as does the statute of Anne, until the transferee gives notice of the transfer, but until the tenant has notice thereof,⁶⁰⁹ the question might be suggested whether, after learning, otherwise than by notice from the mortgagee, of the transfer of the legal title by way of mortgage, the tenant would be protected in paying the rent to the mortgagor. That he would not be protected in such case has, however, never been suggested, and, in view of the recognized usage of paying the rent to the mortgagor unless and until payment is demanded by the mortgagee, and also of the general tendency of the courts

App. (4 Bradw.) 431; *Mirick v. Wright*, 3 Mass. 138, 3 Am. Dec. Hoppin, 118 Mass. 582; *Burden v.* 98.

Thayer, 44 Mass. (3 Metc.) 76, 37 606 See ante, § 146 f, at note 32.
Am. Dec. 117; *Kimball v. Lockwood*, 607 *Comer v. Sheehan*, 74 Ala. 452,
6 R. I. 138; *Comer v. Sheehan*, 74 49 Am. Rep. 819; *Burden v. Thayer*,
Ala. 452, 49 Am. Rep. 819; *Kimball* 44 Mass. (3 Metc.) 76, 37 Am. Dec.
v. Pike, 18 N. H. 419; *Castleman v.* 117.

Belt, 41 Ky. (2 B. Mon.) 157. 608 *Cook v. Guerra*, L. R. 7 C. P.

Where the lessor made a mortgage in fee to the lessee, it was held 132; *Harris v. Foster*, 97 Cal. 292, 32
that the latter could elect whether Pac. 246, 33 Am. St. Rep. 187; *Hen-*
to pay rent as lessee or to account shaw v. Wells, 28 Tenn. (9 Humph.)
for the profits as mortgagee. *Newall* 568. Compare ante, § 177 c.

609 See ante, § 146 f, at note 40 a.

of law as well as of equity to regard a mortgage as creating a lien merely, such a doctrine would presumably be regarded with disfavor.

In jurisdictions where the mortgagee is not vested with the legal title and the right of possession, but has a lien merely, the tenant is not, apart from express stipulation, affected by a mortgage made by the reversioner subsequently to the lease,⁶¹⁰ and the mortgagee is not substituted in any way for the mortgagor as landlord.⁶¹¹ If, however, the mortgagor expressly gives the mortgagee a right to the rents, he is, it has been held, entitled to assert the claim thereto as against the tenant,⁶¹² on the theory, presumably, that this constitutes an assignment of the rent still to accrue, apart from the reversion.

The effect of a mortgage previous, as distinguished from one subsequent, to the lease, upon the right to rent, is elsewhere considered.⁶¹³

e. **Purchasers at judicial or execution sale.** The right to subsequent rent passes with the reversion, not only when the latter is transferred by voluntary act, but also when it is transferred by operation of law, as upon a partition or foreclosure sale,⁶¹⁴ or a sale under execution,⁶¹⁵ or a sale in settlement of a decedent's

⁶¹⁰ See *Hogsett v. Ellis*, 17 Mich. Donahue, 85 Iowa, 748, 52 N. W. 351; *Myers v. White*, 1 Rawle (Pa.) 537.

353. And so the lessor and lessee can by agreement reduce the rent as against the mortgagee. *Frank v. New York, L. E. & W. R. Co.*, 122 N. Y. 197, 25 N. E. 332, 10 L. R. A. 381. ⁶¹³ See ante, § 73 a (5). ⁶¹⁴ *Murray v. Mounts*, 19 Ind. 364; *Watkins v. Duvall*, 69 Miss. 364, 13 So. 727; *Stevenson v. Hancock*, 72 Mo. 612; *Tubb v. Fort*, 58 Ala. 277; *Stockton's Appeal*, 64 Pa. 58.

A lessor who has made a conveyance of his interest by a deed in terms absolute cannot, it has been decided, show that the deed was intended merely as a mortgage, in order to support his right of action for rent. *Abbott v. Hanson*, 24 N. J. Law (4 Zab.) 493. ⁶¹⁵ *Butt v. Ellis*, 86 U. S. (19 Wall.) 544; *Casey v. Gregory*, 52 Ky. (13 B. Mon.) 507, 56 Am. Dec. 581; *Lancashire v. Mason*, 75 N. C. 455; *Hayden v. Patterson*, 51 Pa. 261; *Moore v. Turpin*, 1 Speer Law (S. C.) 32, 40 Am. Dec. 589; *Pickett v. Breckenridge*, 39 Mass. (22 Pick.)

⁶¹¹ *Thorn v. Sutherland*, 123 N. Y. 236, 25 N. E. 362; *Goodwin v. Hudson*, 60 Ind. 117 (semble).

⁶¹² *Thomson v. Erskine*, 36 Misc. 202, 73 N. Y. Supp. 166; *Trulock v. Iowa*, 670; *Van Wicklen v. Paulson*, 14 Barb. (N. Y.) 654.

estate.⁶¹⁶ In the case of such a sale by order of court, or under judicial process, the purchaser is, in most jurisdictions, it seems, entitled to rent accruing after the making of the sale,⁶¹⁷ but in some jurisdictions only that accruing after the date of the confirmation of the sale belongs to him,⁶¹⁸ and sometimes he acquires no right to rent till the execution of a deed to him.⁶¹⁹ If the time for the taking of possession by the purchaser is named in the decree, the purchaser is entitled to rent accruing after that time and not before.⁶²⁰ It has been decided that he is not entitled to rent pending the time for redemption.⁶²¹ These questions, as to the time at which the purchaser at such a sale becomes entitled to rent, would ordinarily be determined with reference to the statutory provisions upon the subject of such sales, in force in the particular jurisdiction.

The position in this respect of a purchaser at a sale under a lien subsequent to the lease is, as has been before stated,⁶²² to be carefully distinguished from that of one who purchases under a lien prior to the lease. The latter is not a transferee of the reversion in any sense, but is to be regarded as if the transfer to him had occurred at the time at which the lien was created; the effect of the enforcement of a lien being to extinguish all rights subsequently created. Not being interested in the reversion, he

⁶¹⁶ *Wilson v. Delaplaine*, 3 Har. Townsend v. Isenberger, 45 Iowa, (Del.) 499; *Burbank v. Dyer*, 54 670; *Varnum v. Winslow*, 106 Iowa, Ind. 392; *Page v. Culver*, 55 Mo. 287, 76 N. W. 708, 68 Am. St. Rep. App. 606; *Marys v. Anderson*, 24 Pa. 306; *Evertsen v. Sawyer*, 2 Wend. 272; *Burns v. Cooper*, 31 Pa. 426. (N. Y.) 507; *Cheney v. Woodruff*, 45

⁶¹⁷ See *Huntington v. Walker*, 9 N. Y. 98; *Garrett v. Dewart*, 43 Pa. D. C. (2 MacArthur) 479; *Wagner* 342, 82 Am. Dec. 570. An act providing that the purchaser should v. Cohen, 6 Gill (Md.) 97, 26 Am. Dec. 559; *Jashenosky v. Volrath*, 59 Ohio St. 540, 69 Am. St. Rep. 786; *Taylor v. Cooper*, 10 Leigh (Va.) 317, 34 Am. Dec. 737; *Snyder v. Riley*, 1 Speers Law (S. C.) 272, 40 Am. Dec. 602. See 3 Freeman, Executions, § 349.

⁶¹⁸ *Ball v. Covington First Nat. Bank*, 80 Ky. 501; *Latta v. Pierce*, 79 Tenn. (11 Lea) 267, 47 Am. Rep. 284.

⁶¹⁹ *Spoor v. Phillips*, 27 Ala. 193;

⁶²⁰ *Latta v. Pierce*, 79 Tenn. (11 Lea) 267, 47 Am. Rep. 284; *Cheney v. Woodruff*, 45 N. Y. 98.

⁶²¹ *Bissell v. Payn*, 20 Johns. (N. Y.) 3; *Cheney v. Woodruff*, 45 N. Y. 98.

⁶²² See ante, § 147.

has no right to the rent, though, if the tenant attorns to or accepts a lease from him, a new tenancy is created.⁶²³

f. **Trustees in bankruptcy.** Another case of transfer of the reversion by operation of law, with a consequent right in the transferee to the rent thereafter falling due, occurs in the case of the bankruptcy of the reversioner, the reversion, with the right to rent, then passing to the trustee in bankruptcy.⁶²⁴

g. **On death of person entitled.** Upon the death intestate of one having a reversion in fee simple, the rent incident to the reversion ordinarily passes therewith to the heir, while if the reversion is of a chattel nature, the rent passes with the reversion to the executor or administrator.⁶²⁵ If the reversion is devised or bequeathed, the rent passes with it to the devisee or legatee,⁶²⁶ provided, that is, it is not needed for the payment of the testator's creditors. If the rent has become severed from the reversion,^{627, 628} it is regarded as a rent charge for the period of the lease, and if the lease is for years, the rent passes to the personal representative.⁶²⁹

A provision in a lease that, after the lessor's death, the rent should be paid to a particular person, has been regarded as invalid as an attempted testamentary provision.⁶³⁰

The statutory provisions, found in a number of states,⁶³¹ that

⁶²³ See ante, § 73 a.

⁶²⁴ See ante, § 147, at note 63.

⁶²⁵ 1 Woerner, Administration, § 300; Sacheverell v. Froggatt, 2 Wms. Saund. 367 a. and notes; Rubottom v. Morrow, 24 Ind. 202, 87 Am. Dec. 324; Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Stinson v. Stinson, 38 Me. 593; Kimball v. Sumner, 62 Me. 305; Towle v. Swasey, 106 Mass. 100; Van Rensselaer's Ex'r v. Platner, 2 Johns. Cas. (N. Y.) 17; Fay v. Halloran, 35 Barb. (N. Y.) 295; In re Woodburn's Estate, 138 Pa. 606, 21 Atl. 16, 21 Am. St. Rep. 932; Overturf v. Dugan, 29 Ohio St. 230; Huff v. Latimer, 33 S. C. 255, 11 S. E. 758; Smith v. Thomas, 82 Tenn. (14 Lea) 324.

⁶²⁶ Broadwell v. Banks, 134 Fed. 470; Cobel v. Cobel, 8 Pa. 342; Tubbs v. Morgan, 12 U. C. Q. B. 151. In Fiske v. Brayman, 21 R. I. 195, 42 Atl. 878, it was held that, where the rent reserved was ice to be furnished to "the lessor and his family," the devisee of the lessor was entitled to the ice though she had married and so had ceased to be a member of his immediate household.

^{627, 628} See ante, § 180 c.

⁶²⁹ Knolle's Case, Dyer, 5 b; Williams, Executors (9th Ed.) 727.

⁶³⁰ Murray v. Cazier, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880.

⁶³¹ Woerner, Administration, § 337.

The Mississippi statute (Code 1906, § 2880) expressly provides

real property shall pass to the executor or administrator, has the effect of making such personal representative the proper person to assert a claim for the rent accruing immediately after the death of the person entitled, even though the latter had a freehold estate in the land.

The question whether, upon the death of one of two or more persons entitled to the rent, the survivor is the proper person to sue for the subsequently accruing rent, or whether the heir or devisee of the person so dying should join in such suit, is referred to in another connection.⁶³²

Each installment of rent, as it becomes due, is personal property, and consequently, if the person entitled dies after the installment becomes due, but before it is paid, the personal representative is entitled, as he is to any personal claim.⁶³³

h. Persons not in privity with lessor. In order that one may be entitled to an installment of rent, he must be either the original lessor, a transferee of the reversion, or one to whom the rent, or the particular installment, has been transferred.⁶³⁴ Occasion for the application of this principle arises most frequently in the case of a claim for rent asserted by one who has a title to the land paramount to that of the person who made the lease. That the rightful owner of land, who has been ousted therefrom by a wrongdoer, has no right to recover rent from one to whom such wrongdoer may have subsequently made a lease of the land, he being an utter stranger to the lease, is a matter as to which, on principle, there can be no question.⁶³⁵ Whether such lessee (or

that the rent to accrue for the land during the year of the lessor's death shall be payable to the personal representative.

In *Maryland* the statute (Code 1904, art. 53, § 19) provides that "the rents of real estate of minors or of leasehold estates that may not be due at the death of such minor shall for the year in which such minor may die be paid to the guardian."

⁶³² See post, § 293 d.

⁶³³ 1 Woerner, Administration, § 300; *Foltz v. Prouse*, 17 Ill. 487; *Mills v. Merryman*, 49 Me. 65; *Ball*

v. First Nat. Bank of Covington, 80 Ky. 501; *Bealey v. Blake's Adm'r*, 70 Mo. App. 229; *Gibson v. Farley*, 16 Mass. 280; *Van Rensselaer's Ex'rs v. Platner's Ex'rs*, 2 Johns. Cas. (N. Y.) 17; *Haslage v. Krugh*, 25 Pa. 97; *Miller v. Crawford*, 26 Abb. N. C. (N. Y.) 376.

⁶³⁴ That rent can be reserved only in favor of the lessor, see ante, § 170, at notes 101-103.

⁶³⁵ This is assumed in the decisions that the owner of the paramount title cannot recover against the lessee in an action for use and occupation. Post, § 304, at note 20.

his assignee) would be liable to an action for mesne profits, as is, unquestionably, the trespasser under whom he claims, is a matter on which there has been great difference of opinion.⁶³⁶

In some cases, the fact that the rightful owner of the land is an entire stranger to the lease and to the reversion, not being so plainly apparent as if the lease were made by one who had actually ousted such owner, the courts have lost sight of the true relation, or rather lack of relation, between the parties. This has occurred in the case of a sale under a mortgage or other lien prior to the lease, in which case the tenant has, as regards the purchaser at the sale, no right whatever to possession, and the purchaser is, on the other hand, not the landlord of the tenant, and not entitled as such to claim rent.⁶³⁷

An application of the above principle, that a claim for rent

But in *Gardner v. Gardner*, 25 Iowa, C. 286, the tenant was allowed to 102, the court seems to indicate a assert, by way of counterclaim in vague impression that under cer- an action for rent, that he had been tain circumstances the tenant of sued by the rightful owner for dam- the "apparent owner" might be ages on account of his wrongful oc- liable for rent to the real owner; cupancy. That the tenant of the and in *Thomas v. Judy* (Tex. Civ. disseisor is not liable to the right- App.) 44 S. W. 890, it is decided that ful owner, see *dictum* in *Liford's* he is so liable, apparently on the Case, 11 Coke, 46 b, and the follow- erroneous theory that an adjudica- ing cases, in which approval of that tion for the plaintiff in an action dictum is expressed. *Barnett v.* for the possession of land actually Guildford, 11 Exch. 19, 30; *Case v.* transfers an interest in the land De Goes, 3 Caines (N. Y.) 261; *Van* from the defendant to the plaintiff. *Brunt v. Schenck*, 11 Johns. (N. Y.)

⁶³⁶ That the tenant is liable to the 377, 385; *Dewey v. Osborn*, 4 Cow. rightful owner for mesne profits, see (N. Y.) 329, 338. And see particu- *Holcomb v. Rawlyns*, Cro. Eliz. 540; larly the discussion of various cases *Trubee v. Miller*, 48 Conn. 347, 40 bearing on the question of the right Am. Rep. 177; *Bradley v. McDaniel*, to recover mesne profits against one 48 N. C. (3 Jones Law) 28; *Babcock* claiming under the original tres- v. *Kennedy*, 1 Vt. 457, 18 Am. Dec. passer in *Bigelow*, *Leading Cases* 695; *Lyman v. Mower*, 6 Vt. 345; on the Law of Torts, at page 361 et *Lamson v. Sutherland*, 13 Vt. 309. seq. The question was the subject In *Newsome v. Graham*, 10 Barn. of decided difference of opinion long & C. 234, a recovery was allowed in before the time of Lord Coke. The favor of the tenant against the land- old authorities are referred to in lord as for money had and received *Stearns*, *Real Actions*, 416, note, and on the ground that the tenant had in the dissenting opinion of *Putnam*, been compelled by suit to pay mesne J., in *Emerson v. Thompson*, 19 profits to the rightful owner. And *Mass.* (2 Pick.) 473.

in *McKesson v. Mendenhall*, 64 N. ⁶³⁷ See ante, § 147.

cannot be asserted by one having paramount title, occurs, in jurisdictions in which a mortgage passes the legal title, in case a lease is made of land which is subject to a prior mortgage.⁶³⁸ In such case the mortgagee's title is paramount to that of the lessee, and he may evict the latter at any time, but he has no right to assert a claim for rent against him, until there is an attornment or new lease creating the relation of landlord and tenant between them.

The principle that a stranger to the reversion cannot recover rent is applicable in the case of a lease by a trustee, the rent reserved under which cannot be recovered by the *cestui que trust*,⁶³⁹ and also in the case of a lease by a life tenant, the rent reserved under which cannot be recovered by the reversioner or remainderman.⁶⁴⁰ And so in the case of a sublease by the tenant under a lease, the rent reserved under the sublease cannot be recovered by the head landlord.⁶⁴¹ So it was decided that where a lease was made by the father of the rightful owners, without any legal authority to act for them, such owners could not, upon their father's death, maintain an action for rent, they not being "privy to the lease, either in contract or estate."⁶⁴²

There are a few cases in this country apparently to the effect that rent may be reserved to a person other than the lessor.⁶⁴³ At common law, however, rent could not be thus reserved to a third person,⁶⁴⁴ and sums so attempted to be reserved should, it seems, be regarded as sums in gross payable to such person rather than as rent.

§ 181. Persons liable for the rent.

a. **Lessees.** The lessee's liability for the rent named may be based upon either privity of estate, that is, the relation of land-

⁶³⁸ See ante, § 73.

⁶³⁹ *Murphy v. Hopcroft*, 142 Cal. 43, 75 Pac. 567; *Chapin v. Foss*, 75 Ill. 280; *Harms v. McCormick*, 132 Ill. 104, 22 N. E. 511; *Patterson v. Emerick*, 21 Ind. App. 614, 52 N. E. 1012.

⁶⁴⁰ This is a necessary consequence of the view that the lease is void as regards the remainderman. See *Ludford v. Barber*, 1 Term R.

90; *Jenkins v. Church*, Cowp. 432, *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424; *McGillick v. McAllister*, 10 Ill. App. (10 Bradw.) 40.

⁶⁴¹ See ante, § 162, at notes 515-517.

⁶⁴² *Mackey v. Robinson*, 12 Pa.

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⁶⁴³ See ante, notes 108-109.

⁶⁴⁴ See ante, at notes 101-103.

lord and tenant, or upon privity of contract, that is, the lessee's covenant to pay such rent.⁶⁴⁵ At common law the liability based on privity of estate is enforced by action of debt⁶⁴⁶ or by distress,⁶⁴⁷ while that based on privity of contract is enforced by action of covenant,⁶⁴⁸ or, if the lessee's promise to pay rent is not under seal, by action of *assumpsit*.⁶⁴⁹ In jurisdictions in which the distinctions between the common-law forms of action no longer exist, it will ordinarily not appear whether the liability is sought to be based on privity of estate or on privity of contract, and the question has, to a very great extent, lost its practical importance.

The lessee is liable for the rent by reason of his privity of estate with the landlord, until this privity is terminated by an assignment by him of the leasehold. But an assignment by the lessee does not relieve him from his liability based on privity of estate, until the lessor indicates his willingness to regard the assignee as his tenant, by receiving rent from him or otherwise, since the lessee cannot substitute another as tenant in his place without the landlord's consent.⁶⁵⁰ And so, presumably, the mere assignment of part of the leasehold, not assented to by the landlord, will not relieve the lessee from any part of such liability. Whether, if the lessor assents to such partial assignment or indicates his acceptance of the assignee as tenant of part, the lessee will be proportionately relieved from liability by reason of privity of estate, as he is entirely relieved therefrom by his assignment of the leasehold in the whole premises, when assented to by the lessor, has apparently never been explicitly decided.⁶⁵¹ Even though the lessor does assent to the assignment of part, he still has, it seems, at common law, a right to distrain upon such part for the whole rent, this being regarded as issuing out of every part of the premises for the purposes of distress.⁶⁵²

⁶⁴⁵ See ante, § 157 a (1), note 294; *Marlowe*, 8 East, 314, note; *Montgomery v. Spence*, 23 U. C. Q. B. 39;

§ 171.

⁶⁴⁶ See post, § 248 a.

⁶⁴⁷ See post, chapter XXXII.

⁶⁴⁸ See post, § 290 b.

⁶⁴⁹ See post, § 290 c.

⁶⁵⁰ *Walker's Case*, 3 Coke, 22 a; *Marsh v. Brace*, Cro. Jac. 334; *Mills v. Auriol*, 1 H. Bl. 433; *Auriol v. Mills*, 4 Term R. 94; *Wadham v.*

Marlowe, 8 East, 314, note; *Montgomery v. Spence*, 23 U. C. Q. B. 39; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Harmony Lodge v. White*, 30 Ohio St. 569, 27 Am. Rep. 492.

⁶⁵¹ The question is discussed in *Rushden's Case*, 1 Dyer, 4 b.

⁶⁵² *Curtis v. Spitty*, 1 Bing. N. C. 756. In *Jackson v. Wychoff*, 5

The lessee's liability upon his covenant to pay rent, that is, by privity of contract as distinguished from privity of estate, is not affected by his assignment of the leasehold, even though assented to by the landlord,⁶⁵³ though, as between him and his assignee, the latter becomes primarily liable.⁶⁵⁴

The lessee is not relieved from liability on his covenant for rent by the fact that the assignee in express terms assumes liability upon the covenant,⁶⁵⁵ nor, it has been decided, by the fact that the assignee agrees with the landlord to pay a rent different from

Wend. (N. Y.) 53, it is held that a partition of the premises between tenants is nugatory, unless assented to by the landlord, as against the latter's right to distrain for the whole rent on any part of the premises.

⁶⁵³ *Worthington v. Cooke*, 56 Md. 51; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Missouri, K. & T. Trust Co. v. Richardson*, 57 Neb. 617, 78 N. W. 273; *Creveling v. De Hart*, 54 N. J. Law, 338, 23 Atl. 611; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *Taylor v. DeBus*, 31 Ohio St. 469; *Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. 705; *Rees v. Lowy*, 57 Minn. 381, 59 N. W. 310; *Oswald v. Fratenburgh*, 36 Minn. 270, 31 N. W. 173; *Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233; *Latta v. Weiss*, 131 Mo. 230, 32 S. W. 1005; *Almy v. Greene*, 13 R. I. 350, 43 Am. Rep. 32; *Ghegan v. Young*, 23 Pa. 18. See ante, § 157 a (2).

So if two partners take a lease, one cannot relieve himself from liability for rent by withdrawing from the firm. *Warner v. Hale*, 65 Ill. 395; *Weil v. Defenbaugh*, 65 Ill. App. 489.

The lessee was even held liable under his covenant, for an increase in rent caused by the act of his as-

signee in availing himself of a provision authorizing the lessee, "his legal representatives and assigns" to retain possession, after notice to terminate from the lessor, upon paying an increased rent named. *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64. But in Ohio it has been decided that where a lease for ninety-nine years, renewable forever, provided that the rent should be fixed every fifteen years by a revaluation of the premises, the lessee was not intended to be liable for rent so fixed by arbitration, conducted by his assignees, for the reason that an increased burden might thus be imposed on him without his assent. *Worthington v. Hewes*, 19 Ohio St. 66, ante, note 229. This case is distinguished in *Taylor v. De Bus*, 31 Ohio St. 468, the court refraining from expressing either approval or disapproval thereof.

As to "implied covenants" to pay rent, and the lessee's continuing liability thereon, see ante, § 171 b.

⁶⁵⁴ See ante, § 158 b, at notes 481-488.

⁶⁵⁵ *Wineman v. Phillips*, 93 Mich. 223, 53 N. W. 168; *Charless v. Froebel*, 47 Mo. App. 45; *Ranger v. Bacon*, 3 Misc. 95, 22 N. Y. Supp. 551; *Adams v. Shirk* (C. C. A.) 104 Fed. 54.

that reserved by the lease.⁶⁵⁶ Nor is it material that the landlord did not demand rent from the assignee before proceeding against the lessee,⁶⁵⁷ nor that he failed to enforce a lien for rent on the assignee's goods.⁶⁵⁸ Occasional decisions to the effect that, under the circumstances, the lessor's acquiescence in the assignment, and failure to assert any claim for rent as against the lessee, had the effect of relieving him from liability,⁶⁵⁹ can be supported only on the theory that such action on the part of the lessor constituted in each case a new lease to the assignee, thus causing a surrender by operation of law.⁶⁶⁰ It has, in one case, been decided that the lessee is relieved from his liability on his covenant to pay rent by the fact that the assignee, with the landlord's consent, makes a use of the premises which is prohibited by the lease.⁶⁶¹ This decision, also, may perhaps be supported on the theory that such change of use, with the lessor's consent, involves a surrender by operation of law.⁶⁶²

⁶⁵⁶ *Wineman v. Phillips*, 93 Mich. 223, 53 N. W. 168.

⁶⁵⁷ *Pittsburgh Consol. Coal Co. v. Greenlee*, 164 Pa. 549, 30 Atl. 589.

⁶⁵⁸ *Barhydt v. Burgess*, 46 Iowa, 476.

⁶⁵⁹ *Colton v. Garham*, 72 Iowa, 324, 33 N. W. 76; *Brayton v. Boomer*, 131 Iowa, 28, 107 N. W. 1099. And see cases cited post, § 190 b (1) (d), notes 114c-114 f.

In *Patten v. Deshon*, 67 Mass. (1 Gray) 325, it is said by Shaw, C. J., that "if the original lessor assents to the assignment and agrees to accept the assignee as his tenant, and proof of receiving rent from the assignee will be deemed evidence of such assent, he has no longer any right of action against the original lessee." This statement is evidently not in accord with the later case of *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64, ante, note 653. It is adopted as expressing the Texas rule in *Ascarete v. Pfaff*, 34 Tex. Civ. App. 375, 78 S. W. 974.

⁶⁶⁰ See post, § 190 b (1) (d).

⁶⁶¹ *Fifty Associates v. Grace*, 125 Mass. 161, 28 Am. Rep. 218.

⁶⁶² The court says that the lessee "was released from liability on the covenant to pay rent, certainly while such occupation continued, for he had covenanted to pay only according to the terms of the lease." But that apparently assumes the point at issue. What the lessee really covenanted to do appears to have been to pay rent and to "use and occupy the premises as and for a dry goods and millinery store," and the assignee used it for another purpose with the lessor's assent. If the lessee agreed to pay rent, as stated by the court, only so long as he or his assignee used the premises in the way named, assuredly a singular kind of agreement from the lessor's point of view, his liability for rent would cease upon a cessation of such use irrespective of whether the lessor assented thereto. But the court appears to regard the

One who is not named in the instrument of lease cannot, it would seem, be regarded as one of the lessees, and liable for rent as such, merely because he joins in the execution. That is, a conveyance in terms to A cannot be regarded as a conveyance to A and B merely because B, as well as A, places his name at the foot thereof. It would seem, moreover, that he cannot be regarded as joining in the covenant to pay the rent, so as to be liable therefor, the language in terms purporting to bind the lessee only. There are occasional decisions to this effect.⁶⁶³

b. **Assignees of the leasehold.** The liability of an assignee of the leasehold for rent reserved by the lease is determined by the application of the general principles and rules which control his liability in other respects. These have been considered in a previous chapter,⁶⁶⁴ to which reference may be made, in connection with the following statements as to the liability of an assignee for rent.

The liability arising from privity of estate, for rent reserved by the lease, is, by an assignment of the leasehold, transferred to the assignee, and he remains subject thereto until he makes a re-assignment to another, who, as being the tenant for the time being, in turn becomes subject thereto.⁶⁶⁵ In some jurisdictions, indeed, it appears that one may be held liable as assignee although there has been a transfer to him of the equitable title merely to the leasehold, or in case he has been given the possession merely.⁶⁶⁶

It has been suggested that, in case of the assignment of the

lessor's assent to the cessation of (Ala.) 45 So. 129. In *Evans v. Con-*
such use as a material consideration klin, 71 Hun, 536, 24 N. Y. Supp.
in relieving the lessor from rent, 1081, it is said that one so signing
since it says that "the effect of the is not a lessee liable for rent."

assent by the plaintiff to the assign-
ment to S., for a different use and
occupation, was to create a new
tenancy inconsistent with the terms
of the lease to the defendant, and
his liability for rent, while such
tenancy continued, ceased;" refer-
ring to *Amory v. Kannoisky*, 117
Mass. 351, 19 Am. Rep. 416, which
was a case of implied surrender.
See, as to surrender, post, § 190.

⁶⁶⁴ See ante, § 158 a.

⁶⁶⁵ *Walker's Case*, 3 Coke, 22 a;
Thursby v. Plant, 1 Wms. Saund.
237, note (1); *Howland v. Coffin*, 26
Mass. (9 Pick.) 52, 29 Mass. (12
Pick.) 125; *McKeon v. Whitney*, 3
Denio (N. Y.) 452; *McBee v. Samp-*
son, 66 Fed. 416; *Hartman v.*
Thompson, 104 Md. 389, 65 Atl. 117,
118 Am. St. Rep. 422; *Daniels v.*
Richardson, 39 Mass. (22 Pick.) 565.

⁶⁶⁶ *Hubbard v. Knous*, 69 Mass.

⁶⁶⁶ See ante, § 158 a (2) d.

(3 Gray) 567; *Brown v. O'Byrne*

leasehold in part of the land, privity of estate might arise as to the whole land, so as to make the assignee liable for the whole rent.⁶⁶⁷ This seems contrary to the principles of apportionment ordinarily adopted,⁶⁶⁸ and there are a number of decisions to the effect that the assignee of part of the land is liable only for a proportioned part of the rent.⁶⁶⁹

An assignee of the leasehold is usually liable for rent, not only by reason directly of the privity of estate between him and the landlord, as above stated, but also by reason of the lessee's covenant to pay rent,⁶⁷⁰ the burden of which is considered to pass to

⁶⁶⁷ In *Curtis v Spitty*, 1 Bing. N. C. 756, it is said by Tindal, C. J., to be "a very nice and difficult question, not settled by any decision in the books, so far as we can ascertain, namely, whether there exists a privity of estate in respect of the whole land by an assignment of part only." In *Damainville v. Mann*, 32 N. Y. 197, 88 Am. Dec. 324, the assignee of an undivided interest in the leasehold was held to be liable for the whole rent, not on the theory that there was privity of estate in respect of the whole land, but on the theory that the taking of possession of the whole land by the assignee rendered him so liable on the covenant for rent, which ran with the land. See ante, § 158 a (2) (d) (m), note 442.

⁶⁶⁸ See ante, § 175.

⁶⁶⁹ *St. Louis Public Schools v. Boatmen's Ins. & Trust Co.*, 5 Mo. App. 91; *Van Rensselaer's Ex'rs v. Gallup*, 5 Denio (N. Y.) 454; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643; *Hogg v. Reynolds*, 61 Neb. 758, 86 N. W. 479, 87 Am. St. Rep. 522; *Van Rensselaer v. Bradley*, 3 Denio (N. Y.) 135, 45 Am. Dec. 451; *Babcock v. Scoville*, 56 Ill. 461; *Daniels v. Richardson*, 39 Mass. (22 Pick.) 565. See *Gamon v. Vernon*, 2 Lev. 231.

⁶⁷⁰ *Barker v. Damer*, Carth. 182;

Stevenson v. Lambard, 2 East, 575; *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *Prettyman v. Walston*, 34 Ill. 175, 85 Am. Dec. 304; *Webster v. Nichols*, 104 Ill. 160; *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Mead v. Madden*, 85 App. Div. 10, 82 N. Y. Supp. 900; *Hunt v. Thompson*, 84 Mass. (2 Allen) 341; *Hannen v. Ewalt*, 18 Pa. 9; *Fennell v. Guffey*, 139 Pa. 341, 20 Atl. 1048; *Hogg v. Reynolds*, 61 Neb. 758, 86 N. W. 479, 87 Am. St. Rep. 522; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443; *Darmstaetter v. Hoffman*, 120 Mich. 48, 78 N. W. 1014; *Le Gierse v. Green*, 61 Tex. 128.

The assignee has been held bound by a covenant to pay rent, the amount of which was to be determined by an assessment by the lessor. *Tate v. Neary*, 52 App. Div. 78, 65 N. Y. Supp. 40. The assignee was held to be bound by a covenant to pay a part of any excess over the rent which the premises might yield from an underlease, although this excess took the form of a lump sum. *Constantine v. Wake*, 31 N. Y. Super. Ct. (1 Sweeny) 239.

The assignee's liability on the covenant for rent exists although the lessee gave his notes for the rent, since the taking of the notes

him along with the leasehold.⁶⁷¹ That is, in jurisdictions where the common-law forms of action are recognized, he is liable in covenant as well as in debt.⁶⁷² The conditions under which liability is imposed upon an assignee of the leasehold by reason of a covenant on the part of the lessee are considered in a previous chapter.⁶⁷³

The assignee is not liable for rent which fell due before the assignment to him, unless he assumed such liability by express stipulation.⁶⁷⁴ But he is liable for any installment which falls due during his tenancy, and he cannot assert, as against his assignor, a claim to have the liability apportioned as of the date of the assignment,⁶⁷⁵ rent not being apportionable as to time.⁶⁷⁶

So far as concerns the liability of the assignee of the leasehold, it is ordinarily immaterial whether it is based on privity of estate or on privity of contract, since his liability by reason of privity of contract is based on the theory that such privity exists by reason of the privity of estate. In other words, the assignee of the leasehold is liable upon the lessee's covenant for

does not extinguish the liability for transfer of a life interest in land rent. *McCormick v. Young*, 32 Ky. has been held to bind a subsequent transferee of such interest. *McMurphy v. Minot*, 4 N. H. 251. In (2 Dana) 294.

⁶⁷¹ See ante, § 158 a (2).

⁶⁷² See post, § 290 b.

The burden of a covenant to pay rent, made on a conveyance in fee, has also been decided in this country to run with the land, so as to render a grantee of the land personally liable thereon. *Carley v. Lewis*, 24 Ind. 23; *Herbaugh v. Zentmyer*, 2 Rawle (Pa.) 159; *Hannen v. Ewalt*, 13 Pa. 9; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *Van Rensselaer v. Read*, 26 N. Y. 558; *Van Rensselaer v. Dennison*, 35 N. Y. 393. By statute in Pennsylvania, at the present day, the purchaser of land is personally liable only when he assumes liability in writing. See *Easby v. Easby*, 180 Pa. 429, 36 Atl. 923, 57 Am. St. Rep. 654. Likewise, the burden of a covenant to pay rent reserved on the

transfer of a life interest in land has been held to bind a subsequent transferee of such interest. *McMurphy v. Minot*, 4 N. H. 251. In England, it would seem, in view of expressions adverse to the running of the burden of covenants on conveyances in fee (see 1 *Tiffany*, Real Prop. § 344), that a grantee of land would not be liable on such a covenant reserved on a conveyance in fee. To this effect, see the remarks of Holt, C. J., in *Brewster v. Kidgill*, 12 Mod. 166; *Copinger & Munro*, Law of Rents, 473-476. But that the burden does run, see *Sugden, Vendors & Purchasers* (13th Ed.) 483; *Harrison*, Chief Rents, 102.

⁶⁷³ See ante, § 158 a (2).

⁶⁷⁴ See ante, § 158 a (2) (c), at notes 347-349.

⁶⁷⁵ *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917; *Graves v. Porter*, 11 Barb. (N. Y.) 592.

⁶⁷⁶ See ante, § 176 a.

rent because he is in privity of estate with the landlord, and only so long as such privity endures. There is, so to speak, a privity of contract by reason of the privity of estate. .

One to whom the leasehold in part only of the premises is assigned is liable for a proportionate part of the rent, both upon the theory of privity of estate,⁶⁷⁷ and upon that of privity of contract.⁶⁷⁸ Likewise, an assignee, not of the leasehold interest in the part of the leased premises, but of an undivided interest in the leasehold in the whole premises, is liable for a proportionate part of the rent.⁶⁷⁹

In jurisdictions in which a mortgage has the effect of transferring the legal title, a mortgagee of the leasehold would ordinarily be liable for the rent to the same extent as would an absolute assignee.⁶⁸⁰ In some jurisdictions, in which the equitable conception of a mortgage prevails, the assignee has been regarded as liable if he takes possession, and otherwise not.⁶⁸¹

⁶⁷⁷ *Gamon v. Vernon*, 2 Lev. 231. *Boatman's Ins. & Trust Co.*, 5 Mo. App. 91; *Babcock v. Scoville*, 56 Ill.

⁶⁷⁸ *Babcock v. Scoville*, 56 Ill. 461; 461. See *Merceron v. Dowson*, 5 Cox v. Fenwick, 7 Ky. (4 Bibb) Barn. & C. 479; *Norval v. Pascoe*, 34 538; *Harris v. Frank*, 52 Miss. 155; Law J. Ch. 82. *Damainville v. Astor v. Miller*, 2 Paige (N. Y.) 68; *Mann*, 32 N. Y. 197, 88 Am. Dec. 324, *Van Rensselaer v. Gifford*, 24 Barb. holding such assignee of a part interest liable for the whole rent if he (N. Y.) 349. See ante, § 158 a (2) takes possession of the whole, is (m), at notes 436, 439, 442. well criticised in the case first above cited.

In *Woodruff v. Baldwin*, 72 Conn. 430, 44 Atl. 748, it was held that an assignee of the leasehold in part of the leased premises was bound, as against the lessee, to pay the whole of the rent reserved, and not an apportioned part only, the deed of assignment reciting that the land conveyed was part of the leased "premises," and providing that the assignee "agrees to pay the rent of said premises that may annually become due to (the original lessor) as a part of the consideration for the deed," and it showing no basis on which the values of the parcels of land could be ascertained for the purpose of apportionment.

⁶⁷⁹ *St. Louis Public Schools v.* 287, 76 Am. Dec. 481; *Cargill v*

⁶⁸⁰ *Williams v. Bosanquet*, 1 Brod. & B. 238; *McMurphy v. Minot*, 4 N. H. 251; *Mayhew v. Hardesty*, 8 Md. 479; *Farmers' Bank v. Mutual Assur. Soc.*, 4 Leigh (Va.) 69. See ante, § 158 a (2) (f).

⁶⁸¹ *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Walton v. Cronly*, 14 Wend. (N. Y.) 63; *Tallman v. Bresler*, 65 Barb. 369, 56 N. Y. 635; *Levy v. Long Island Brewery*, 26 Misc. 410, 56 N. Y. Supp. 242; *McKee v. Angelrodt*, 16 Mo. 283; *Prather v. Foote*, 1 Disn. (Ohio) 434. See ante, § 158 a (2) (f), notes 367-369. But compare *Johnson v. Sherman*, 15 Cal.

One to whom the lessee, or an assignee of the lessee, makes an assignment for the benefit of creditors, becomes liable on the covenant for rent, at least if he accepts the leasehold as part of the assets assigned.⁶⁸²

When the leasehold passes to another person by operation of law, such person becomes liable for the rent reserved, for the most part to the same extent as does an assignee by voluntary act, by reason of the covenant to pay rent, and also, it would seem, apart from such covenant, purely by reason of privity of estate. Thus, a purchaser at judicial or execution sale is liable for the rent.⁶⁸³ And so a trustee in bankruptcy is liable therefor, if he accepts the leasehold as part of the assets.⁶⁸⁴ In some jurisdictions, likewise, a receiver of the lessee or of the assignee of the leasehold becomes liable as being himself an assignee.⁶⁸⁵

Though the lessor can proceed on the covenant against either the lessee or the assignee, or against both, he can have but one satisfaction of his judgment.⁶⁸⁶

As between the lessee and his assignee, the latter is primarily bound to pay the rent, and, in case the lessee is compelled to pay it, he may recover the amount of his expenditures in this regard by action against the assignee.⁶⁸⁷

Thompson, 57 Minn. 534, 59 N. W. 638, 25 L. R. A. 755.

⁶⁸² See ante, § 158 a (2) (k).

⁶⁸³ See ante, § 158 a (2) (g).

⁶⁸⁴ See ante, § 158 a (2) (j).

⁶⁸⁵ See ante, § 158 a (2) (l).

⁶⁸⁶ Brett v. Cumberland, Cro. Jac. 521; Bachelour v. Gage, Cro. Car. 188; Sutliff v. Atwood, 15 Ohio St. 186; Whetstone v. McCartney, 32 Mo. App. 430. In LeGierse v. Green, 61 Tex. 128, it is held that the fact that the lessor unsuccessfully sues the original lessee for the rent does not affect his right subsequently to recover it from the lessee's assignee.

In Whitcomb v. Cummings, 68 N. H. 67, 38 Atl. 503, while it was decided that the fact that the lessor sued the assignee of the leasehold for rent at the lessee's request, was

not an election to treat the assignee as the lessee, so as to release the lessee from liability on the covenant, the court said that the bringing of such action might have had that effect in the absence of the elements of estoppel, that is, if the lessor had brought the action of his own motion instead of at the lessee's request. There is no other case suggesting such a limitation upon the lessor's right to sue the lessee and assignee in succession upon the covenant.

That a lessor distrains on the goods of a sublessee or assignee which are on the premises does not relieve the lessee from liability for rent subsequently accruing. Manley v. Dupuy, 2 Whart. (Pa.) 162.

⁶⁸⁷ See ante, § 158 b.

Since the assignee's liability for rent is by reason of the privity of estate, arising from his ownership of the leasehold, he can terminate this liability, as regards rent not yet due, by assigning the leasehold to another.⁶⁸⁸ Likewise the assignee may effect an apportionment of the rent in his own favor by assigning the leasehold in part of the premises, he having the same right thus to diminish his liability as he has, by assigning the whole leasehold, entirely to divest himself of liability, and in such case he remains liable for a proportionate part, while his assignee becomes liable for the other part.⁶⁸⁹

A sublease of part or of the whole, whether by the original lessee or by an assignee, cannot affect the sublessor's liability for rent, since it does not in any way affect the privity of estate.⁶⁹⁰

If the assignee expressly assumes liability for the rent to accrue, he will, even after reassigning, be subject to liability therefor in favor of his assignor, who may have been compelled to pay the rent, and, in some jurisdictions, it seems, directly to the landlord. Whether there is such an assumption of liability is, in each case, a question of the construction of the language used in the assignment.⁶⁹¹

c. **Executors and administrators.** The executor or administrator of the tenant, as standing in his place, is, to the extent of the assets of the estate, liable for the rent which may have accrued before his decedent's death.⁶⁹² He is so liable also for rent

⁶⁸⁸ *Pitcher v. Tovey*, 1 Salk. 81, 4 rent already due at the time of the Mod. 71; *Paul v. Nurse*, 8 Barn. & C. reassignment, though so due because payable in advance. *McLean* 486; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Trabue v. McAdams*, 71 Ky. (8 Bush) 74; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Bell v. American Protective League*, 163 Mass. 558, 40 N. E. 857, 28 L. R. A. 452, 47 Am. St. Rep. 481; *Durand v. Curtis*, 57 N. Y. 7, 15 Am. Rep. 453; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624. See ante, § 158 a (2) (n). But he is not relieved as regards

McLean v. Caldwell, 107 Tenn. 138, 64 S. W. 16; *Congregational Soc. of Sharon v. Rix (Vt.)* 17 Atl. 719.

⁶⁸⁹ *Congham v. King*, Cro. Car. 221; *Muldoon v. Hite*, 6 Ky. Law Rep. 663.

⁶⁹⁰ *Broom v. Horr*, Cro. Eliz. 633.

⁶⁹¹ See ante, § 158 a (2) (n) (bb).

⁶⁹² 2 Williams, *Executors* (9th Ed.) 1634; *Woerner, Administration*, § 372; 2 Platt, *Leases*, 367; 1 Wms. Saund. 1, note to *Jevens v. Harridge*. See ante, § 158 a (2) (h).

accruing after his decedent's death.⁶⁹³ If the decedent was the original lessee, the executor or administrator is liable, to the extent of the assets, for the rent which may accrue until the expiration of the lease, even though the lessee may have assigned the leasehold to another,⁶⁹⁴ the assets of the lessee's estate being thus chargeable to the same extent as would have been the lessee himself.⁶⁹⁵ Nor can the executor or administrator of the original lessee avoid such liability by himself making an assignment.⁶⁹⁶ On the other hand, if the decedent was not the original lessee, but was a mere assignee of the leasehold, and he did not expressly assume liability upon the covenants of the lease, the assets of his estate are not liable for rent which may have accrued after a reassignment of the leasehold by the decedent,⁶⁹⁷ and likewise the assets of the estate may be relieved from rent subsequently to accrue by means of an assignment by the executor or administrator himself.⁶⁹⁸

Not only is the personal representative of the tenant liable as such for rent to accrue, that is, to the extent of the assets of the decedent's estate, but he is also liable personally as an assignee by operation of law, provided he takes possession of the premises.⁶⁹⁹ It has been decided, however, that he may show in

⁶⁹³ *House v. Webster*, Yel. 103; *Len*, 127 Mass. 248; *Scott v. Lunt's Helier v. Casebert*, 1 Lev. 127; *Coghil v. Freelove*, 3 Mod. 325; *Greenleaf v. Allen*, 127 Mass. 248; *Traylor v. Cabanne*, 8 Mo. App. 131; *Alsop v. Banks*, 68 Miss. 664, 9 So. 895, 3 L. R. A. 598, 24 Am. St. Rep. 294; *Howard v. Heinerschit*, 16 Hun (N. Y.) 177; *Wilcox v. Alexander* (Tex. Civ. App.) 32 S. W. 561; *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S. E. 950.

⁶⁹⁴ See ante, § 55 a.

⁶⁹⁵ *Helier v. Casebert*, 1 Lev. 127; *Coghil v. Freelove*, 3 Mod. 325; *Pitcher v. Tovey*, 1 Salk. 81, 4 Mod. 71; *Pate v. Oliver*, 104 N. C. 458, 10 S. E. 709.

⁶⁹⁷ See ante, § 158 a (2) (n).

⁶⁹⁸ In *Rowley v. Adams*, 4 Mylne & C. 534, the executor was held liable for failing to do so.

⁶⁹⁹ *Rich v. Frank*, Cro. Jac. 238; *Wollaston v. Hakewill*, 3 Man. & G. 297; *In re Bowes*, 37 Ch. Div. 128; *Howard v. Heinerschit*, 16 Hun (N. Y.) 177; 1 Wms. Saund. 1, note to

⁶⁹⁴ *Helier v. Casbard*, 1 Sid. 266; *Coghil v. Freelove*, 3 Mod. 325; 1 Wms. Saund. 241 a, note (5) to

Thursby v. Plant; *Greenleaf v. Al-*

diminution of such liability that the profits obtainable from the land are less than the rent,⁷⁰⁰ and that he may, in such case, relieve himself from liability by relinquishing possession to the landlord.⁷⁰¹ He may also assign to another and thus terminate his liability as assignee.⁷⁰²

d. **Subtenants.** A person to whom the tenant makes a sublease, or his assignee, is not in privity either of contract or estate with the head landlord, and is consequently not liable for rent reserved by the head lease,⁷⁰³ though he is obviously liable for the rent reserved by the sublease. Within this rule is the case of a person who goes into possession by permission of the tenant, without any assignment of the leasehold, and without any formal lease from him, he being at most, it seems, his tenant at will or periodic tenant.⁷⁰⁴

Occasionally a statute provides that one in possession of land

⁷⁰⁰ *Billingham v. Speerman*, 1 *lege v. Clough*, 8 N. H. 22; *James v. Salk*, 297; *Rubery v. Stevens*, 4 *Kurtz*, 23 Pa. Super. Ct. 304; *Harn. & Adol.* 241; *Reid v. Tenterden*, 4 Tyrw. 111; *In re Bowes*, 37 Ch. Div. 128; *Rendall v. Andreae*, 61 Law J. Q. B. 630; *Whitehead v. Palmer* [1908] 1 K. B. 151; *Inches v. Dickinson*, 84 Mass. (2 Allen) 71, 79 Am. Dec. 765.

⁷⁰¹ 2 *Williams, Executors* (9th Ed.) 639; *Stephens v. Hotham*, 1 Kay & J. 571; *Reid v. Tenderden*, 4 Tyrw. 111; *Remnant v. Bremridge*, 8 Taunt. 191. See ante, § 58 a (2) (h), note 382.

⁷⁰² *Taylor v. Shum*, 1 Bos. & P. 201, 15 N. E. 584; *Fisher v. Pforzheimer*, 93 Mich. 650, 53 N. W. 828; *Camp v. Scott*, 47 Conn. 366; *In re Campbell's Estate*, 21 Pa. Super. Ct. 424. See ante, §§ 13 a (3), 14 b (2), 158 a (2) (d).

⁷⁰³ *Holford v. Hatch*, 1 Doug. 183; *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274; *Shattuck v. Lovejoy*, 74 Mass. (8 Gray) 204; *Carver v. Palmer*, 33 Mich. 342; *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Rehm v. Weiss*, 8 Misc. 525, 28 N. Y. Supp. 772; *Austin v. Thomson*, 45 N. H. 113; *Trustees of Dartmouth Col-*

The subtenant may, however, be liable to the head landlord for the rent reserved by the sublease if the subreversion, or the rent appurtenant thereto, is transferred to the latter. See *Simmons v. Fielder*, 46 Ala. 304; *Hessel v. Johnson*, 129 Pa. 173, 18 Atl. 754, 5 L. R. A. 851, 15 Am. St. Rep. 716.

⁷⁰⁴ See *Brooks v. Allen*, 146 Mass. 201, 15 N. E. 584; *Fisher v. Pforzheimer*, 93 Mich. 650, 53 N. W. 828; *Camp v. Scott*, 47 Conn. 366; *In re Campbell's Estate*, 21 Pa. Super. Ct. 424. See ante, §§ 13 a (3), 14 b (2), 158 a (2) (d).

In *Foucar v. Holberg*, 85 Ark. 59, 107 S. W. 172, it was held that if the subtenant agreed with the tenant, his lessor, to pay the rent, the head landlord could sue on this agreement as having been made for his benefit.

shall be liable for the amount or proportion of the rent due on the land,⁷⁰⁵ the effect of which would seem to be to impose liability on a subtenant in favor of the head landlord.

If the lessee is insolvent, the lessor is allowed to proceed by bill in equity against the sublessee, in order to obtain satisfaction of his claim for rent out of money due the lessee under the sublease.⁷⁰⁶

An assignee of part of the leased premises, though he has been compelled to pay the entire rent, and though the lessee, his assignor, is insolvent, cannot compel contribution from a sublessee of another part, since, as has been previously stated, a sublessee is not liable on the covenants.⁷⁰⁷

A person in trust for whom another takes a lease is not liable for the rent. He is, like a subtenant, not in privity with the landlord.⁷⁰⁸

⁷⁰⁵ *Minnesota* Rev. Laws 1905, § 3330; *Rhode Island* Gen. Laws 1896, c. 269, § 9; *Wisconsin* Rev. St. 1898, § 2189.

In *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. R. Co.*, 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607, it was decided that Rev. St. 1889, § 6388, providing that rent may be recovered from a lessee, his assignee or "undertenant" by the "remedies given in the preceding sections," did not give the landlord a right to sue the undertenant at law for rent unless it was sought to enforce a lien or to issue an attachment, these being the only remedies given by the preceding sections. This decision is followed in *Glasner v. Fredericks*, 73 Mo. App. 424. It does not appear to have been decided whether the same construction would be placed on a similar Kentucky statute (St. 1903, § 2305).

⁷⁰⁶ *Goddard v. Keate*, 1 Vern. 87; *Haley v. Boston Belting Co.*, 140 Mass. 73, 2 N. E. 785; *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481; *Otis v. Conway*, 114 N. Y. 13, 20 N. E. 628; *Glasner v. Fredericks*, 73 Mo. App. 424; *Kemp v. San Antonio Catering Co.*, 118 Mo. App. 134, 93 S. W. 342; 1 Story, Eq. Jur. § 687.

The New Jersey statute (1 Gen. St. p. 1212, § 22) requires the subtenant, on notice from the head landlord, to pay to the latter the rent due under the sublease.

As to the right of the sublessee to pay the head rent and assert it as a payment on the rent due by him, see ante, § 177 e.

⁷⁰⁷ *Johnson v. Wild*, 44 Ch. Div. 146.

⁷⁰⁸ *Walters v. Northern Coal Min.*

It is held in Georgia that, under the statutory prohibition of a sublease without the lessor's assent, the lessor may elect to treat the sub-

e. **Principals and agents.** The question of the person liable for rent when the lease is nominally to an agent is determined by the ordinary doctrines of agency. If the instrument of lease is under seal, executed by the agent in his own name, and does not purport to be the act of the principal, the agent, and not the principal, is liable.⁷⁰⁹ And even though the instrument is not under seal, if it purports to be executed by one in his own behalf, he is liable as principal,⁷¹⁰ though the person for whom he acted may also be liable. One who does not execute the instrument of lease, and who is not the nominal lessee thereunder, is not liable merely because he takes possession as agent in behalf of the lessee,⁷¹¹ and *a fortiori* he is not liable if he does not take possession and merely acts as agent in paying the rent.⁷¹²

f. **Sureties and guarantors—**(1) **Nature of contract.** A person other than the lessee, or an assignee of the lessee, may be liable for the rent by reason of a contract on his part as surety for, or guarantor of, its payment by the lessee. The rights and liabilities of one, so making himself responsible for the performance by the lessee of his covenant to pay rent, are governed by the same rules as are ordinarily applicable to a contract of suretyship or guaranty, but the circumstances calling for the application of these rules, in connection with the liability of a lessee, are sometimes peculiar, and it seems proper to set out the decisions which have been rendered in this regard.

The distinction between a contract of suretyship and one of guaranty is in effect that the surety is a party with the principal to the original contract, and is liable as such, while the guarantor is an independent contractor, agreeing to become responsible only in case the principal fails or is unable to pay.⁷¹³

(2) **Form and validity of contract.** A contract of suretyship

Co., 5 De Gex, M. & G. 629; Cox v. Bishop, 8 De Gex, M. & G. 815; Ramage v. Womack [1900] 1 Q. B. 116.

⁷⁰⁹ Beck v. Eagle Brewery (N. J. Eq.) 30 Atl. 1100; Borchering v. Katz, 37 N. J. Eq. (10 Stew.) 150; Klersted v. Orange & A. R. Co., 69 N. Y. 343, 25 Am. Rep. 199. See ante, § 57 a.

⁷¹⁰ Stobie v. Dills, 62 Ill. 432. See ante, § 57 b.

⁷¹¹ Dresner v. Fredericks, 91 App. Div. 224, 86 N. Y. Supp. 589; Stewart v. Perkins, 3 Or. 508.

⁷¹² Ireland v. United States Mortg. & Trust Co., 72 App. Div. 95, 76 N. Y. Supp. 177; Id., 175 N. Y. 491, 67 N. E. 1083.

⁷¹³ Stearns, Suretyship, § 6; 1 Brandt, Suretyship, § 2.

or guaranty must be in writing, under the provision of the statute of frauds with reference to contracts to answer for the debt or default of another.⁷¹⁴

The contract may be incorporated in the same instrument as the lease itself, or it may be evidenced by a separate instrument. A separate instrument evidencing such a contract, a bond for the payment of rent for instance, need not, it has been held, be executed by the lessee as well as by the sureties,⁷¹⁵ this according with the ordinary rule that a bond is valid without the principal's signature, if the latter's liability exists independently of the bond.⁷¹⁶ Any omission in the contract may be supplied by reference to the instrument of lease itself, if this is so referred to in the contract of suretyship or guaranty as to be substantially incorporated therein.⁷¹⁷

A contract of suretyship or guaranty is, like most contracts, invalid if not supported by a consideration. If the contract is made at the same time as the original lease, the making of the lease is a sufficient consideration.⁷¹⁸ If, on the other hand, the contract is made after the lease, a new consideration is necessary.⁷¹⁹ But a guaranty executed after the lease will be deemed contemporaneous therewith for this purpose, if it is delivered at the same time and before the lessee is permitted to occupy.⁷²⁰

(3) **Evidence of relation.** It is generally held that one who executes an instrument together with another person, apparently as a principal obligor, may show, as against the obligee, as

⁷¹⁴ Stearns, Suretyship, § 24 et seq. See *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434. *ton v. Huntington*, 67 Mich. 139, 34 N. W. 279; *McKensie v. Farrell*, 17 N. Y. Super. Ct. (4 Bosw.) 192.

⁷¹⁵ *City of New York v. Kent*, 57 N. Y. Super. Ct. (25 Jones & S.) 109, 5 N. Y. Supp. 567, *affd.*, without opinion, 128 N. Y. 600, 28 N. E. 252. ⁷¹⁹ *Bullen v. Morrison*, 98 Ill. App. 669; *Lewin v. Barry*, 15 Colo. App. 461, 63 Pac. 121.

⁷¹⁶ See *Deering v. Moore*, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; *State v. Bowman*, 10 Ohio, 445; *Trustees of Schools v. Sheik*, 119 Ill. 579, 8 N. E. 189, 59 Am. Rep. 830; *Stearns, Suretyship*, § 140. The lessor's forbearance to eject the tenant whose rent was in arrear was held a sufficient consideration for a guaranty by a third person of both the past and future rent. *Vinal v. Richardson*, 95 Mass. (13 Allen) 521.

⁷¹⁷ *Otto v. Jackson*, 35 Ill. 349. ⁷²⁰ *Garland v. Gaines*, 73 Conn.

⁷¹⁸ *Adams v. Bean*, 12 Mass. 137, 7 Am. Dec. 44; *Voullaire v. Wise*, 19 Misc. 659, 44 N. Y. Supp. 510; *Pres-* 662, 49 Atl. 19, 84 Am. St. Rep. 182. See Stearns, Suretyship, § 16.

well as against his co-obligor, that it was understood that he was to be liable as a surety only,⁷²¹ and this view has been applied in the case of one signing an instrument of lease.⁷²² The fact that he is surety, while not itself relieving him from liability for the rent as an original obligor,⁷²³ may enable him to claim immunity by reason of the lessor's consent to an alteration or extension of the lessee's contract to pay rent,⁷²⁴ or it may relieve him from liability by reason of the expiration of the original lease and of the contract to pay rent thereunder.⁷²⁵

(4) **Expiration of liability.** The question has occasionally arisen whether, upon a construction of the contract of suretyship or guaranty, the liability thereunder extends to rent accruing after the term designated by the lease, as when the lease is renewed, or the lessee holds over without renewal. Ordinarily one who becomes surety for the payment of the rent reserved by a lease is not liable for rent which accrues after the term, as a result of the lessee's action in holding over, since the rent in such

⁷²¹ 4 Wigmore, Evidence, § 2438; 1 Brandt, Suretyship (3d Ed.) 39. ⁷²² See *Carpenter v. King*, 50 Mass. (9 Metc.) 511, 43 Am. Dec. 405; *Kennebec Bank v. Turner*, 2 Me. (2 Greenl.) 42; *Hubbard v. Gurney*, 64 N. Y. 457; *Nims v. Bigelow*, 44 N. H. 376; *Bulkley v. House*, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; *Kennedy v. Evans*, 31 Ill. 258; *Mariners' Bank v. Abbott*, 28 Me. 280; *Hunt v. Chambliss*, 15 Miss. (7 Smedes & M.) 532; *American & General Mortg. & Inv. Corp. v. Marquam*, 62 Fed. 960. Contra, *McCollum v. Boughton*, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480. And see *Hobbs v. Batory*, 86 Md. 68, 37 Atl. 713, to the effect that the true relations of the parties cannot be shown.

⁷²³ *Bowen v. Clarke*, 25 Or. 592, 37 Pac. 74; *Perkins v. Goodman*, 21 Barb. (N. Y.) 218; *Way v. Reed*, 88 Mass. (6 Allen) 364. See *Thomas v. Gumaer*, 7 Wend. (N. Y.) 43. There are occasional decisions by intermediate courts of New York apparently to the effect that one who joins in executing the instrument of lease as surety or guarantor is under no liability to the lessor whatever as regards the rent, owing to the fact that the consideration is not stated in writing as required by the statute of frauds. See *Gould v. Moring*, 28 Barb. (N. Y.) 444; *Decker v. Gaylord*, 8 Hun (N. Y.) 111; *Evans v. Conklin*, 71 Hun, 536, 24 N. Y. Supp. 1081. But the contract being made at the time of the lease, no other consideration than the making of the lease would seem to be necessary (ante, at note 718), and that this is the consideration is inferentially apparent on the face of the writing. See *Stearns, Suretyship*, § 27.

⁷²⁴ See post, § 181 f (5).

⁷²⁵ *Knowles v. Cuddeback*, 19 Hun (N. Y.) 590; *Kennebec Bank v. Turner*, 2 Me. (2 Greenl.) 42.

case becomes due from the lessee, not by reason of the original reservation of rent, but by a new contract inferred from the conduct of the parties, as to which new contract the surety has undertaken no responsibility.⁷²⁶ As has been judicially remarked: "It is not an unreasonable presumption that a tenant, who holds over, means to pay the same rent which he contracted to pay under the expired lease; but it would be most unreasonable to presume from the tenant's holding over that the surety intended to bind himself for the rent of a time beyond the contract."⁷²⁷ On this principle it has been decided that, where a lease for a month provided that if the lessee paid rent when it was due he might continue in occupation, a guarantor of the lessee's contract was not bound for rent subsequently accruing, if the rent for the first month was not paid when due.⁷²⁸

Though the guaranty does not ordinarily apply to rent accruing upon such holding over, it may happen that the lease provides for the payment of rent in case of holding over, even without giving the right to hold over, and one guaranteeing the rent under the lease would remain liable for rent thus accruing after the term named,⁷²⁹ but not for rent for which, by a new agreement, the lessee becomes liable on holding over.⁷³⁰ In Pennsylvania it has been decided that, if a lease provides for a tenancy for one year, with a stipulation that, if the lessee continues in possession thereafter, he shall hold from year to year till the tenancy is terminated by notice, persons who make themselves responsible as sureties for the lessee's contract are liable for rent for succeeding years, if the lessee continues in possession;⁷³¹

⁷²⁶ Gadsden v. Quackenbush, 9 Rich. Law (S. C.) 222; ⁷³⁰ Warren v. Lyons, 152 Mass. 310, 25 N. E. 721.

Knapp, 18 Mass. (1 Pick.) 332, 11 Am. Dec. 183; Kennebec Bank v. Exch. 303, it was decided that if a Turner, 2 Me. (2 Greenl.) 42. See notice to quit was given to a tenant from year to year, the tenancy terminated at the end of the year, and an agreement withdrawing the notice was in effect an agreement for a new tenancy, and consequently the guarantor on the original lease was not liable for rent subsequently accruing.

⁷²⁷ Brewer v. Thorp, 35 Ala. 9, per Walker, C. J.

⁷²⁸ Allen v. Herman, 3 Phila. (Pa.) 378.

⁷²⁹ Salisbury v. Hale, 29 Mass. (12 Pick.) 416; Rice v. Loomis, 139 Mass. 302, 1 N. E. 548. See Edwards v. Hale, 91 Mass. (9 Allen) 462.

⁷³¹ Coe v. Vogdes, 71 Pa. 383.

but that in such a case, if the surety notifies the lessor, in sufficient season to enable the lessor to terminate the lease by notice, either not to renew the lease or to obtain other security, and the surety thereafter dies, equity will intervene to protect the surety's estate, as against a continuance of his liability as a result of the failure to terminate the tenancy.⁷³²

That one binds himself as surety for the payment of the rent reserved by the lease does not seem ground for regarding him as so liable for rent reserved on a subsequent lease, even though made in renewal of the former lease, and in accordance with a covenant to grant a renewal.⁷³³ But the terms of his contract may be such as to impose a continuance of liability during the renewal term,⁷³⁴ and the contract has been regarded as open to such a construction when the lessor, in leasing for one year, agreed to lease to the same lessee for another year, at the latter's option, upon the same terms and conditions, and the guaranty was to pay the "aforesaid rent."⁷³⁵ In case the instrument of lease is to be regarded, not as creating a term with a right of renewal, but as creating a term with a right of "extension," which is, apparently, in legal effect, a lease for a term with a right in the lessee to terminate the tenancy at the end of a shorter period,⁷³⁶ one becoming liable as surety for the rent reserved would, it seems, be liable for the longer term named.⁷³⁷

⁷³² Pleasonton & Biddle's Appeal, 75 Pa. 344.

⁷³³ It is so decided in Knowles v. Cuddeback, 19 Hun (N. Y.) 590.

In Woods v. Doherty, 153 Mass. 558, 27 N. E. 676, where the lease was for three years at a certain rent, the lessee "to have the right to renew the lease for the further term of two years, if he shall so elect," a guaranty for the "payment of the rent by the lessee, according to the terms of the lease, providing said lessee shall live to the end of the term," was held not to extend to the additional two years upon the lessee's exercise of his right of renewal.

⁷³⁴ In Decker v. Gaylord, 8 Hun (N. Y.) 110, it was held that one

who signed a lease for one year as surety for the lessee was liable for a second year's rent, the lease providing "this contract is to be renewed for three consecutive years if it is fulfilled to the satisfaction of both parties." This case is distinguished in the subsequent case of Knowles v. Cuddeback, 19 Hun (N. Y.) 590, supra, upon the theory apparently that the words "this contract" extended to the contract of suretyship.

⁷³⁵ Debois v. Earle, 7 R. I. 26. And so, in Shand v. McCloskey, 27 Pa. Super. Ct. 260, when one became surety "for the above rent."

⁷³⁶ See post, § 218.

⁷³⁷ See Dufau v. Wright, 25 Wend. (N. Y.) 636, where there is a dic-

In a guaranty of rent, so long as the lessee named "shall occupy the premises," the word "occupy" has been held to be equivalent to "hold as tenant," so that the liability thereunder continues, though the lessee abandons the premises.⁷³⁸

The liability of a guarantor or surety ceases upon the cessation of the liability of his principal, since "no collateral promise to pay the debt of another can have any force when the debt of the other has been satisfied, and since the equity of the promisor to have indemnity from the principal is cut off by this transaction."⁷³⁹ On this theory, upon the cessation of the lessee's liability by reason of a surrender of the leasehold,⁷⁴⁰ or by reason of a release of the lessee's liability for rent given by the lessor,⁷⁴¹ the liability of the guarantor or surety for subsequently accruing rent also comes to an end. But his liability as regards rent which has already accrued is not affected.⁷⁴² The guarantor's liability would also cease upon a termination of the lease by forfeiture,⁷⁴³ unless, perhaps, the lease provides for a continuing liability for rent in such case.⁷⁴⁴ And his liability, it is said, terminates on the issue of a warrant in summary proceedings.⁷⁴⁵ It also will terminate upon an eviction by title paramount.⁷⁴⁶

tum that this would be the case upon a lease for one year with the privilege of continuing in possession for four years.

⁷³⁸ *Morrow v. Brady*, 12 R. I. 130. Compare *Woods v. Broder*, 58 Misc. 567, 109 N. Y. Supp. 908.

⁷³⁹ *Stearns, Suretyship*, § 102.

⁷⁴⁰ *Brady v. Peiper*, 1 Hilt. (N. Y.) 61; *White v. Griffing*, 44 Conn. 437; *Nichols v. Palmer*, 48 Wis. 110, 4 N. W. 137; *Koenig v. Miller Bros. Brewery Co.*, 38 Mo. App. 182; *Tillotson v. Herrick*, 66 Ill. App. 660; *Barrett v. Boddie*, 76 Ill. App. 661; *White v. Walker*, 31 Ill. 422; *Reading Trust Co. v. Jackson*, 22 Pa. Super. Ct. 69.

⁷⁴¹ *Kingsbury v. Williams*, 53 Barb. (N. Y.) 142.

⁷⁴² *Kingsbury v. Westfall*, 61 N. Y. 356; *McKensie v. Farrell*, 17 N. Y. Super. Ct. (4 Bosw.) 192; *New*

York v. New York Refrigerating Const. Co., 8 Misc. 61, 28 N. Y. Supp. 614, *affd.* 82 Hun, 553, 31 N. Y. Supp. 714.

⁷⁴³ See post, § 194 k.

⁷⁴⁴ In *Way v. Reed*, 88 Mass. (6 Allen) 365, it was held that a joint lessee who covenanted jointly to pay the rent, although described as "surety," was liable for rent accruing after the re-entry by the lessor under a clause providing that the lessor might re-enter for breach of covenants and relet at the risk of the lessees, who should remain liable for rent for the residue of the term. See post, at notes 927-952.

⁷⁴⁵ *Newcombe v. Eagleton*, 16 Misc. 285, 38 N. Y. Supp. 424.

⁷⁴⁶ *Duff v. Wilson*, 69 Pa. 316. This was a case of eviction by a purchaser under a paramount mortgage, and that the lessee had cov-

On the same principle, the liability of a surety for the performance of the obligation of the assignee of a lease to pay rent comes to an end upon the cessation of such obligation by an assignment over.⁷⁴⁷

(5) **Discharge of liability.** As is well settled, a surety or guarantor is relieved from liability by a material alteration in the terms of the principal contract,⁷⁴⁸ and accordingly it has been decided that a surety for rent is relieved if the lessor releases one of the lessees, or "buys back" a part of the land leased.⁷⁴⁹ A sublease by the lessee does not involve any such alteration of the contract for the payment of rent as to relieve the lessee's surety, even though the sublease is to the lessor himself.⁷⁵⁰ Nor does an assignment have such an effect.⁷⁵¹ And the lessor's assent to an assignment or sublease by the lessee does not discharge the surety, even though such assent is expressly required.⁷⁵²

No alteration in the terms of the contract as to rent can have the effect of discharging the surety if such change is provided

enanted to pay this off was regarded as immaterial. In *Starkweather v. Maginnis*, 98 Ill. App. 143; *Id.*, 196 Ill. 274, 63 N. E. 692, it was decided that the eviction of the tenant by the lessor relieved the sureties from any further liability. But since such eviction only *suspends* the tenant's liability for rent (post, § 182 e [1] [a]), it would seem to have no greater effect upon the surety's liability.

⁷⁴⁷ *In re Willey's Estate*, 12 Phila. (Pa.) 152.

⁷⁴⁸ *Stearns, Suretyship*, c. 4; 1 *Brandt, Suretyship*, c. 15.

⁷⁴⁹ *Prior v. Kiso*, 81 Mo. 241. See *Stern v. Sawyer*, 78 Vt. 5, 61 Atl. 36, 112 Am. St. Rep. 890, post, note 760.

In *New York v. Clark*, 84 App. Div. 383, 82 N. Y. Supp. 855, it was decided that the surety was discharged where the premises leased, a dock, were enlarged by an agreement between the lessor and les-

see, the lessee agreeing to pay an increased rent. In a strong dissenting opinion, such increase in the leased premises, with a corresponding increase in rent, was regarded as in effect merely a lease of additional premises, the first lease remaining unchanged.

⁷⁵⁰ *Medary v. Cathers*, 161 Pa. 87, 28 Atl. 1012; *Sutherland v. Shelton*, 59 Tenn. (12 Heisk.) 374.

⁷⁵¹ *Fleck v. Feldman*, 54 Misc. 228, 104 N. Y. Supp. 366; *Almy v. Greene*, 13 R. I. 350, 43 Am. Rep. 32.

⁷⁵² *Morgan v. Smith*, 70 N. Y. 537; *Hall v. Ochs*, 34 App. Div. 103, 54 N. Y. Supp. 4; *Gilbert v. Henck*, 30 Pa. 205; *Dietz v. Schmidt*, 27 Ill. App. 114; *Way v. Reed*, 88 Mass. (6 Allen) 364; *Stein v. Jones*, 18 Ill. App. 543; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Oswald v. Fratenburgh*, 36 Minn. 270, 31 N. W. 211.

for by the lease,⁷⁵³ or is assented to or induced by the surety,⁷⁵⁴ or if the alteration is ineffective for want of a writing or other informality.⁷⁵⁵ An agreement between the lessor and lessee, that the latter shall make certain improvements and be credited therewith on the rent, is not an alteration of the contract to pay rent within the rule.⁷⁵⁶ Nor is the surety discharged by the act of the lessor in receiving an order drawn by the lessee on a third person and accepted by the latter, this not being understood by the lessor or lessee to relieve the latter from any of his obligations.⁷⁵⁷

The cases are not in accord as to whether a surety is relieved from liability by an alteration in the principal contract, which is, in its nature, beneficial to him, as reducing his liability.⁷⁵⁸ In England it has been decided that a surety will not be discharged if it is self-evident, without inquiry, that the alteration is beneficial to him, while he is discharged if evidence is necessary to show that the alteration is beneficial. This rule was established in a case in which a lessor reduced the rent in consideration of the surrender of the leasehold in part of the premises, and the surety was accordingly held to be discharged.⁷⁵⁹ In one state a surety has been regarded as discharged by a surrender of part of the leased premises, made without his consent, without reference to whether such surrender was beneficial or harmful to the surety.⁷⁶⁰ But on the other hand it has been decided in at least

⁷⁵³ Woodbridge v. Richardson, 2 Standard Brewery Co. v. Kelly, 6f Thomp. & C. (N. Y.) 418. So a re-

linquishment of possession by the lessee to the lessor was held not to relieve the surety, the lessee being then in default, and the lease providing that the lessor might take possession on default. American Bonding Co. v. Pueblo Inv. Co. (C. C. A.) 150 Fed. 17, 9 L. R. A. (N. S.) 557.

⁷⁵⁴ Lenane v. Mayer, 18 Misc. 454, 41 N. Y. Supp. 960; Newcombe v. Eagleton, 19 Misc. 603, 44 N. Y. Supp. 401.

⁷⁵⁵ Ogden v. Sanderson, 3 E. D. Smith (N. Y.) 166; Shufeldt v. Gustin, 2 E. D. Smith (N. Y.) 57;

⁷⁵⁶ Morrill v. Baggott, 157 Ill. 240, 41 N. E. 639.

⁷⁵⁷ The acceptance of the rent monthly instead of quarterly does not discharge the surety. Ogden v. Rowe 3 E. D. Smith (N. Y.) 312.

⁷⁵⁸ Burnham v. Hubbard, 36 Conn. 539.

⁷⁵⁹ See Stearns, Suretyship, § 79.

⁷⁶⁰ Holme v. Brunskill, 3 Q. B. Div. 495.

⁷⁶¹ Stern v. Sawyer, 78 Vt. 5, 61 Atl. 36, 112 Am. St. Rep. 890. It is also, in this case, adjudged that the sureties were discharged because the lessor did not comply with his

two cases that a reduction of rent in itself does not discharge the surety.⁷⁶¹

An important application of the principle, that an alteration in the principal contract discharges the surety, occurs in the rule that a binding contract for the extension of time of performance of a contract has that effect.⁷⁶² Accordingly, the surety of the lessee is discharged by a contract between the lessor and lessee extending the time for the payment of rent.⁷⁶³ But an extension of time as to rent subsequently to accrue does not affect the surety's liability on rent already accrued,⁷⁶⁴ and, ordinarily, an extension of time as to one installment would not affect his liability for another installment.⁷⁶⁵ An extension of time for payment does not affect the surety's liability, if it is expressly stipulated between the creditor and principal debtor that it shall not have that effect, since in that case the surety has the same right as before immediately to pay the debt and sue the principal debtor.⁷⁶⁶ And there is authority for the statement that the same principle will apply in the case of any other alteration of the contract to pay rent.⁷⁶⁷

The surety is not discharged by the fact that the premises are used for an illegal purpose,⁷⁶⁸ unless he knew of such intended use at the time of becoming surety.⁷⁶⁹

A surety is, it has been decided, not discharged by the landlord's failure to assert a lien for the rent upon the subtenant's crop,⁷⁷⁰ nor by the death of the lessee,⁷⁷¹ and the surety's estate

covenant to furnish the premises and put them in repair and the lessee nevertheless took possession, it being said that he thus "took possession under a different contract than the one which the defendants guaranteed the performance of on his part," and that they "were thereby released." The meaning of this statement is somewhat obscure.

⁷⁶¹ *Preston v. Huntington*, 67 Mich. 139, 34 N. W. 279; *Ellis v. McCormack*, 1 Hilt. (N. Y.) 313.

⁷⁶² *Stearns, Suretyship*, § 81 et seq.

⁷⁶³ *Ducker v. Rapp*, 67 N. Y. 464.

⁷⁶⁴ *Coe v. Cassidy*, 72 N. Y. 133.

⁷⁶⁵ *Ducker v. Rapp*, 67 N. Y. 464.

⁷⁶⁶ *Stearns, Suretyship*, § 92.

⁷⁶⁷ *Morgan v. Smith*, 70 N. Y. 537; *Palmer v. Purdy*, 83 N. Y. 144.

⁷⁶⁸ *Way v. Reed*, 88 Mass. (6 Allen) 364.

⁷⁶⁹ *Mound v. Barker*, 71 Vt. 253, 44 Atl. 346, 76 Am. St. Rep. 767.

⁷⁷⁰ *Ewing v. Williams* (Ky.) 39 S. W. 843.

⁷⁷¹ *Holthausen v. Kells*, 18 App. Div. 80, 45 N. Y. Supp. 471; *Id.*, 154 N. Y. 776, 49 N. E. 1098; *Hall v. Ochs*, 34 App. Div. 103, 54 N. Y. Supp. 4.

remains liable after his own death.⁷⁷² Nor can a surety or guarantor relieve himself by notice to the lessor that he will no longer be liable for the rent.⁷⁷³

The surety or guarantor is not liable if he was induced to assume that position by fraud on the part of the lessor,⁷⁷⁴ but he cannot, it has been decided, assert fraud on the part of the lessor in inducing the lessee to take the lease, if the lessee, by failing to repudiate the lease, has precluded himself from so doing.⁷⁷⁵

If the lessee treats the lease as valid, it has been held, a guarantor of the rent cannot question it,⁷⁷⁶ and so his liability is not affected by the fact that the lease does not comply with the statute of frauds, if the lessee has entered thereunder.⁷⁷⁷

(6) **Assignment of right of action.** The right of action against a surety, strictly so called, being based on the original contract, should pass by assignment of the contract to another, to the same extent as the right of action against the principal, and so a surety for rent is ordinarily liable, it seems, to the same extent as his principal, to one to whom the reversion or rent may be transferred by the lessor.⁷⁷⁸ In the case, however, of a separate bond for the payment of the rent, signed by the lessee and his sureties, the mere transfer of the reversion or of the rent would not, it seems, give the transferee any right of action on the bond, in the absence of an express transfer of the bond, and the question whether the bond itself is transferable depends upon the law of the particular jurisdiction.⁷⁷⁹

⁷⁷² *Holthausen v. Kells*, 18 App. Div. 80, 45 N. Y. Supp. 471. self handed it to the lessor as having been properly executed.

⁷⁷³ *Snow v. Horgan*, 18 R. I. 289, 27 Atl. 338. ⁷⁷⁷ *Duffee v. Mansfield*, 141 Pa. 507, 21 Atl. 675.

⁷⁷⁴ *Mendelson v. Stout*, 37 N. Y. Super. Ct. (5 Jones & S.) 408. See *Allen v. Culver*, 3 Denio (N. Y.) 284. ⁷⁷⁸ It is apparently so decided in *Steele v. Mills*, 68 Iowa, 406, 27 N. W. 294, it is decided that the assignee of the rent may sue the lessee's sureties by force of the statutory provision authorizing the assignee of a bond or other instrument in writing by which the maker promises to pay a sum of money, to sue in his own name thereon.

⁷⁷⁵ *Carhart v. Ryder*, 11 Daly (N. Y.) 101. See *Stearns, Suretyship*, § 103.

⁷⁷⁶ *Clark v. Gordon*, 121 Mass. 330. In *Sidney B. Bowman Cycle Co. v. Dyer*, 31 Misc. 496, 64 N. Y. Supp. 551, it was held that the guarantor could not assert that the lease was not properly executed by the lessee when he, the guarantor, had him- ⁷⁷⁹ In *Stevens v. Wadleigh*, 6 Ariz.

As to the question of the transferability of a contract of guaranty, as distinguished from one of suretyship, the authorities are to the effect that if it is in terms made for the benefit of a particular person, that is, if it is a "special" and not a "general" guaranty, only such person can assert any rights therein.⁷⁸⁰ In one or two cases, however, a guaranty of rent has been regarded as assignable without reference being made to the distinction between a general and a special guaranty,⁷⁸¹ and a guaranty of rent might perhaps ordinarily be regarded as general, as being intended for the benefit of whoever may become entitled to the rent.

(7) **Remedies.** Since a surety, strictly so called, is a party to the original contract, he is not entitled to notice before suit by the creditor,⁷⁸² and this rule applies, no doubt, in the case of a surety for rent. Ordinarily a guarantor of rent is similarly liable without any previous demand on the principle, or notice to the guarantor of the principal's default, the contract containing no specific requirement to this effect,⁷⁸³ though occasionally the view

351, 57 Pac. 622, it is assumed that such a bond may be assigned to the assignee of the reversion.

⁷⁸⁰ See Stearns, Suretyship, § 52.

⁷⁸¹ That a guaranty of rent is assignable, see *Cunningham v. Norton* (Cal.) 40 Pac. 491. In *Potter v. Gronbeck*, 117 Ill. 404, 7 N. E. 586, it is said that a guaranty of the payment of rent is assignable as being an instrument in writing for the payment of money, but it is there decided that a guaranty of the payment of rent and the performance of other covenants, not being entirely for the payment of money and being indivisible, is not assignable as regards the rent. In *Harbeck v. Sylvester*, 13 Wend. (N. Y.) 608, it is decided that the statutory provision that the grantee of a reversion or rent shall have the same remedies by entry, action, distress or otherwise for the nonperform-

ance of any agreement contained in the lease, or for the recovery of rent, as his grantor might have had if such reversion had remained in the grantor, does not enable the grantee of the reversion to sue in his own name upon a guaranty of rent endorsed on the lease, but it is there said that the grantee might sue in the name of the lessor.

⁷⁸² Stearns, Suretyship, § 6.

⁷⁸³ *Welch v. Walsh*, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782, 83 Am. St. Rep. 302; *Cass v. Shewman*, 61 Hun, 472, 16 N. Y. Supp. 236; *Voltz v. Harris*, 40 Ill. 155; *J. Obermann Brew. Co. v. Opherking*, 33 Ill. App. 26; *Turnure v. Hohenthal*, 36 N. Y. Super. Ct. (4 Jones & S.) 79.

A provision that if the rent is not paid when due, the lessor will notify the sureties, and they shall have the right to dispossess the lessee and take possession, does not

is asserted that a guarantor may assert a claim on account of any loss arising from failure to notify him of the default.⁷⁸⁴

A surety is not entitled to have a demand made upon the principal, or to have any proceedings taken against him, before suit against the surety,⁷⁸⁵ and this is the case with a guarantor, unless the contract of guaranty is such as to import an intention that the remedies against the principal first be exhausted.⁷⁸⁶

An action may be brought on a guaranty of rent as soon as any installment falls due, or it may be postponed till the end of the term, and suit may then be brought for all the installments.⁷⁸⁷

Ordinarily, a surety can be sued jointly with the principal and a guarantor cannot.⁷⁸⁸ The cases involving the right to join in one action the principal debtor and the surety for, or guarantor of, the rent, are usually in accord with this general rule.⁷⁸⁹

The cases are not in accord as to whether a surety is entitled to the benefit of a set-off or counterclaim existing in favor of the principal against the creditor.⁷⁹⁰ In one case it has been decided that a counterclaim in favor of the lessee for wrongful eviction cannot be set up by his surety,⁷⁹¹ but it has on the other hand been decided that, when the statute exonerates a guarantor, if by any act of the creditor the original obligation of the

render notice a condition precedent to the surety's liability. *Barhydt v. Ellis*, 45 N. Y. 107. *Wend. (N. Y.)* 216; *Ducker v. Rapp*, 41 N. Y. Super. Ct. (9 Jones & S.) 235; *Cass v. Shewman*, 61 Hun, 472,

⁷⁸⁴ *Ward v. Wilson*, 100 Ind. 52, 50 Am. Rep. 763. The assertion of this view in *Vinal v. Richardson*, 95 Mass. (13 Allen) 521, is overruled by *Welch v. Walsh*, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782, 83 Am. St. Rep. 302, *supra*. 16 N. Y. Supp. 236; *Ledoux v. Jones*, 20 La. Ann. 539, 96 Am. Dec. 425. Compare *Gilbert v. Henck*, 30 Pa. 205. And see *Stearns, Suretyship*, § 61; 14 Am. & Eng. Enc. Law (2d Ed.) 1153.

⁷⁸⁵ *Hall v. Hoxsey*, 84 Ill. 616; *Joyce v. Spafford*, 101 Ill. App. 422.

Haynes v. Synnott, 160 Pa. 180, 20 Atl. 832; *Allen v. Hubert*, 49 Pa. 259; *Supplee v. Herman*, 16 Pa. Super. Ct. 45; *Hall v. Ochs*, 34 App. Div. 103, 54 N. Y. Supp. 4; *Ewing v. Williams (Ky.)* 39 S. W. 843. ⁷⁸⁷ *Bing v. Tyler*, 79 Ill. 248;

⁷⁸⁸ See 1 *Brandt, Suretyship*, § 155; 16 *Enc. Pldg. & Prac.* pp. 929, 942. ⁷⁸⁹ See *post*, § 181 f (7).

⁷⁹⁰ *Stearns, Suretyship*, § 117; 1 *Brandt, Suretyship*, § 236. ⁷⁹¹ *La Farge v. Halsey*, 14 N. Y. Super. Ct. (1 Bosw.) 171, 4 Abb. Pr. 397.

⁷⁸⁶ *Snow v. Horgan*, 18 R. I. 289, 27 Atl. 338; *Garland v. Gāines*, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182; *Ruggles v. Holden*, 3

principal is altered, or the creditor's rights and remedies against the principal are in any way impaired, the guarantor of rent is fully discharged if the lessor has, by breach of a covenant, caused damage to the lessee to the amount of the rent.⁷⁹²

A surety or guarantor who is compelled to pay the rent has the rights of subrogation and contribution which ordinarily belong to a surety or guarantor.⁷⁹³ So it has been decided that he may call upon the lessor to account for property mortgaged to the latter to secure the rent,⁷⁹⁴ and that he may bring an action in the name of the lessor against the surety of an assignee of the lease, if compelled to pay installments of rent which the assignee should have paid.^{795, 796}

§ 182. Defenses available to tenant—Suspension or extinguishment of rent.

a. **Exclusion of lessee from possession**—(1) **By one having paramount title.** We have before considered the question whether the inability of the lessee to obtain possession of the leased premises owing to the action either of the lessor or of a third person gives him a right to damages as against the lessor.⁷⁹⁷ We will now consider whether such exclusion of the lessee from possession constitutes a defense to the lessor's claim for rent, discussing separately, as in connection with the question of recovery of damages, the cases of the lessee's exclusion: (1) by one having paramount title, (2) by a stranger without title, and (3) by the lessor himself, personally or acting through another.

The fact that the lessee is unable to obtain possession, owing to the possession of one having paramount title, is a good defense to a claim for rent,⁷⁹⁸ and this has been held to be so even though the exclusion from possession extends to but a part of

⁷⁹² *McAlester v. Landers*, 70 Cal. Scott, 2 Hilt. (N. Y.) 550 (dictum);
79, 11 Pac. 505. *State University v. Joslyn*, 21 Vt.

⁷⁹³ See *Stearns, Suretyship*, c. 10; 52; *Holgate v. Kay*, 1 Car. & K. 341;
2 *Brandt, Suretyship*, c. 12. *Field v. Herrick*, 14 Ill. App. (14

⁷⁹⁴ *Coe v. Cassidy*, 72 N. Y. 133. *Bradw.*) 181; *Ludden v. Stern*, 20

^{795, 796} *Bender v. George*, 92 Pa. 36. *Ill. App.* (20 *Bradw.*) 88; *Duncan v.*

⁷⁹⁷ See *ante*, chapter IX. *Moloney*, 115 Ill. App. 522; *Posten v.*

⁷⁹⁸ *Brandt v. Philippi*, 82 Cal. 640, *Jones*, 37 N. C. (2 *Ired. Eq.*) 350, 38
23 Pac. 122, 7 L. R. A. 224; *Andrews* *Am. Dec.* 683; *Maverick v. Lewis*, 3
v. *Woodcock*, 14 Iowa, 397; *Me-McCord* (S. C.) 211.

chanics' & Traders' Fire Ins. Co. v.

the premises.⁷⁹⁹ It has been decided, however, that if the lessee takes possession of the part from which he is not excluded, he is liable to an action of use and occupation for such part.⁸⁰⁰ In one case, indeed, it is stated that if the lessee takes possession of part, he is liable for the whole rent, and is remitted to his right to recover damages, by action or counterclaim, for his inability to recover possession of the other part.⁸⁰¹ And it is said in the same case that the lessee may "waive" his right to the possession of the whole premises by taking possession of part.⁸⁰² It would seem that the partial exclusion of the lessee from possession by one having paramount title might well be assimilated, so far as concerns its effect on the liability for rent, to his partial eviction by such person, so as to call for an apportionment of the rent,⁸⁰³ and there are occasional decisions to that effect.⁸⁰⁴

One holding under a previous unexpired lease by the same lessor holds by paramount title for this purpose,⁸⁰⁵ as for others,

⁷⁹⁹ Neale v. Mackenzie, 1 Mees. & W. 746; Dengler v. Michelssen, 76 Cal. 125, 18 Pac. 138; Lawrence v. French, 25 Wend. (N. Y.) 443, 7 Hill, 519; Goerl v. Damrauer, 27 Misc. 555, 58 N. Y. Supp. 297; Smith v. Barber, 96 App. Div. 236, 89 N. Y. Supp. 317; Id., 112 App. Div. 187, 98 N. Y. Supp. 365. In Holgate v. Kay, 1 Car. & K. 341, it was decided that, in such case, in an action of covenant for rent, a portion of the rent could not be recovered, for the reason that rent is not apportionable in such an action; citing Stevenson v. Lambard, 2 East, 575, ante, note 339.

⁸⁰⁰ Lawrence v. French, 25 Wend. (N. Y.) 443, 7 Hill, 519 (dictum); Tunis v. Grandy, 22 Grat. (Va.) 109; Watson v. Waud, 8 Exch. 335 (semble).

⁸⁰¹ Smith v. Barber, 96 App. Div. 236, 89 N. Y. Supp. 317, citing O'Brien v. Smith, 37 N. Y. St. Rep. 41, 13 N. Y. Supp. 408; Id., 129 N. Y. 620, 29 N. E. 1029, post, note 823.

But it was at the same time, held that the fact that the lessee made contracts for the furnishing of the premises and did other acts showing an expectation of taking possession when his term began, did not tend to show a taking possession of part.

In Sullivan v. Schmitt, 93 App. Div. 469, 87 N. Y. Supp. 714, it was decided that the lessee was not liable for any part of the rent, though he took possession of that part which was not occupied by the other person, and though, on the lessor's request to him to stay and the latter's promise to obtain possession for him at the end of a month, he stayed during such month, leaving at the end thereof.

⁸⁰² As to the theory of waiver in such a case, see post, at notes 824, 825.

⁸⁰³ See post, § 182 e (2) (b).

⁸⁰⁴ McLoughlin v. Craig, 7 Ir. C. L. 117; Seabrook v. Moyer, 88 Pa. 417.

⁸⁰⁵ See Neale v. Mackenzie, 1

⁸⁰⁶but it is otherwise if his lease has expired.⁸⁰⁷ It has been decided in Ireland and Canada,⁸⁰⁸ that possession of part of the premises, by a third person holding under an unexpired prior lease made by the same lessor, will not constitute even a partial defense to an action for the rent under the second lease, if this latter is under seal, the theory being that it then operates as a lease in possession of that part of the land of which the lessor has possession, and a lease of the reversion (concurrent lease⁸⁰⁹) of that part held by the prior lessee. These decisions are in accord with the language of an opinion delivered in an English case, in which, however, under similar circumstances, the second lessee was relieved from liability, on the ground that the lease to him was wholly void as to the part of the premises held by the prior lessee, such lease not being under seal, and therefore insufficient as a lease of the reversion.⁸¹⁰ This view above referred to is not suggested in any of the cases decided in this country as to the liability for rent when a part or the whole of the premises is in the possession of a prior lessee.^{810a} In any case, it would seem, the question whether the second lease could thus be

Mees. & W. 746; Lawrence v. French, 25 Wend. (N. Y.) 443, 7 Hill, 519; Tunis v. Grandy, 22 Grat. (Va.) 109; Dengler v. Michelssen, 76 Cal. 125, 18 Pac. 138; Smith v. Barber, 112 App. Div. 187, 98 N. Y. Supp. 365.

In Murphy v. Farley, 124 Ala. 279, 27 So. 442, it was decided that the defendant in an action for rent could show, under a plea of "failure of consideration," that another person was occupying the premises under a lease extending beyond the beginning of the defendant's term.

Here the prior tenant was the husband of the defendant and they lived together on the premises, and such facts might perhaps have justified the view that there had been a surrender, by implication of law, of the prior term. See post, § 190 d.

A monthly tenant under a previous lease by the lessor, who has a right to retain possession owing to the lessors' failure to give legal notice to quit, is within the rules stated in the text. See Goerl v. Damrauer, 27 Misc. 555, 58 N. Y. Supp. 297.

⁸⁰⁶ See ante, § 82, at notes 16, 17; post, § 186 a (1), at note 171.
⁸⁰⁷ See post, at note 812.
⁸⁰⁸ Ecclesiastical Com'rs of Ireland v. O'Connor, 9 Ir. C. L. 242; Holland v. Vanstone, 27 U. C. Q. B. 15.
⁸⁰⁹ See ante, § 146 d, at notes 24-27.
⁸¹⁰ Neale v. McKenzie, 1 Mees. & W. 747. But in any jurisdiction in which a conveyance of the reversion can be regarded as effective though not under seal (ante, § 146 c), the second lease might, on this theory, be upheld to its full extent, though not under seal.

^{810a} See ante, note 805.

regarded as operating as a lease of the reversion, for the purpose of imposing liability for rent, would be one of the construction of the language used.

A lessee cannot, it has been held, set up the possession of another under paramount title as a defense to rent if he, on failing to obtain possession from such other, assigned his lease to the latter, since in such case his assignee is let into possession, though not he himself.⁸¹¹

(2) **By stranger without right.** The cases are generally to the effect that the fact that the lessee is unable to obtain possession of the premises owing to the presence of a third person wrongfully in possession, such as a tenant holding over his term, is no defense to an action for the rent,⁸¹² unless the lease can be construed as expressly so providing.⁸¹³ Perhaps in some jurisdictions, in view of decisions to the effect that the lessee has a right of action for damages in such case,⁸¹⁴ it might be held that such exclusion is an absolute bar to the claim for rent.⁸¹⁵

⁸¹¹ *Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233.

⁸¹² *Mechanics' & Trader's Fire Ins. Co. v. Scott*, 2 Hilt. (N. Y.) 550; *Ward v. Edesheimer*, 43 N. Y. St. Rep. 138, 17 N. Y. Supp. 173; *Portman v. Weeks*, 1 City Ct. R. (N. Y.) 183; *McKinney v. Holt*, 8 Hun (N. Y.) 336; *Cozens v. Stevenson*, 5 Serg. & R. (Pa.) 421; *University of Vermont v. Joslyn*, 21 Vt. 52.

The lessor's right to the full rent reserved is necessarily not affected by the fact that the lessee agrees with a former tenant that he may retain possession of part without paying rent. *Fonda v. Lape*, 29 N. Y. St. Rep. 327, 8 N. Y. Supp. 792.

⁸¹³ Where the lease provided for the payment of rent "before possession is delivered to the tenant," this was held to import an undertaking by the landlord to actually give him possession, and the latter's inability to do so owing to the possession of a third person was regarded as re-

lieving the lessee from liability. *Harris v. Greenberger*, 50 App. Div. 439, 64 N. Y. Supp. 136.

⁸¹⁴ See ante, § 83.

⁸¹⁵ There is a decision to that effect in *Kean v. Kolkschneider*, 21 Mo. App. 538, and it is so assumed in *Rieger v. Welles*, 110 Mo. App. 166, 84 S. W. 1136. There is a dictum to that effect in *Smart v. Allegaert*, 14 Phila. (Pa.) 179, where the court apparently sees no distinction between an exclusion by a wrongdoer and an exclusion by one having paramount title.

In *Hatfield v. Fullerton*, 24 Ill. 278, it was apparently decided that the landlord could not distrain for the rent, the lessee having been kept out of possession by one apparently without title. Here, also, no distinction is made between an exclusion by one having, and one not having, title. This is, perhaps, to be regarded as overruled by *Field v. Herrick*, 101 Ill. 110, where, in an

(3) **By lessor.** If the lessee is prevented from taking possession by the lessor himself, the latter is, it is generally agreed, liable in damages to the former, as for breach of an implied covenant to give possession, or, by some cases, of the covenant for quiet enjoyment,⁸¹⁶ and this claim the lessee might ordinarily assert by way of set-off or recoupment in an action for the rent.⁸¹⁷ On the question whether the lessee has the additional, or rather alternative, right to set up his exclusion from possession by the lessor as a total defense to rent, the decisions are not entirely in unison. Ordinarily it has been held that such exclusion from possession by the lessor entirely relieves the lessee from liability for rent,⁸¹⁸ unless there is a provision otherwise,⁸¹⁹ and that the fact that he is able to obtain possession of part of the premises does not render him liable for any part of the rent, if he fails to take possession of such part, that is, that he is not bound to take a part when he is entitled to the whole.⁸²⁰

By some decisions, even though the lessee does take possession

equitable proceeding by the lessee to cancel the lease, the court shows that his inability to obtain possession was due to the prior possession of one holding without right and not of one having title, and implies that, this being the case, the lessee cannot escape liability for rent. And see *Gazzolo v. Chambers*, 73 Ill. 75.

⁸¹⁶ See ante, §§ 81, 82.

⁸¹⁷ *Judd v. Fellows*, 9 App. Div. 203, 41 N. Y. Supp. 274; *O'Brien v. Smith*, 37 N. Y. St. Rep. 41, 13 N. Y. Supp. 408; *Eldred v. Leahy*, 31 Wis. 546. See post, § 296.

⁸¹⁸ *McClurg v. Price*, 59 Pa. 420, 98 Am. Dec. 356; *Penny v. Fellner*, 6 Okl. 386, 50 Pac. 123; *Reed v. Reynolds*, 37 Conn. 469; *Field v. Her- rick*, 10 Ill. App. (10 Bradw.) 591; *Hickman v. Rayl*, 55 Ind. 551 (sem- ble); *Garner v. Byard*, 23 Ga. 289, 68 Am. Dec. 527 (exclusion of sub- tenant in effect exclusion of ten- ant); *Spencer v. Burton*, 5 Blackf.

(Ind.) 57; *Dougherty v. Wilson*, 1 Blackf. (Ind.) 478; *O'Brien v. Smith*, 37 N. Y. St. Rep. 41, 13 N. Y. Supp. 408 (dictum), *aff.*, without opinion, 129 N. Y. 620, 29 N. E. 1029; *Moore v. Guardian Trust Co.*, 173 Mo. 218, 73 S. W. 143.

⁸¹⁹ In *Cronin v. Epstein*, 19 N. Y. St. Rep. 806, 2 N. Y. Supp. 709, it was decided, in view of a provision for the making of alterations by the lessor, that an express requirement of the giving of possession to the lessee on a certain date was not imperative, so as to relieve the lessee from rent from that date, if the alterations were not then completed and possession at that time was re- fused.

⁸²⁰ *O'Brien v. Smith*, 37 N. Y. St. Rep. 41, 13 N. Y. Supp. 408, *aff.*, without opinion, 129 N. Y. 620, 29 N. E. 1029; *Knox v. Hexter*, 42 N. Y. Super. Ct. (10 Jones & S.) 10. And see *Walker v. Tucker*, 70 Ill. 527, which is perhaps to that effect.

of part, he is, if excluded from the balance, not liable for any part of the rent or on a *quantum meruit*,⁸²¹ though in other cases a different view is taken.⁸²² There is one decision to the effect that the exclusion of the lessee by the lessor from part of the premises is no defense to an action on the covenant to pay rent, provided the lessee accepts possession of the other part, but that his only remedy in such case is by an action or counterclaim for damages.⁸²³ Conceding that the lessee may refuse to pay rent

⁸²¹ *Moore v. Mansfield*, 182 Mass. 302, 65 N. E. 398, 94 Am. St. Rep. 657; *McClurg v. Price*, 59 Pa. 420, 98 Am. Dec. 356; *Penny v. Fellner*, 6 Okl. 386, 50 Pac. 123.

Where it was agreed that the lessor might retain possession of part of the premises for a few days, for a certain purpose, and the lessee accordingly took possession of part only, and the lessor did not move out of the other part at the time named, and refused to name a time when he would do so, the lessee was held to be entitled to relinquish the lease, and not to be liable for rent, if he immediately left the premises. *Reed v. Reynolds*, 37 Conn. 469.

That the lessee is not liable in covenant for an apportioned part of the rent in such case, see *Holgate v. Kay*, 1 Car. & K. 341.

The fact that the lessor leaves chattels on the premises does not involve such a partial eviction or exclusion from the premises as to excuse nonpayment of rent. The lessee should, it is said, remove the chattels and charge the expense to the landlord. *Baumgardner v. Consolidated Copying Co.*, 44 Ill. App. 74.

⁸²² See *Hurlbut v. Post*, 14 N. Y. Super. Ct. (1 Bosw.) 28; *Knox v. Hexter*, 42 N. Y. Super. Ct. (10 Jones & S.) 8; *Eldred v. Leahy*, 31 Wis. 541, 11 Am. Rep. 613. In *Prior*

v. Kiso, 81 Mo. 241, it is said that the lessee is liable only for a *pro tanto* part of the rent in case he obtains possession of part only, unless he waives "full performance." See post, at notes 824, 825.

⁸²³ *O'Brien v. Smith*, 37 N. Y. St. Rep. 41, 13 N. Y. Supp. 408, *affd.*, without opinion, 129 N. Y. 620, 29 N. E. 1029. The opinion of the intermediate appellate court is unsatisfactory. It quotes from a text book which itself cites no decision in point, and also refers to two previous decisions, *Vanderpool v. Smith*, 4 Abb. Dec. (N. Y.) 464, and *Etheridge v. Osborn*, 12 Wend. (N. Y.) 529, 27 Am. Dec. 152, in the former of which it was decided that the lessee could not defend against the claim for rent merely because the lessor continued to occupy a building on the premises after the beginning of the term, the lessee having indicated no desire to take possession thereof, and the latter of which involved the right to assert in defense to rent the lessor's breach of his covenant to make certain improvements. There are in both of these cases *dicta* to the effect that the lessor's exclusion of the lessee from possession, whether in whole or in part, not being an eviction, is no defense to a claim for rent. But the principal case expressly says that it is a defense if the lessee

in case the lessor wrongfully excludes him from part, and he thereupon refuses to take possession of the balance, it is not entirely clear why the fact that he takes possession of the portion from which he is not excluded should preclude him from asserting the wrongful conduct of the lessor as a defense, at least in part, to the claim for rent. It is not, indeed, a case of eviction, but it is so analogous to a wrongful eviction by the landlord that it seems that it might well have the same effect in relieving from rent.

It has been asserted that the fact that the lessee takes and retains possession of part may justify a finding that he "waived" his right to have possession of the balance, that is, that he may be held liable for the whole rent in such case.⁸²⁴ This seems to involve the imposition on the lessee rather than on the lessor of the penalty for the lessor's wrongdoing. The theory of waiver can, it would seem, properly be applied only where there are the elements of a valid contract or of an estoppel,⁸²⁵ and those are certainly not present in such a case of a taking of possession of part of the leased premises. There is not even any inconsistency between such action on the part of the lessee and his subsequent action in asserting his partial exclusion from the premises as a defense, in whole or in part, to the claim for rent.

The mere fact that the lessor remains in possession of the premises after the time at which the lessee is entitled to possession does not, it seems, involve any exclusion from possession

takes possession of no part of the premises.

⁸²⁴ *Prior v. Kiso*, 81 Mo. 241. And see dicta to that effect in *Smith v. Barber*, 96 App. Div. 236, 89 N. Y. Supp. 317, and *Moore v. Mansfield*, 182 Mass. 302, 65 N. E. 398, 94 Am. St. Rep. 657.

⁸²⁵ See article by Colin P. Campbell, Esq., in 3 Mich. Law Rev. 9; 29 Am. & Eng. Enc. Law (2d Ed.) 1097.

In *Cluett v. Sheppard*, 131 Ill. 636, 23 N. E. 589, the lessee of a portion of a building was given the privilege of using the cellar for storage purposes, and he thereafter "waiv-

ed," that is, agreed to relinquish, his rights in the cellar in consideration of being allowed to use another room for storage purposes, and it was held that his exclusion from the cellar was no defense to a claim for rent. The court speaks as if the cellar was a part of the leased premises, but it evidently was not. The lessee had merely a license to use it, and this license he gave up by an express agreement for a consideration. So there was no question of waiver of the right to possession of the whole premises by taking possession of part.

within the meaning of the cases previously cited, in the absence of any request for possession by the lessee. "There is no law which requires a landlord to hunt up his tenant and ask him to go into possession of the premises before he can claim the rent which his tenant has agreed to pay. It is the duty of the tenant to demand possession of the premises at the premises."⁸²⁶ And a mere statement made by the lessor before the time for the lessee's possession, that the latter should not have possession, is not, it would seem, to be regarded as an exclusion from possession for this purpose.⁸²⁷

b. **Failure of lessee to take possession.** Apart from any question of the exclusion of the lessee from the demised premises, the cases are generally to the effect that the mere failure of the lessee to take possession is no defense to the claim for rent, since his liability is fixed by the reservation of rent or by his covenant to pay rent, and he cannot escape this liability by failing to utilize the premises.⁸²⁸ It has been several times said that in the

⁸²⁶ *Millie Iron Min. Co. v. Thalmann*, 34 App. Div. 281, 54 N. Y. Supp. 276. And see *Haines v. Graf Mfg. Co.*, 13 N. Y. St. Rep. 730; *Vanderpool v. Smith*, 4 Abb. Dec. (N. Y.) 461. But in *Spencer v. Burton*, 5 Blackf. (Ind.) 57, it is said that the lessee is relieved if the lessor "fails" to give possession; and see *Hickman v. Rayl*, 55 Ind. 551, which is perhaps to that effect, though extremely obscure.

In *Fitzhugh v. Baird*, 134 Cal. 570, 66 Pac. 723, it is said that the lessee who failed to take possession is not entitled to a reduction of rent because the lessor occupied the premises a part of the time, when such occupancy was for the purpose of protecting the property, is not shown to have been profitable to him, and there was no claim for recoupment. This would seem to imply that in some cases the lessor would lose part of his rent merely because he failed to abandon the

premises, although the lessee failed to present himself to take possession.

⁸²⁷ *Millie Iron Min. Co. v. Thalmann*, 34 App. Div. 281, 54 N. Y. Supp. 276. Contra, *Samuel v. Roberts*, 27 Misc. 296, 58 N. Y. Supp. 765.

⁸²⁸ *Anonymous*, 4 Leon. 17; *Belasis v. Burbick*, 1 Salk. 209; *Levi v. Lewis*, 6 C. B. (N. S.) 766; *Stier v. Surget*, 18 Miss. (10 Smedes & M.) 154; *Douglass v. Branch Bank*, 19 Ala. 659, 54 Am. Dec. 207; *Tully v. Dunn*, 42 Ala. 262, 94 Am. Dec. 646; *Marix v. Stevens*, 10 Colo. 261, 15 Pac. 350; *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 164 Ill. 88, 45 N. E. 488; *Gilhooley v. Washington*, 4 N. Y. (4 Comst.) 217; *Be-car v. Flues*, 64 N. Y. 518; *Weston v. Ryley*, 15 Misc. 638, 37 N. Y. Supp. 216; *Brown v. Cairns*, 107 Iowa, 727, 77 N. W. 478; *McGlynn v. Brock*, 111 Mass. 219; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134; *May-er v. Lawrence*, 58 Ill. App. 194;

case of a tenancy at will the rule is different, and that the tenant is not liable for rent unless he takes possession.⁸²⁹ It does not clearly appear, however, why a lessee at will, if he enters into a stipulation for rent, should thus be able to relieve himself from liability. He would seem to stand in this regard in the same position as any other lessee, and the fact that he might, at common law, by notice and relinquishment of the possession taken by him, relieve himself from liability for all subsequent installments of rent, except that next due,^{829a} is not, it is conceived, a reason for allowing him to relieve himself from all liability by taking no action whatever.

Though, as above stated, an entry by the lessee is not necessary to impose liability on him for rent, the fact that he has not entered may be material in this connection as showing that he has not accepted the lease, and therefore should not be made liable by reason of the provisions thereof. If, however, he executed the lease, or has paid rent or taxes in pursuance of provisions therein, or has otherwise indicated his acceptance of it, his failure to take possession is immaterial.⁸³⁰

c. **Invalidity of lease.** Although a lease is absolutely void, the lessee, if he goes into possession, is ordinarily liable for the amount of the rent reserved, either in an action for use and occupation, or by reason of the inference of an intention that he shall hold as a periodic tenant at the rent named.⁸³¹ In some cases of invalidity, however, the lessee has been regarded as free

Birckhead v. Cummins, 33 N. J. Law, 44; *Oregonian R. Co. v. Oregon R. & Nav. Co.*, 27 Fed. 277; *Moore v. Dove*, 1 Hayw. & H. 161, Fed. Cas. No. 9,757.

⁸²⁹*Bellasis v. Burbrick*, 1 Salk. 209, Holt. 199, 1 Ld. Raym. 170; *Anonymous*, 1 Vent. 41; *Jeakill v. Linne*, Het. 54; *Anonymous*, Dal. 44; *Hardy v. Winter*, 38 Mo. 106.

^{829a} See ante, at note 374.

⁸³⁰ See ante, § 32, at notes 606, 607; § 53 b, at note 53.

In *Pendergast v. Young*, 21 N. H. 234, it is said that entry by the lessee is necessary to show his assent to the lease; citing *Bac. Abr.*, Lease (M), and *Miller v. Green*, 8 Bing. 92. But this is so only if his assent is not otherwise shown. The case of *Miller v. Green*, 8 Bing. 92, deciding that a lease by indenture is not effective as against a subsequent conveyance until entry by the lessee, seems most questionable (See ante, § 37). It is, it may be remarked, apparently cited in none of the leading English textbooks on the subject so far as this point is concerned.

⁸³¹ See ante, § 13 a (2), at notes 373-378; § 25 g (1) (4).

from liability even though he entered into possession.⁸³² If the lease is voidable, rather than void, as when the lessor was guilty of fraud, the lessee is liable for the rent unless he relinquishes possession and obtains a rescission of the lease, or its equivalent.⁸³³ The effect of various possible vices and defects in a lease, upon the liability for rent of one claiming thereunder, has been considered in connection with the discussion of the particular class of vice or defect, and it is not possible to deduce from the cases a uniform rule in regard thereto.⁸³⁴

d. **Defect in lessor's title.** As before stated,⁸³⁵ the tenant cannot refuse to pay rent upon the ground that the lessor, at the time of the demise, had no title to the land. This is ordinarily based upon the theory of estoppel, though it might rather, it seems, be based upon the theory that the rent, being payable in return for the possession or opportunity for possession of the land, the tenant, so long as he has such possession or the opportunity for possession by virtue of the landlord's act, should not be allowed to repudiate his stipulations as to the payment of rent merely because of such defect in title.

The tenant is not precluded from showing that the person asserting the claim for rent is not the person entitled thereto, for the reason that the title to the reversion or to the rent is in another person.⁸³⁶ And, according to occasional decisions, and quite numerous *dicta*, the tenant may show that, though the lessor had an estate in the land at the date of the lease, this estate was so limited in duration that it expired before the installment or installments of rent in question became due.⁸³⁷

As before stated,⁸³⁸ the courts are not in unison as to whether

⁸³² As in the case of a lease made on Sunday (ante, § 35), or of a lease made for an illegal purpose (ante, § 40). The fact that the lease was for a longer period than the statute allowed (ante, § 12 c (1)) has also been assumed to constitute a defense to the claim for rent. Odell v. Durant, 62 N. Y. 524.

⁸³³ See ante, § 38.

⁸³⁴ As to lease by or to married woman, see ante, § 21 a (1) (d), b; lease to infant, see ante, § 21 b (2);

lease to insane person, see ante, § 21 c (2); ultra vires lease by or to corporation, see ante, § 21 d (2); lease invalid under statute of frauds, see ante, § 25 g (4); effect of insufficiency of description, see ante, § 26 c (1); effect of nonexecution by lessor, see ante, § 53 a.

⁸³⁵ See ante, § 78 c (3).

⁸³⁶ See ante, § 78 n, o.

⁸³⁷ See ante, § 78 p (3).

⁸³⁸ See ante, § 19 b (4).

one may, by taking a lease from or attorning to two or more persons, the title of one of whom at least is defective, become liable for rent to each.

e. **Eviction of tenant—(1) By landlord—(a) Total eviction.** An eviction of the tenant by the landlord, the nature of which is elsewhere discussed,⁸³⁹ has the effect of suspending the tenant's liability for rent thereafter to become due.⁸⁴⁰

It has been suggested in one case that there might be a right in the landlord to recover in use and occupation for the part of the rent period during which he enjoyed the premises prior to the eviction,⁸⁴¹ but such a view cannot, it would seem, be sustained even when the eviction is by title paramount,⁸⁴² and *a fortiori* is it incorrect when applied to the case of an eviction by the landlord.⁸⁴³

The eviction, it is to be noticed, does not absolutely terminate the liability for rent, as it does not terminate the tenancy,⁸⁴⁴ but it merely relieves the tenant from liability for such rent as may, by the terms of the lease, become due while the tenant remains out of possession as a result of the eviction.⁸⁴⁵ The tenant is free from liability for the rent becoming due between the time of the eviction and his restoration to possession, even though the landlord does not himself retain the possession.⁸⁴⁶ Not infre-

⁸³⁹ See post, chapter XVII.

⁸⁴³ That there is no such right of recovery in use and occupation is decided, without discussion, in *Columbia Bank v. Galloway*, 1 Cranch, C. C. 353, 2 Fed. Cas. No. 868; and *Christopher v. Austin*, 11 N. Y. (1 Kern.) 216, is to this effect. See, also, post, note 859.

⁸⁴⁰ *Upton v. Townend*, 17 C. B. 30; *Wright v. Lattin*, 38 Ill. 293; *Engstrom v. Tyler*, 46 Kan. 317, 26 Pac. 735; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Osmers v. Furey*, 32 Mont. 581, 81 Pac. 345; *Matthews v. Tobener*, 39 Mo. 115; *Bennet v. Bittle*, 4 Rawle (Pa.) 339; *Poston v. Jones*, 37 N. C. (2 Ired. Eq.) 350, 38 Am. Dec. 683. And practically all the cases cited post, § 185, support the same proposition.

⁸⁴⁴ See post, § 185 h.

⁸⁴¹ *Fitchburg Cotton Mfg. Co. v. Melven*, 15 Mass. 268. The case involved an eviction by title paramount, but the language is broad enough to cover the case of an eviction by the landlord.

⁸⁴⁵ *Tiley v. Moyers*, 43 Pa. 404; *Smith v. McEnany*, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272; *Mackubin v. Whetchaft*, 4 Har. & McH. (Md.) 135; *Holmes v. Guion*, 44 Mo. 164 (semble); *Day v. Watson*, 8 Mich. 535; *Co. Litt.* 319 a.

⁸⁴⁶ *Cibel v. Hill*, 1 Leon. 110; *Bennett v. Bittle*, 4 Rawle (Pa.) 339. See *Lewis v. Payn*, 4 Wend. (N. Y.) 423.

⁸⁴² See post, § 182 e (2). (1157)

quently the courts speak as if the eviction absolutely terminated the liability for rent, and this is ordinarily the actual result thereof, there being no resumption of possession by the tenant.

While it is uniformly recognized that an eviction does not relieve from liability for rent which is already due, if the rent is not payable in advance,⁸⁴⁷ there are a number of decisions to the effect that, if the rent is payable in advance, the tenant is relieved from liability therefor in case an eviction occurs during the rent period, that is, after the rent is due.⁸⁴⁸ There are, however, decisions to the contrary, that he is not so relieved,⁸⁴⁹ and it

⁸⁴⁷ *Page v. Parr*, *Styles*, 432; *Giles v. Comstock*, 4 N. Y. (4 Comst.) 270, 53 Am. Dec. 374; *McCarty v. Hudsons*, 24 Wend. (N. Y.) 291; *Henning v. Savage*, 51 Misc. 609, 100 N. Y. Supp. 1015; *Cole v. Sanford*, 77 Hun, 198, 28 N. Y. Supp. 353; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; *Livingston v. L'Engle*, 27 Fla. 502, 8 So. 728; *Tiley v. Moyers*, 43 Pa. 404; *Klinker v. Guggenheimer*, 43 Misc. 393, 87 N. Y. Supp. 474; *Schusler v. Ames*, 16 Ala. 73, 50 Am. Dec. 168.

⁸⁴⁸ See *The Richmond v. Cake*, 1 App. D. C. 447; *Sutton v. Goodman*, 194 Mass. 389, 80 N. E. 608; *Hall v. Joseph Middleby*, 197 Mass. 485, 83 N. E. 1114. In *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348, it is said that the lessor can, in case of eviction, recover only a part of the rent apportioned up to the time of eviction. The so-called eviction was a failure to heat the premises. That there can be no such apportionment, see *Hall v. Joseph Middleby*, 197 Mass. 485, 83 N. E. 1114, *supra*, and *ante*, § 176 a.

In *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117, a case of constructive eviction, it is said that "when the tenant lawfully ceases to occupy, he is discharged from his obligation to pay accruing rent. This is so

whether the rent is payable in advance or at the end of the term." And see *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*, 9 Colo. App. 299, 48 Pac. 671, where it is said: "It is true that the rent for the month was payable in advance February 1st and the eviction occurred February 2nd; but, as there was no use of the premises by the tenant by reason of the eviction, the jury may technically have erred in finding no rent due on February 1st. But the error is harmless. If the month's rent had been paid, it could have been recovered back by the tenant by reason of the eviction. So the result would have been the same."

In *Wreford v. Kenrick*, 107 Mich. 389, 65 N. W. 234, it was decided that the landlord could not, owing to a subsequent eviction, recover rent payable in advance. There was not, however, it seems, an eviction in this case, but merely an assertion by the landlord of the right, expressly given by the lease, to terminate the tenancy.

⁸⁴⁹ *Ryerse v. Lyons*, 22 U. C. Q. B. 12; *Giles v. Comstock*, 4 N. Y. (4 Comst.) 270, 53 Am. Dec. 374; *Hunter v. Reiley*, 43 N. J. Law, 480; *Stein v. Rice*, 23 Misc. 348, 51 N. Y. Supp. 320; *Johnson v. Barg*, 8 Misc.

is difficult to comprehend how, after the tenant has, by the terms of the lease, become absolutely liable for an installment of rent, he can be relieved from such liability by a subsequent occurrence. In most jurisdictions the tenant could, in an action for the rent so payable in advance, set up a claim for damages on account of the eviction by way of set-off, and so in effect make the eviction a defense to the landlord's claim.⁸⁵⁰

There are occasional decisions or *dicta* to the effect that, if the rent is payable in advance, and the tenant so pays it, he may, upon his eviction during the period for which the rent is paid, recover the sum so paid.⁸⁵¹ These are, perhaps, to be regarded as based on the theory of a "failure of consideration." But the applicability of such a theory, as a ground for the recovery of a payment voluntarily made on account of rent, seems questionable, since the consideration for the contract to pay rent, consisting of the execution of the lease, is executed and not executory. A more satisfactory mode of adjusting the rights of the parties, it is conceived, would be to consider the advance payment in determining the damages recoverable for the eviction.

If the tenant pays rent before it becomes due, and he is subsequently, but before the rent is due, evicted by the landlord, he may, it would seem, recover the money so paid, as money lent or as money had and received, such payment being properly merely an advance, to be applied on the rent when it becomes due.⁸⁵²

In case the tenant gives a note or separate agreement for rent to become due in the future, and he is thereafter evicted before the obligation becomes due, he may, it seems, obtain relief in equity against his legal obligation.⁸⁵³

307, 28 N. Y. Supp. 728; *Sheehan v. Coyle*, 36 Misc. 766, 74 N. Y. Supp. 847; *Gugel v. Isaacs*, 21 App. Div. 503, 48 N. Y. Supp. 594. *Giles v. Comstock*, supra, was a case of eviction by title paramount, but the court expresses the rule so broadly as to apply also in case of an eviction by the landlord.

⁸⁵⁰ See post, § 296, at notes 146-150.

⁸⁵¹ *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*, 9 Colo. App. 299,

48 Pac. 671; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117; *Mallette v. Hillyard*, 117 Ga. 423, 43 S. E. 779; *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348.

In *Breck v. Biddle*, 19 Kan. 550, it is decided that if the tenant pays rent in advance by making improvements, as agreed, he has no lien for the value thereof.

⁸⁵² See ante, § 177 c. 1-1.

⁸⁵³ See *Poston v. Jones*, 37 N. C. (2 Ired. Eq.) 350, 38 Am. Dec. 683.

The question of what constitutes an eviction by the landlord, for the purpose of defense to an action for rent, has been the subject of a large number of decisions, and the courts of some states have gone extremely far in regarding particular acts on the part of the landlord, and even a failure on his part to act, as sufficient for this purpose. The cases bearing on the subject are subsequently considered.⁸⁵⁴

(b) **Partial eviction.** In case of an eviction of the tenant by the landlord, not from the whole, but from a part only, of the premises, a "partial eviction," the tenant is relieved from the whole rent so long as he is kept out of possession of such part, the same rule applying as when he is evicted from the entire premises.⁸⁵⁵ Nor does he, by paying some part of the rent thereafter becoming due, lose his right to refuse to pay the residue.⁸⁵⁶ The theory on which the landlord is thus deprived of the entire rent, although he evicts the tenant from part only of the premises, is that the landlord should not be allowed, by his wrongful act in dispossessing the tenant of part of the premises, to change the contract made between himself and the tenant, which contemplated the payment of rent for the premises as a whole only. This is the

This was actually a case of exclusion of the lessee from possession by one having possession under paramount title, but the court would no doubt have applied the same principle in a case of actual eviction.

In *Anderson v. Tighe*, 57 Tenn. (10 Heisk.) 299, the persons entitled to the land having forbidden the lessee to make use of it, a court of equity rescinded the lease and enjoined the collection of notes given for the rent.

⁸⁵⁴ See post, § 185.

⁸⁵⁵ *Co. Litt.* 148 b; *Gilbert, Rents*, 173; *Morrison v. Chadwick*, 7 C. B. 266; *Christopher v. Austin*, 11 N. Y. (1 Kern.) 216; *Colburn v. Morrill*, 117 Mass. 262, 19 Am. Rep. 415; *Smith v. McEnany*, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272; *Morris v. Kettle*, 57 N. J. Law, 218, 30 Atl. 879; *Wright v. Lattin*, 38 Ill.

293; *Smith v. Wise*, 58 Ill. 141; *Frepons v. Grostein*, 12 Idaho, 671, 87 Pac. 1004; *Skaggs v. Emerson*, 50 Cal. 3; *Edmison v. Lowry*, 3 S. D. 77, 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774; *Sirey v. Braems*, 65 App. Div. 472, 72 N. Y. Supp. 1044; *Perniciaro v. Veniero*, 9 N. Y. Supp. 369; *Graham v. Anderson*, 3 Har. (Del.) 364; *Vaughan v. Blanchard*, 1 Yeates (Pa.) 175; *Kessler v. McConachy*, 1 Rawle (Pa.) 441; *Linton v. Hart*, 25 Pa. 193, 64 Am. Dec. 691; *New York Dry Goods Store v. Pabst Brew. Co.*, 50 C. C. A. 295, 112 Fed. 381; *Briggs v. Hall*, 4 Leigh (Va.) 484, 26 Am. Dec. 326; *Okie v. Person*, 23 App. D. C. 170.

⁸⁵⁶ *Morris v. Kettle*, 57 N. J. Law, 218, 30 Atl. 879; *Buffalo Stone & Cement Co. v. Radsky*, 14 N. Y. St. Rep. 82.

gist of the expressions on the subject, though it is expressed in different ways. It is sometimes said, for instance, that the landlord cannot "apportion his own wrong." In Alabama alone, apparently, is it the law that the tenant, remaining in possession of the part from which he is not evicted, is liable for a proportionate part of the rent. There it has been decided that, if he desires to relieve himself from the entire liability, he must relinquish possession of the entire premises.⁸⁵⁷ In Illinois it has been decided that if the tenant retains possession of part of the premises, and thereafter gives a note for the rent, the note will be valid as based on a moral consideration.⁸⁵⁸ Probably such a view would not be adopted in most jurisdictions.

The cases previously cited, to the effect that the lessor cannot, if he evicts the tenant from part of the premises, recover any part of the rent, in effect recognize that he cannot recover in use and occupation for his partial enjoyment of the premises. There are a few cases in which this is expressly asserted.⁸⁵⁹

The rule forbidding apportionment of rent on a partial eviction by the landlord was established before the theory of "constructive" eviction^{859a} was developed, and the cases in which it has been applied appear to have almost invariably involved an "actual" eviction. The question seems never to have been discussed whether it would be applied in case the landlord is guilty of not an actual eviction, but merely of acts which would justify the tenant in abandoning possession, and the tenant abandons merely part of the premises. It is ordinarily stated that the tenant cannot assert an eviction, a "constructive" eviction, on account of such acts, unless he relinquishes possession,⁸⁶⁰ and this would seem to mean a relinquishment of the possession, not of part of the premises, but of the whole. But the rule now under

⁸⁵⁷ Warren v. Wagner, 75 Ala. 188, Christopher v. Austin, 1 N. Y. (1 51 Am. Rep. 446; Crossthwaite v. Kern.) 216. See remark of Parke, Caldwell, 106 Ala. 275, 18 So. 47; B., in Reeve v. Bird, 1 Cromp. M. & Anderson v. Winton, 136 Ala. 422, 34 R. 36, disapproving the nisi prius case of Stokes v. Cooper, 3 Camp. So. 962.

⁸⁵⁸ Anderson v. Chicago Marine & Fire Ins. Co., 21 Ill. 601. 514, note, contra. And see Fuller v. Ruby, 76 Mass. (10 Gray) 285.

⁸⁵⁹ Morris v. Kettle, 57 N. J. Law, 218, 30 Atl. 879; Briggs v. Hall, 4 Leigh (Va.) 484, 26 Am. Dec. 326;

^{859a} See post, § 185 a.

⁸⁶⁰ See post, § 185 d.

discussion would make such acts, if followed by an actual abandonment of part of the premises, sufficient as a defense to the entire rent, as effecting a partial eviction. For instance, if the landlord interferes with the tenant's enjoyment of the premises as a whole, as by obstructing the access thereto, the tenant might abandon a small part of the premises and assert an eviction from such part, exempting him entirely from liability for rent, while retaining possession and making use of a considerable part of the premises. It might perhaps be considered, in such case, that the fact that the tenant retains possession of part of the premises, the enjoyment of which is as greatly affected by the landlord's acts as is the part which he abandons, is evidence to show that his partial abandonment is not in consequence of the landlord's acts, but merely a device to avoid payment of rent, and that consequently he should be held liable for the whole rent. In one case it seems to have been considered that the fact that certain rooms in a house on the leased premises were made uninhabitable by the landlord's construction of a building on the premises, in such a way as to prevent the passage of light to such rooms, justified the lessee in abandoning such rooms and refusing to pay any rent whatever, although apparently retaining possession of the balance of the house.⁸⁶¹ In this case, however, there was an actual eviction as to part of the leased premises by reason of the construction of the new building on such part.

The rule that the eviction of a tenant by his landlord suspends liability for rent to become due does not apply except to rent payable on account of the land which the tenant holds of that landlord, and if a landlord transfers the reversion in but a part of the land, or if he transfers that in different parts to

⁸⁶¹ Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322. The head note states that the tenant entirely abandoned the premises. There is nothing in the opinion to show this, and the statement that the particular rooms were abandoned would rather raise an inference that the balance of the house was not abandoned. This case is cited and applied in Frepons v. Grostein, 12 Idaho, 671, 87 Pac. 1004, 8 L. R. A. (N. S.) 903, where it appears that the tenant entirely abandoned possession. In Osmer v. Furey, 32 Mont. 581, 81 Pac. 345, the tenant was, by the action of the landlord in making alterations in part of the premises, "actually evicted from a part of the premises, and constructively from the rest, and was at liberty to

different persons, the rent being thereby apportioned,⁸⁶² the rent payable to one of such reversioners is not suspended by the fact that the tenant is evicted by another reversioner.⁸⁶³

(2) **By paramount title**—(a) **Total eviction.** If the tenant is evicted from the entire premises by one having paramount title, the tenant's liability for rent under the demise comes to an end,⁸⁶⁴ and though he may by attornment or otherwise assume such relations to the paramount owner as to become liable to the same amount, this liability is under a different demise and for a different rent.⁸⁶⁵ Thus, if a mortgage prior to the lease is foreclosed, and the purchaser takes possession, or the tenant attorns to him, the former landlord cannot recover for rent becoming due thereafter, nor can the purchaser properly recover rent under the former lease;⁸⁶⁶ and the case is the same if possession is taken by a purchaser at sheriff's sale under a judgment prior to the lease.⁸⁶⁷ The mere existence of a paramount title, without any eviction thereunder, is no defense to rent.⁸⁶⁸

It is but rarely that the right of the same landlord to the rent will be revived after an eviction by paramount title, though this will occur, it seems, if the eviction is by one claiming under a lien

abandon possession, and thus be discharged from any obligation to pay rent for the remainder of the term."

⁸⁶² See ante, § 175 b.

⁸⁶³ Reed v. Ward, 22 Pa. 144; Linton v. Hart, 25 Pa. 193, 64 Am. Dec. 691; Gribbie v. Toms, 70 N. J. Law, 522, 57 Atl. 144; Id., 71 N. J. Law, 338, 59 Atl. 1117. And it is immaterial in this regard that the reversioner effecting the eviction was advised to do so by the reversioner asserting the claim for rent. Reed v. Ward, 22 Pa. 144.

⁸⁶⁴ Cuthbertson v. Irving, 4 Hurl. & N. 742; Wheelock v. Warschauer, 34 Cal. 265; Home Life Ins. Co. v. Sherman, 46 N. Y. 370; Moffatt v. Strong, 22 N. Y. Super. Ct. (9 Bosw.) 57; In re Arkell Pub. Co., 29 Misc. 145, 60 N. Y. Supp. 832; Leopold v. Judson, 75 Ill. 536; Stubbings v. Evanstown, 136 Ill. 37, 26 N.

E. 577, 11 L. R. A. 839; Bauders v. Fletcher, 11 Serg. & R. (Pa.) 419; George v. Putney, 58 Mass. (4 Cush.) 351, 50 Am. Dec. 788; Adams v. Bigelow, 128 Mass. 365; Friend v. Oil Well Supply Co., 165 Pa. 652, 30 Atl. 1134; Maxwell v. Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124.

⁸⁶⁵ See ante, §§ 19 c, 73 a (4).

⁸⁶⁶ See ante, § 73 a (5), c.

⁸⁶⁷ See Day v. Austin, Cro. Eliz. 398; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364.

⁸⁶⁸ Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Hayes v. Ferguson, 83 Tenn. (15 Lea) 1, 54 Am. Rep. 398; Hochenauer v. Hilderbrant, 6 Colo. App. 199, 40 Pac. 470; Ricketts v. Garrett, 11 Ala. 806; Home Life Ins. Co. v. Sherman, 46 N. Y. 370; Russell v. Fabyan, 27 N. H. 529. See ante, § 78 c (3).

prior to the lease, and the landlord re-establishes his title by a redemption within the statutory time.⁸⁶⁹

An eviction by title paramount, like an eviction by the landlord,⁸⁷⁰ does not affect the tenant's liability for rent which became due before the eviction occurred, since such rent was fully earned.⁸⁷¹ And this would seem to be properly the case even though the rent is payable in advance, and the eviction takes place before the end of the period for which it is payable,⁸⁷² though there are authorities to the contrary.⁸⁷³

There are cases suggesting that, upon an eviction by paramount title, the landlord may recover on a *quantum meruit* for the value of the occupancy of the premises since the last rent payment.⁸⁷⁴ Such a view is ignored in the numerous decisions that there is no right of recovery for rent in case of a total eviction by title paramount,⁸⁷⁵ as well as in those that, in case of a partial eviction

⁸⁶⁹ See *Russell v. Fabyan*, 27 N. H. 529, 28 N. H. 543, 61 Am. Dec. 629. eviction on the next day would not have been a defense.

⁸⁷⁰ See ante, at note 847.

⁸⁷³ See cases cited ante, note 848,

⁸⁷¹ 2 Rolle, Abr., Rent (O); *Baynton v. Bobbet*, 2 Vent. 68; *Grobham v. Thornborough*, Hob. 82; *Fitchburg Cotton Manufactory Corp. v. Melven*, 15 Mass. 268; *Giles v. Comstock*, 4 N. Y. (4 Comst.) 270, 53 Am. Dec. 374; *Boodle v. Cambell*, 7 Man. & G. 386; *Pepper v. Rowley*, 73 Ill. 262. So a landlord can recover all rent which may become due prior to a foreclosure sale under a mortgage prior to the lease. *Mason v. Lenderoth*, 88 App. Div. 381, 84 N. Y. Supp. 740.

with reference to an eviction by the landlord after the rent payable in advance is due. It seems that the same principle must apply whether the eviction is by the landlord or under title paramount.

⁸⁷² *Giles v. Comstock*, 4 N. Y. (4 Comst.) 270, 53 Am. Dec. 374. See ante, note 849. In *Smith v. Shepard*, 32 Mass. (15 Pick.) 147, 25 Am. Dec. 432, it was decided that as the tenant had the whole of the first day of the quarter in which to pay rent payable in advance, an eviction on that day was a defense to a claim for the rent, since it was not after the rent was due, implying that an

⁸⁷⁴ See *Fitchburg Cotton Manufactory Corp. v. Melven*, 15 Mass. 268. In *Wheeler v. Shed*, 1 D. Chip. (Vt.) 208, a nisi prius case, in an action for use and occupation against a tenant who had been evicted by title paramount, it was left to the jury to find whether the use of the premises for the part of the rent period previous to the eviction was beneficial to the defendant, and to find its value. The right to maintain the action does not appear to have been brought in question, and the verdict was for the defendant. See *Nicholson v. Munigle*, 88 Mass. (6 Allen) 215.

⁸⁷⁵ See ante, note 864.

by such title, the rent is apportioned as to amount,⁸⁷⁶ and its adoption would seem to render practically nugatory the rule forbidding apportionment of rent as to time.⁸⁷⁷ There are occasional decisions adverse to any such right of recovery in case of eviction.⁸⁷⁸

The rule that eviction by paramount title is a defense to the claim for rent has been decided to be applicable, even though the eviction results from a breach by the lessee of his own covenants, as when a sublessee violates a covenant of his lease as to the use of the premises, and the chief landlord re-enters because such forbidden use is also in violation of a covenant in the original lease.⁸⁷⁹

As elsewhere stated,⁸⁸⁰ there is no such thing as an eviction, in a legal sense, by a third person not acting under the authority of, or by consent of, the landlord, unless he has paramount title, and consequently a dispossession by such a person does not affect the tenant's liability for rent.⁸⁸¹

(b) **Partial eviction.** If the eviction under paramount title is partial merely, the rent is apportioned, and the tenant is relieved from liability only for an amount proportioned to the value of the part of the premises of which he retains possession,⁸⁸² the rule being thus different when the partial eviction is under paramount title from that which applies when it is by the landlord.

It has in New York been held that, in the case of a lease of land, together with certain water rights, there is a partial eviction.

⁸⁷⁶ See post, note 882.

⁸⁷⁷ See ante, § 176 a.

⁸⁷⁸ See *Nicholson v. Munigle*, 88 Mass. (6 Allen) 215; *Fuller v. Swett*, 88 Mass. (6 Allen) 219, note. ⁸⁷⁹ *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370.

⁸⁸⁰ See post, § 184.

⁸⁸¹ See ante, § 182 a (2).

⁸⁸² *Halligan v. Wade*, 21 Ill. 470. 74 Am. Dec. 108; *Fillebrown v. Hoar*, 124 Mass. 580; *Carter v. Burr*, 39 Barb. (N. Y.) 59; *Cheairs v. Coats*, 77 Miss. 846, 28 So. 728, 50 L. R. A. 111, 78 Am. St. Rep. 546; *Poston v. Jones*, 37 N. C. (2 Ired. Eq.)

350, 38 Am. Dec. 683; *Lawrence v. French*, 25 Wend. (N. Y.) 445; *Christopher v. Austin*, 11 N. Y. (1 Kern.) 216; *Tunis v. Grandy*, 22 Grat. (Va.) 109; *Mayor of Swansea v. Thomas*, 10 Q. B. Div. 48; *Co. Litt.* 148 b.

In one case it is said that in case of a partial eviction by paramount title, the tenant may, by giving up the whole of the premises, relieve himself from the entire rent. See *Seabrook v. Moyer*, 88 Pa. 417. Such a view evidently does not accord with the cases above cited.

tion of the tenant, if he is deprived by paramount title of the water rights in question, though retaining the land, and that the rent is to be apportioned in such case.⁸⁸³ This is perhaps in accord with the statement in an old case that, upon the demise of a barn and of tithes, "though the rent is only issuing out of the barn in point of remedy, yet it is issuing out of both, * * * in point of render."⁸⁸⁴

f. **Merger.** As elsewhere stated,⁸⁸⁵ the tenancy may be terminated in whole or in part by the merger of the leasehold in the reversion, and the effect of this is to terminate the liability for rent, either wholly or in proportion to the extent of the merger.⁸⁸⁶ Whether the right to rent will be extinguished by the merger of the leasehold in the reversion, if the rent has previously become separated from the reversion, does not appear to have been decided, but it seems that, if a landlord transfers to a third person the reversion without the rent, or the rent without the reversion, and the leasehold is thereafter merged in the rever-

⁸⁸³ Blair v. Claxton, 18 N. Y. 529; the leasehold to the reversioner and, Carter v. Burr, 39 Barb. (N. Y.) 59. presumably, conveyed it to the latter, he remained liable for the rent

⁸⁸⁴ Doubitoft v. Curteene, Cro. Jac. 452. See Gardiner v. William- "under the peculiar circumstances of son, 2 Barn. & Adol. 336, per Parke, the case," where "from the very J., quoting with approval Saunders' nature of the transaction the liability of the estate for the rent was Windsor v. Gover, 2 Wms. Saund. 303, based on Doubitoft v. Curteene, clearly specify what circumstances differentiated this from other cases of merger.

⁸⁸⁵ See ante, § 12 g (2).

⁸⁸⁶ Otis v. McMillan, 70 Ala. 46; There are, in Pennsylvania, a Higgins v. California Petroleum & number of decisions as to the Asphalt Co., 109 Cal. 304, 41 Pac. extinguishment of a rent reserved on 1087; Liebschutz v. Moore, 70 Ind. a conveyance in fee by reason of its 142, 36 Am. Rep. 182; Casey v. Gregory, 52 Ky. (13 B. Mon.) 505, 56 Am. becoming vested in the person who owns the land. See Phillips v. Dec. 581; Matter of Eddy, 10 Abb. Clarkson, 3 Yeates (Pa.) 124; Pen- N. C. (N. Y.) 396; Mixon v. Coffield, ington v. Coats, 6 Whart. (Pa.) 277; Charnley v. Hansbury, 13 Pa. 24 N. C. (2 Ired. Law) 301; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 16; Wilson v. Gibbs, 28 Pa. 151; Mc- 34 Am. Dec. 285; Sutliff v. Atwood, Quigg v. Morton, 39 Pa. 31; Cook v. 15 Ohio St. 186; Jones v. Rose, 96 Brightly, 46 Pa. 439; Wasserman v. Carroll, 2 Pa. Super. Ct. 551. See, Md. 483, 54 Atl. 69.

But in Pate v. Oliver, 104 N. C. also, Millard v. McMullin, 68 N. Y. 458, 10 S. E. 709, it was decided that Dec. (N. Y.) 211.

sion as a result of their passing to one person, the right of the third person to rent remains unaffected, in accordance with the general rule that a merger, like a surrender, does not operate to the prejudice of a third person not a party to the acts producing the merger.⁸⁸⁷ And if the landlord, in conveying the reversion to the tenant, reserves the right to rent, the tenant, it seems, remains liable therefor, though the leasehold itself is merged.⁸⁸⁸ The merger of the leasehold in the reversion obviously does not affect the liability of the tenant for rent already accrued.⁸⁸⁹

If the reversion on a sublease is merged in the original reversion, the sublessee's liability for rent is, by the rule of the English decisions, terminated, the same principle applying as in the case of the surrender of the subreversion.⁸⁹⁰ How far this principle would be applied in this country seems doubtful.⁸⁹¹ It could in any case not apply to rent already accrued under the sublease.⁸⁹²

g. **Surrender.** Since, upon a surrender by the tenant of his interest under the lease, the tenancy comes to an end, and there is no longer any outstanding leasehold interest from which the rent can issue,⁸⁹³ the right to rent subsequently to become due is thereby extinguished.⁸⁹⁴ This is true, however, only as regards

⁸⁸⁷ See 3 Preston, Conveyancing, 20 So. 54; *Amory v. Kannoffsky*, 117 Mass. 351, 19 Am. Rep. 416; *Schulenberg v. Uffelmann*, 106 Mich. 453, 64 N. W. 460; *Kiernan v. Germain*, 61 Miss. 498; *Minneapolis Co-Operative Co. v. Williamson*, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473; *Webb v. Russell*, 3 Term R. 393.

⁸⁸⁸ *Zeysing v. Welbourn*, 42 Mo. App. 352.

⁸⁸⁹ *Johnson v. Muzzy*, 42 Vt. 708, 1 Am. Rep. 365.

⁸⁹⁰ *Thre'r v. Barton*, Moore, 94; *Davis v. George*, 67 N. H. 393, 39 Atl. 979; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Everett v. Williamson*, 107 N. C. 204, 12 S. E. 187, 22 Am. St. Rep. 870; *Elliott v. Aiken*, 45 N. H. 30; *Pratt v. H. M. Richards Jewelry Co.*, 69 Pa. 53, 8 Am. Rep. 212; *Imler v. Baenish*, 74 Wis. 567, 43 N. W. 490; *West Concord Mill. Co. v. Hosmer*, 129 Wis. 8, 107 N. W. 12, 116 Am. St. Rep. 931. The cases cited post, chapter XVIII, are to the same effect.

⁸⁹¹ See ante, § 12 g (11), at notes 337-342a.

⁸⁹² *Townsend v. Read*, 13 Daly (N. Y.) 198.

⁸⁹³ See post, § 191.

⁸⁹⁴ *American Bonding Co. v. Pueblo Inv. Co. (C. C. A.)* 150 Fed. 17, 9 L. R. A. (N. S.) 557; *Terstegge v. First German Mut. Benevolent Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Dills v. Stobie*, 81 Ill. 202; *Armour Packing Co. v. Des Moines Pork Co.*, 116 Iowa, 723, 89 N. W. 196, 93 Am. St. Rep. 270; *Morgan v. McCollister*, 110 Ala. 319, 320, 53 Atl. 394, 46 L. R. A. 748, the

rent subsequently to become due, and the landlord has the same right as before the surrender to rent which had already become due,⁸⁹⁵ even though it was payable in advance, and the surrender occurs immediately after the rent day.⁸⁹⁶ Nor can the landlord, the surrender occurring between rent days, demand an apportionment of rent as to time, and claim an allowance for the tenant's occupation of the premises from the last rent day till the day of the surrender,⁸⁹⁷ unless there is a statute allowing apportionment as to time in such a case.

The effect of a surrender is necessarily to terminate the lia-

immunity from rent after a surrender was based on a stipulation to that effect, it being said that the surrender is "a valid consideration for the relinquishment of rent."

⁸⁹⁵ *Kastner v. Campbell* (Ariz.) 53 Pac. 586; *Sperry v. Miller*, 8 N. Y. (4 Seld.) 336, 16 N. Y. 407; *Sammis v. Day*, 48 Misc. 327, 96 N. Y. Supp. 777; *Forgotson v. Becker*, 39 Misc. 816, 81 N. Y. Supp. 319; *Nicol v. Young*, 68 Mo. App. 448; *Attorney General v. Cox*, 3 H. L. Cas. 240; *Shaw v. Lomas*, 59 Law T. (N. S.) 477.

⁸⁹⁶ *Okie v. Person*, 23 App. D. C. 170; *Learned v. Ryder*, 61 Barb. (N. Y.) 552; *Stern v. Murphy*, 102 N. Y. Supp. 797. So if each month's rent is payable on the first of the month in advance, the whole rent for the month may be recovered, though a surrender is made on the fifteenth of the month. *Barkley v. McCue*, 25 Misc. 738, 55 N. Y. Supp. 608. In *Kahn v. Simmons*, 25 Misc. 737, 55 N. Y. Supp. 619, it seems to be decided that if the rent is due on the first of the month, it may be recovered though a surrender occurs on that day. But this can hardly be so, since the lessee has till midnight of that day to pay, and consequently the rent cannot be considered as actually due at

the time of the surrender. See ante, § 172 h.

It may of course be agreed at the time of the surrender that the tenant shall not be liable for accrued rent. *Hembrock v. Stark*, 53 Mo. 588.

⁸⁹⁷ *Grimman v. Legge*, 8 Barn. & C. 324; *Greider's Appeal*, 5 Pa. 422, 47 Am. Dec. 413; *Curtiss v. Miller*, 17 Barb. (N. Y.) 477; *Okie v. Person*, 23 App. D. C. 170; *American Bonding Co. v. Pueblo Inv. Co.* (C. C. A.) 150 Fed. 17, 9 L. R. A. (N. S.) 557. This is assumed in the numerous cases stating that a surrender extinguishes the claim for rent still to accrue. *Fitch v. Sargeant*, 1 Ohio, 352, is perhaps to the contrary.

In *Cameron v. Little*, 62 Me. 550, the landlord requested the tenant to leave, and the latter did so. The court does not speak of this as a surrender, but that is what it was, it seems. See post, § 190 c, at note 151. The court says that "if the landlord voluntarily puts an end to the tenancy in the middle of the quarter, or the middle of the month, or at any other time between the regular rent days, he cannot recover of the tenant rent for the fraction of time he occupied after the last regular rent day."

bility for rent growing out of the lease, and an agreement by the parties to the surrender cannot give it a different effect. Thus, when a surrender is made by an assignee of the leasehold to the landlord, the parties cannot agree that this shall not have the effect of relieving the original lessee from liability on his covenant for rent.⁸⁹⁸ Nor can the parties to the surrender continue, by express agreement, the tenant's liability for rent, using the term "rent" in its technical sense, since, as above remarked, the interest in the land out of which the rent was to issue no longer exists. Such an agreement for the continuance of the tenant's liability after surrender is merely an agreement to pay in the future periodic sums equivalent to the installments of rent previously paid.⁸⁹⁹

It has been decided in England that, if the landlord transfers the reversion, retaining, however, the rent, the tenant's right to surrender to the transferee of the reversion is not affected by the fact that thereby the transferor's right to rent is destroyed, since the right of a tenant to surrender cannot be affected by an arrangement between third persons to which he is not a party.⁹⁰⁰ In one state, however, there is a decision apparently contrary to that above referred to, it having been held that the tenant cannot, by making a surrender of the leasehold interest to the lessor, escape liability for rent to one to whom the lessor has previously transferred the future rent, provided he has, at the time of making the surrender, knowledge of such previous transfer of the rent.⁹⁰¹ The view that the tenant's right to surrender, and thereby to relieve himself from rent, is not affected by his land-

⁸⁹⁸ *Clements v. Richardson*, L. R. agreement that one person shall 22 Ir. 535. The lease might itself build a house for another, which provide that the lessee's liability for they could rescind by mutual consent even though the builder has the installments of rent, should continue assigned to a third person the assignee, and such a provision the contract. It is intimated that would, it seems, be effectual. the assignee of the reversion might

⁸⁹⁹ See *Bain v. Clark*, 10 Johns. be liable for damages to his assignor for thus destroying his right (N. Y.) 424; *Vogel v. Piper*, 89 N. to rent. Y. Supp. 431, and post, note 951.

⁹⁰⁰ *Southwell v. Scotter*, 49 Law J. ⁹⁰¹ *Wittman v. Watry*, 45 Wis. Q. B. 356, where *Bramwell, L. J.*, 491. The opinion does not discuss compared the case to that of an the question.

lord's act in separating the rent from the reversion, appears the sounder on principle.

The instrument of lease sometimes provides in terms that the tenant may "surrender" during the term, but the word "surrender," when thus used, refers not to a technical surrender, but merely to a relinquishment of possession, and such a clause is merely equivalent to a clause authorizing the tenant to terminate the tenancy before the time at which it would otherwise come to an end, and the cases involving such a provision for "surrender" have consequently been considered in another connection.⁹⁰²

The surrender of the leasehold in a part of the premises will, it seems clear, have the effect of extinguishing the rent in proportion to the value of such part, and no further, that is, as it is expressed in the old books, the rent will be apportioned.⁹⁰³

There are many decisions upon the question whether, in the particular case, there was a surrender, so as to relieve the tenant from rent subsequently to accrue. These decisions are referred to in a subsequent chapter.⁹⁰⁴

By certain English decisions if a tenant, after making a sublease, surrenders his term, the reversion upon the sublease being thus destroyed, there can be no recovery of subsequently accruing rent against the subtenant by either the head landlord or sublandlord. How far this doctrine would be accepted in this country is questionable.⁹⁰⁵

h. Abandonment by tenant. A mere abandonment of the premises by the tenant, unless followed by such action on the part of the landlord as to make a valid surrender, as elsewhere explained,⁹⁰⁶ has no effect on the right to or liability for rent, and upon such abandonment the landlord may allow the premises to lie vacant and may hold the tenant for the full rent.⁹⁰⁷

⁹⁰² See ante, § 12 f.

A provision for the payment of rent "during occupancy" was construed to bind the tenant for the term of the lease and not only while he chose to remain. *Bickford v. Kirwin*, 30 Mont. 1, 75 Pac. 518.

⁹⁰³ Litt. § 222; Co. Litt. 148 a; Bac. Abr., Rent (M); *Ehrman v. Mayer*, 57 Md. 612, 40 Am. Rep. 448; *Peters*

v. Newkirk, 6 Cow. (N. Y.) 103. See *Smith v. Pendergast*, 26 Minn. 318, 3 N. W. 978; *Hewitt v. Hornbuckle*, 97 Ill. App. 97.

⁹⁰⁴ See post, chapter XVII.

⁹⁰⁵ See ante, § 12 g (11), at notes 336-342a.

⁹⁰⁶ See post, § 193.

⁹⁰⁷ *Wolffe v. Wolff*, 69 Ala. 549, 44 Am. Rep. 526; *Meyer & Co. v.*

The fact that the landlord, upon such abandonment by the tenant, makes a lease to another will, under some circumstances, and in some jurisdictions, have the effect of a complete surrender, so as to exclude the tenant from liability for rent thereafter accruing,⁹⁰⁸ but so far as it does not do this, the new letting is regarded as in behalf of the former tenant, so as to relieve him from the rent under the original lease to the extent of the rent received under the new lease and no further.⁹⁰⁹ Not infrequently the lease expressly provides that, in case of the vacation or abandonment of the premises, the lessor may re-enter and relet the premises, applying the rent received under the new lease upon that falling due under the former lease. The effect of such

Smith, 33 Ark. 627; Lockwood v. amount of the subsequent rent less Lockwood, 22 Conn. 425; Miller v. what he could have obtained by so Benton, 55 Conn. 540; Stobie v. reletting. There is no authority for Dills, 62 Ill. 432; Orcutt v. Isham, 70 such a view, and it is expressly re- Ill. App. 102; Martin v. Stearns, 52 pudiated in Rau v. Baker, 118 Ill. Iowa, 345, 3 N. W. 92, 35 Am. Rep. App. 150.
278; Higgins v. Street (Okla.) 92 ⁹⁰⁸ See post, § 190 c, at notes 144- Pac. 153; Bowen v. Clarke, 22 Or. 148.
566, 30 Pac. 430, 29 Am. St. Rep. ⁹⁰⁹ Meyer & Co. v. Smith, 33 Ark. 627; Marshall v. Grosse 625; McGlynn v. Brock, 111 Mass. Clothing Co., 184 Ill. 421, 56 219; Quinette v. Carpenter, 35 Mo. N. E. 807, 75 Am. St. Rep. 181; 502; Laughran v. Smith, 75 N. Y. Halligan v. Wade, 21 Ill. 470, 205; Underhill v. Collins, 132 N. Y. 74 Am. St. Rep. 108; Oldewurtel v. 269, 30 N. E. 576; Davidson v. Hirsh Wiesenfeld, 97 Md. 165, 54 Atl. 969, (Tex. Civ. App.) 18 Tex. Ct. Rep. 99 Am. St. Rep. 427; Underhill v. 159, 101 S. W. 269; Barlow v. Wain- Collins, 132 N. Y. 269, 30 N. E. 576; wright, 22 Vt. 88, 53 Am. Dec. 79; Breuckmann v. Twibill, 89 Pa. 58; Merrill v. Willis, 51 Neb. 162, 70 N. Reeves v. Comeskey, 168 Pa. 571, 32 W. 914; Brown v. Cairns, 107 Iowa, Atl. 96; Emrich v. Union Stock 727, 77 N. W. 478; Marselles v. Yard Co., 86 Md. 482, 38 Atl. 943; Kerr, 6 Whart. (Pa.) 500, 37 Am. Bickford v. Kirwin, 30 Mont. 1, 75 Dec. 430; Alsup v. Banks, 68 Miss. Pac. 518; Respini v. Porta, 89 Cal. 664, 9 So. 895, 13 L. R. A. 598, 24 464, 26 Pac. 967, 23 Am. St. Rep. Am. St. Rep. 294; Auer v. Penn, 99 488; Patterson v. Emerick, 21 Ind. Pa. 370, 44 Am. Rep. 114; Bowen v. App. 614, 52 N. E. 1012; Merrill v. Clarke, 22 Or. 566, 30 Pac. 430, 29 Willis, 51 Neb. 162, 70 N. W. 914. Am. St. Rep. 625; Gerhart Realty Co. v. Brecht, 109 Mo. App. 25, 84

In *Resser v. Corwin*, 72 Ill. App. S. W. 216; Higgins v. Street (Okla.) 625, it seems to be held that the 92 Pac. 153; Isaacson v. Wolfensohn, landlord is bound to lease the prem- 84 N. Y. Supp. 555.
ises on the tenant's abandonment, and that he can recover only the

a provision will be considered in connection with the question of the effect of a forfeiture of the leasehold upon the right to rent.⁹¹⁰

When the statute requires a notice of a certain length in order to terminate a tenancy at will, the tenant, it has been decided, though he abandons the premises and the landlord is aware thereof, continues liable until the statutory notice is given.^{910a} And it has been asserted, in reference to a tenancy from year to year, that the tenant, though he abandons the premises, continues liable, if he fails to give the requisite notice to terminate the tenancy, not only for the balance of that year, but for subsequent years, until he properly terminates the tenancy by giving such notice.⁹¹¹

i. **Release.** The right to rent may be extinguished by a release, executed by the person entitled to the rent, in favor of the person whose estate is charged therewith.⁹¹² A release from

⁹¹⁰ See post, at notes 927-952.

In *McElroy v. Brooke*, 104 Ill. App. 220, it was decided that there was an "abandonment" within such a provision when the leasehold passed to a receiver by operation of law and he renounced it as an asset of the estate.

^{910a} *Rollins v. Moody*, 72 Me. 135. This case refers to several Maine and Massachusetts cases where it was held that the landlord could recover the amount of the rent for the current rent period although the tenant abandoned possession, unless he gave the statutory notice, but in these cases the question whether he could recover for subsequent periods was not considered. See *Withers v. Larrabee*, 48 Me. 570; *Whitney v. Gordon*, 55 Mass. (1 Cush.) 266; *Walker v. Furbush*, 65 Mass. (11 Cush.) 366, 59 Am. Dec. 148.

⁹¹¹ *Pugsley v. Aikin*, 11 N. Y. (1 Kern.) 494; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 13 L. R. A. 83, 24 Am. St. Rep. 146

(semble). And see *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957.

⁹¹² Litt. § 479; Co. Litt. 280a; *Howell v. Lewis*, 7 Car. & P. 566.

This is perhaps as convenient a place as any for a reference to the two following decisions, though they involved no question of a technical release. In *Chambers v. Ross*, 25 N. J. Law, 293, it was decided that a landlord did not deprive himself of his right to recover rent by refusing to receive rent or make repairs, under the erroneous impression that the reversion had passed to another, the tenant not having been prejudiced by such disclaimer. In *Woodworth v. Harding*, 75 App. Div. 54, 77 N. Y. Supp. 969, it was held that the fact that one of two joint lessees agreed, subsequently to the demise, that if the lesser took proceedings against the other lessee, who had become bankrupt, or recovered the premises from such other for nonpayment of rent, the

all liability or obligation to perform any of the covenants and agreements of the lease has been held to cover rent due and to become due.⁹¹⁸ A release is, properly speaking, an instrument under seal, and such an instrument is valid without reference to the presence of a consideration *vel non*.⁹¹⁴ A contract not to claim any rent, if not under seal, and not supported by a sufficient consideration, is invalid.⁹¹⁵ But it has been decided that if, during the term of the tenancy, the landlord agrees to release the joint and several liability of the two tenants for the rent of the whole, and accepts in place thereof the separate tenancy of each for one-half, such an agreement, even if not valid at the time, for lack of consideration, becomes valid in favor of either tenant, if another year is entered on with the intention that it shall be binding.⁹¹⁶

The fact that no rent has been paid for a long period, even for twenty years or more, raises no presumption that the rent has been released, though it may, by reason of the statute of limitations, prevent a recovery of particular installments of rent overdue.⁹¹⁷ In Maryland a statute has been passed providing that the nondemand or nonpayment of rent for twenty years shall raise a conclusive presumption of the extinction of the rent;⁹¹⁸ and in Pennsylvania there is a like provision as to the nondemand or nonpayment of "ground rent" for twenty-one years.⁹¹⁹ In

lessor might still hold him for the rent, did not relieve the bankrupt lessee from liability for the rent.

⁹¹⁸ *Baker v. Clancy*, 69 Ill. App. 85.

⁹¹⁴ *Co. Litt.* 264b; *Bac. Abr.*, Release (A); *Wald's Pollock, Contracts* (Williston's Ed.) 812.

⁹¹⁵ See *Haseltine v. Ausherman*, 87 Mo. 410; *Kaven v. Chrystie*, 84 N. Y. Supp. 470; *Donaldson v. Wherry*, 29 Ont. 552. But in *Hill v. Williams*, 41 S. C. 134, 19 S. E. 290, it appears to be assumed that the landlord could relieve the tenant from liability for rent by his oral indication of an intention that the tenancy should be dissolved.

⁹¹⁶ *Walker v. Githens*, 156 Pa. 178, 27 Atl. 36.

⁹¹⁷ *Ehrman v. Mayer*, 57 Md. 612, 40 Am. Rep. 448; *Myers v. Silljacks*, 58 Md. 327; *Jackson v. Davis*, 5 Cow. (N. Y.) 130, 15 Am. Dec. 451; *Cole v. Patterson*, 25 Wend. (N. Y.)

456; *Troy Central Bank v. Heydorn*, 48 N. Y. 260; *Lyon v. Odell*, 65 N. Y. 28; *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357, 1 L. R. A. 456; *Kurr v. Brobst*, 2 Woodw. (Pa.) 187; *St. Mary's Church Trustees v. Miles*, 1 Whart. (Pa.) 229.

⁹¹⁸ Code Pub. Gen. Laws, art. 53, § 26.

⁹¹⁹ Act April 27, 1855. See, as to the construction of the act, *Hlester v. Shaeffer*, 45 Pa. 537, 84 Am. Dec. 518; *Korn v. Browne*, 64 Pa. 55; *Wallace v. Fourth United Presbyterian Church*, 152 Pa. 258, 25 Atl.

Maryland, moreover, before the passage of the statute referred to, it was decided that the fact that the landlord has for many years collected only a certain part of the entire rent from each one of several parts into which the premises originally leased have been subdivided, taken in connection with other circumstances, may furnish ground for a presumption that he has assented to an "apportionment" of the rent with reference to such parts in accordance with the payments so made,⁹²⁰ that is, in effect, that a partial release of the rent as to a part of the premises leased may be presumed.

j. Forfeiture of leasehold interest. Upon the assertion of a forfeiture by the landlord, though he is still entitled to rent which had previously become due,⁹²¹ he cannot recover rent subsequently to become due, or rather, there is no rent subsequently to become due,⁹²² and, if he re-lets to another at a less rent, the

520; *Barber v. Lefavour*, 176 Pa. Rubicum v. Williams, 1 Ashm. 331, 35 Atl. 202. That the statute (Pa.) 235.

is not invalid as impairing the obligation of contracts, as applied to rents created before its passage, see *Wilson v. Iseminger*, 185 U. S. 55, 46 Law. Ed. 804.

⁹²⁰ See *Myers v. Silljacks*, 58 Md. 319, 42 Am. Rep. 332; *Barnitz v. Reddington*, 80 Md. 622, 24 Atl. 409; *Connaughton v. Bernard*, 84 Md. 577, 36 Atl. 265. But that the landlord for many years collected the entire rent from the holder of one portion of the leased premises, who was a sublessee bound for the whole rent, did not involve an apportionment or release as to the other portion. See *Smith v. Heldman*, 93 Md. 343, 48 Atl. 946.

⁹²¹ *Hartshorne v. Watson*, 4 Bing. (N. C.) 178; *Hinsdale v. White*, 6 Hill (N. Y.) 507; *McKeon v. Whitney*, 3 Denio (N. Y.) 452; *Johnson v. Oppenheim*, 55 N. Y. 280; *Mackubin v. Whetcroft*, 4 Har. & McH. (Md.) 135; *Stuyvesant v. Davis*, 9 Paige (N. Y.) 427; *McCready v. Lindenberg*, 172 N. Y. 400, 65 N. E. 208; *E. 590*; *Jones v. Carter*, 15 Mees. & W. 718; *Watson v. Merrill*, 69 C. C. A. 185, 136 Fed. 359; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Wrenford v. Kenrick*, 107 Mich. 389, 65 N. W. 234; *Way v. Reed*, 88 Mass. (6

In *Cook v. Parker*, 67 Minn. 374, 69 N. W. 1099, 36 L. R. A. 463, it was held that the rent and taxes in arrear had been in effect satisfied by reason of the fact that the lessor, though he might have asserted a right of re-entry under the lease on account of their nonpayment when due, had not done so, but had asked for and obtained a decree finding the amount due and foreclosing all the lessee's rights unless such amount was paid within a time named, he thereby occupying the same position, it was said, as a mortgagee who seeks and obtains a strict foreclosure.

⁹²² *Oldershaw v. Holt*, 12 Adol. & E. 590; *Jones v. Carter*, 15 Mees. & W. 718; *Watson v. Merrill*, 69 C. C. A. 185, 136 Fed. 359; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Wrenford v. Kenrick*, 107 Mich. 389, 65 N. W. 234; *Way v. Reed*, 88 Mass. (6

former lessee is not liable for any deficiency.⁹²³ It is no doubt immaterial in this connection whether the forfeiture is enforced by ejectment, summary proceedings, or actual re-entry, the material point being the cessation of the leasehold estate.

Under the old practice in ejectment, in case such an action was brought to enforce a forfeiture, the rent to which the landlord was entitled was that which became due before the date of the fictitious demise, the tenant being considered as a trespasser from that time, and as consequently thereafter liable only for mesne profits as distinguished from rent.⁹²⁴ Under the modern practice, the rent which becomes due prior to the commencement of an action by the landlord to recover possession would ordinarily, it seems, be recoverable, and that only,⁹²⁵ unless there is, in the particular case, an actual re-entry or declaration of forfeiture, sufficient in itself to make the tenant continuing in possession a wrongdoer from that time, in which case there could be no recovery as for rent subsequently becoming due,^{925a} though the landlord might, in some cases, it seems, recover mesne profits from that time.⁹²⁶

Though the rule is settled that, apart from express stipulation, there can be no recovery as for rent falling due after the enforcement of a forfeiture for breach of condition, the courts have shown a disposition to uphold provisions in the instrument of lease, continuing the liability of the lessee in such case in

Allen) 364; Sutton v. Goodman, 194 E. 590; Stuyvesant v. Davis, 9 Paige Mass. 339, 80 N. E. 608; Hall v. (N. Y.) 427.

Joseph Middleby, Jr., 197 Mass. 485, ⁹²⁵ See Jones v. Carter, 15 Mees. & 83 N. E. 1114; Stuyvesant v. Davis, W. 718; Coburn v. Goodall, 72 Cal. 9 Paige (N. Y.) 428; Hackett v. 498, 14 Pac. 190, 1 Am. St. Rep. 75. Richards, 13 N. Y. (3 Kern.) 138. ^{925a} See Brigham Young Trust Co.

In Isom v. Rex Crude Oil Co., 147 v. Wagener, 13 Utah, 236, 44 Pac. Cal. 659, 82 Pac. 317, it was decided 1030.

that the lessor, rescinding the lease ⁹²⁶ See Johannes v. Kielgast, 27 under Cal. Civ. Code, § 1930, author- Ill. App. 576; Fifty Associates v. izing him to rescind if the premises Howland, 59 Mass. (5 Cush.) 214. are used for a purpose other than In Fish v. Ryan, 88 Ill. App. 524, it that for which they are let, need not is said that a tenant wrongfully repay the rent already paid to him holding possession after the forfei- for the expired portion of the term. ture of the leasehold is liable in use

⁹²³ Ex parte Houghton, 1 Lowell, and occupation. This appears to be 554, Fed. Cas. No. 6,725. incorrect, as he is no longer the

⁹²⁴ Oldershaw v. Holt, 12 Adol. & tenant of the lessor. See post, § 304.

spite of the termination of the tenancy. Thus it has been decided that the parties may validly stipulate that, upon the termination of the tenancy by re-entry or equivalent action on the part of the landlord, he may re-let to another at the risk of the tenant, the latter remaining liable for any deficiency in the amount so obtained as compared with that reserved by the original lease.⁹²⁷ And even a provision that the lessee shall remain liable for rent in spite of the forfeiture of his term has been upheld,⁹²⁸ though such a provision will enable the landlord, having re-let to another, to claim from the first lessee, not the whole rent reserved by the lease to him, but only the deficiency left after crediting thereon the amount reserved by the second lease.⁹²⁹

When the landlord is authorized to re-let at the risk of the tenant and hold him liable for any deficiency, he must, it is said, in order to be able to assert a continuing liability for the rent, make an honest and reasonable attempt to re-let, and he cannot refrain from making any attempt and yet hold the former tenant personally liable for the accruing rent under the lease.⁹³⁰ Nor can he, without good reason, refuse to re-let to a particular person who offers to take a lease, and he is liable for any loss occasioned by such a refusal.⁹³¹ It is sufficient, however, that he manages the property in good faith, according to his best judgment, for the interest of the former tenant as well as for his own,⁹³² and if he re-lets at what appears to be the best rent obtainable, the former tenant cannot complain,⁹³³ nor is he bound to re-let to a particular person merely because that person is

⁹²⁷ *Way v. Reed*, 88 Mass. (6 Allen) 364; *Hall v. Gould*, 13 N. Y. (3 Kern.) 127; *Hackett v. Richards*, 13 N. Y. (3 Kern.) 138; *Nathan v. Gendron Iron Wheel Co.*, 18 Misc. 374, 41 N. Y. Supp. 661; *Lewis v. Stafford*, 24 Misc. 717, 53 N. Y. Supp. 801; *Baldwin v. Thibaudeau*, 28 Abb. N. C. 14, 17 N. Y. Supp. 532; *Woodbury v. Sparrell Print*, 187 Mass. 426, 73 N. E. 547.

⁹²⁸ *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Heims Brew. Co. v. Flannery*, 137 Ill. 309, 27 N. E. 286.

⁹²⁹ *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248.

⁹³⁰ *International Trust Co. v. Weeks*, 203 U. S. 364, 51 Law. Ed. 224.

⁹³¹ *Fitch v. Armour*, 59 N. Y. Super. Ct. (27 Jones & S.) 413, 14 N. Y. Supp. 319.

⁹³² *Edmands v. Rust & Richardson Drug Co.*, 191 Mass. 123, 77 N. E. 713.

⁹³³ See *James v. Rubino*, 30 Misc. 452, 62 N. Y. Supp. 468.

satisfactory financially to such former tenant.⁹³⁴ Furthermore, he is under no obligation to join adjoining premises owned by him to those leased, in order to effectuate a re-letting of the latter.⁹³⁵

The landlord, while he is under no obligation to make improvements in order to re-let, should, it has been said, make small repairs necessary to render the premises tenantable, having in view the surrounding circumstances and the fact of the first lessee's interest in the matter.⁹³⁶ The burden of showing diligence in regard to re-letting is, it is said, upon the landlord suing to recover under the clause in question.⁹³⁷

The landlord, after making a new lease to another, cannot, until there has been an actual default by the new tenant, recover as against the former lessee more than the difference in the rents reserved,⁹³⁸ and if any rent under the new lease is not collected owing to his neglect, he must nevertheless credit the former lessee with the amount thereof.⁹³⁹ He cannot make improvements for the purpose of obtaining a higher rent and charge the former lessees with the cost thereof.⁹⁴⁰

The validity of an agreement of this character has been held to be independent of the fact that the forfeiture is enforced by a summary proceeding, and that the statute provides that a judgment in such a proceeding shall terminate the relation of landlord and tenant.⁹⁴¹

In Massachusetts, a provision that the lessee "should be liable to the lessor for all loss and damage sustained by the lessors on account of the premises remaining unleased, or being let for the remainder of the term for a less rent than that herein reserved," has been held to impose no obligation to make any payments until the premises cease to remain unleased.⁹⁴² In New York,

⁹³⁴ *Edmands v. Rust & Richardson* Super. Ct. (27 Jones & S.) 413, 14 Drug Co., 191 Mass. 123, 77 N. E. 713. N. Y. Supp. 319.

⁹³⁵ *Woodbury v. Sparrell* Print, 198 Mass. 1, 84 N. E. 441. ⁹⁴⁰ *Hackett v. Richards*, 13 N. Y. (3 Kern.) 138; *McCreedy v. Lindborn*, 172 N. Y. 400, 65 N. E. 208.

⁹³⁶ *Woodbury v. Sparrell* Print, 198 Mass. 1, 84 N. E. 441. ⁹⁴¹ *Slater v. Von Chorus*, 120 App. Div. 16, 104 N. Y. Supp. 996; *Panuto v. Foglia*, 55 Misc. 244, 105 N. Y. Supp. 495; *Slater v. Bonfiglio*, 56

⁹³⁷ *Woodbury v. Sparrell* Print, 198 Mass. 1, 84 N. E. 441. ⁹⁴² *Woodbury v. Sparrell* Print, (3 Kern.) 138.

⁹³⁸ *Hackett v. Richards*, 13 N. Y. Misc. 385, 106 N. Y. Supp. 861.

⁹³⁹ *Fitch v. Armour*, 59 N. Y. 187 Mass. 426, 73 N. E. 547.

under a provision that the lessee should pay any deficiency upon the re-letting in equal monthly installments as the amount thereof should, from month to month, be ascertained, by deducting from the rent reserved the rent received, it was held that a separate and independent cause of action arose every month on the ascertainment of the deficiency, and that while the landlord could recover in one action the sum of the deficiencies accruing during a succession of months up to the time of bringing the action, he could not recover for a deficiency which accrued thereafter.⁹⁴³ It has been suggested in the same state that, in the absence of a provision for ascertaining the deficiency monthly, the lessor would have to await the ascertainment of the total deficiency by reason of the ending of the term before bringing suit.⁹⁴⁴

Such a clause, authorizing the lessor, after re-entry, to lease at the risk of the lessee, does not entitle the lessee to the benefit of any excess of rent obtained on the new letting over that payable under the former lease, to be asserted against a claim for rent accruing under the former lease before the re-entry, nor can the lessee assert, as against such claim, that the re-letting was at too small a rent.⁹⁴⁵

In New York it has been decided that a provision authorizing the lessor, upon a "re-entry" by him, to re-let on account of the original lessee, applies only when the re-entry is by means of a common-law action of ejectment, and not when it is by means of a summary proceeding.⁹⁴⁶ A provision giving such a privilege of re-letting after "resuming possession" has been differently regarded,⁹⁴⁷ as has one authorizing the lessor to re-let after "re-entry by force or otherwise,"⁹⁴⁸ or after "re-entry by any of the forms known to the law."⁹⁴⁹

The benefit of a clause of this character, entitling the lessor

⁹⁴³ *McCready v. Lindenborn*, 172 N. Y. 400, 65 N. E. 208.

⁹⁴⁴ *Harding v. Austin*, 93 App. Div. 564, 87 N. Y. Supp. 887.

⁹⁴⁵ *Richardson v. Gordon*, 188 Mass. 279, 74 N. E. 344.

⁹⁴⁶ *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425, 57 L. R. A. 317.

⁹⁴⁷ *Landesman v. Hauser*, 45 Misc. 603, 91 N. Y. Supp. 6.

⁹⁴⁸ *Anzalone v. Paskusz*, 96 App. Div. 188, 89 N. Y. Supp. 203; *Slater v. Bonfiglio*, 56 Misc. 385, 106 N. Y. Supp. 861.

⁹⁴⁹ *Baylies v. Ingram*, 84 App. Div. 360, 82 N. Y. Supp. 891; *Id.*, 181 N. Y. 518, 73 N. E. 1119.

to re-let at the lessee's risk, passes upon a transfer of the reversion.⁹⁵⁰

In these cases, it is to be observed, in which the lessee, by express stipulation, continues liable, after the forfeiture of his interest, for the amount of the rent reserved in the lease, or for any excess of such amount over that obtained on a new lease, the continuing liability is not, properly speaking, for rent, since the tenancy to which the rent appertained has ceased to exist. It is merely a contractual liability to the extent named.⁹⁵¹ But it has been decided that the claim may be pleaded as one for rent.⁹⁵²

Upon the termination of the tenant's interest by a forfeiture, during a particular rent period, the rent is not, in the absence of a statutory provision or express stipulation to the contrary, apportionable as to time,^{952a} and, consequently, unless the rent is payable in advance, the landlord loses all the rent for that period.⁹⁵³ For this reason it is advisable for him to insert in the instrument of lease an express provision reserving rent for a proportionate part of the period in which forfeiture may take place.⁹⁵⁴ This is, however, unnecessary when there is a stipulation, such as that above referred to, continuing the lessee's liability, conceding that a stipulation of the latter character would be regarded as valid in the particular jurisdiction.

In case the rent is payable in advance, the tenant is the one to suffer by reason of the nonapportionability of the rent, the landlord being, it seems, entitled to the rent for the whole period, though he re-enters on the day after it falls due. It has been so decided in England,⁹⁵⁵ and such a view has been adopted in New York in connection with summary proceedings to recover possession for default in payment.^{955a} In Massachusetts^{955b} and

⁹⁵⁰ *Weeks v. International Trust Co.*, 60 C. C. A. 236, 125 Fed. 370.

⁹⁵¹ See *Hall v. Gould*, 13 N. Y. (3 Kern.) 127; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Woodbury v. Sparrell Print*, 187 Mass. 426, 73 N. E. 547.

⁹⁵² *Weeks v. International Trust Co.*, 60 C. C. A. 236, 125 Fed. 370.

^{952a} See ante, § 176 a.

⁹⁵³ *Ellis v. Rowbotham* [1900] 1 Q. B. 740; *Hall v. Middleby*, 197 Mass. 485, 83 N. E. 1114.

⁹⁵⁴ See *Davidson's Precedents in Conveyancing* (3d Ed.) vol. 5, pt. 1, p. 109, note.

⁹⁵⁵ *Ellis v. Rowbotham* [1900] 1 Q. B. 740.

^{955a} *Healy v. McManus*, 23 How. Pr. (N. Y.) 238; *McNulty v. Duffy*, 59 N. Y. Supp. 592; *Cunningham v.*

Michigan^{955c} a contrary view has been asserted, unfortunately without any discussion of the matter. It is difficult to understand how, rent having become due at the commencement of the rent period, it can cease to be due because the tenancy subsequently comes to an end.

In case the tenant redeems from a forfeiture he is, it has been decided, entitled to recover from his subtenant the rent payable under a sublease previously made by him to the latter, though the subtenant had, after the forfeiture, attorned to the head lessor and paid rent to him.^{955d}

k. **Taking under eminent domain.** It is stated in a number of cases that a taking of premises under the power of eminent domain, and the ouster of the tenant as a result thereof, does not involve an eviction of the tenant,⁹⁵⁶ and the courts have, as a general rule, considered the question of the effect of such taking upon the liability for rent without reference to the common-law rules as to the effect upon such liability of an eviction either by the landlord or by paramount title. In discussing this question we will consider first the decisions as to the effect of a taking of the whole premises and then those as to the effect of a taking of part only.

There are perhaps two decisions to the effect that it is no defense to the claim for rent that the whole premises have been taken for public use by the state, or by some person acting under authority from the state, it being considered that the covenant to pay rent remains operative in spite of the fact that the covenantor no longer has any interest in the land from which to pay it, he receiving compensation for the value of his interest.⁹⁵⁷ More

Phillips, 1 E. D. Smith (N. Y.) 416; City of Boston, 37 Mass. (20 Pick.) Bernstein v. Helnemann, 23 Misc. 159; Folts v. Huntley, 7 Wend. (N. Y.) 210; Stubbings v. Evanston, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839, 29 Am. St. Rep. 300; Gluck v. City

332.
^{955b} Sutton v. Goodman, 194 Mass. 389, 80 N. E. 608; Hall v. Middleby, 197 Mass. 485, 83 N. E. 1114.

^{955c} Wreford v. Kenrick, 107 Mich. 389, 65 N. W. 234.

^{955d} Wilson v. Jones, 64 Ky. (1 Bush) 173.

⁹⁵⁶ Parks v. City of Boston, 32 Mass. (15 Pick.) 198; Patterson v. the latter case there was a "perpet-

⁹⁵⁷ Foote v. City of Cincinnati, 11 Ohio, 408, 38 Am. Dec. 737; Folts v. Huntley, 7 Wend. (N. Y.) 210.

usually, however, it has been decided that if the whole of the premises are taken, the liability of the tenant upon his covenant to pay rent comes entirely to an end.⁹⁵⁸

Some of the latter class of decisions apparently regard such a case as governed by the decisions, which we have elsewhere ventured to question,⁹⁵⁹ to the effect that the termination of the lessor's estate before the expiration of the term named in the lease of itself relieves the lessee from any further liability for

ual lease" of the use of the waters of a creek, and the creek was afterwards diverted by the state canal commissioners, and it was held that the liability for "rent" remained. This was in reality not a "lease," it would seem, nor was the compensation "rent." It was a conveyance of certain water rights, with a covenant on the part of the grantee to pay annually a sum in gross in compensation therefor. It is, however, in terms, a decision that the taking of the whole subject-matter of a lease does not terminate the liability for rent. So considered, there are later decisions of the intermediate appellate court not in accord therewith. See *Lodge v. Martin*, 31 App. Div. 13, 52 N. Y. Supp. 385; *Gugel v. Isaacs*, 21 App. Div. 503, 48 N. Y. Supp. 594.

⁹⁵⁸ *Barclay v. Pickler*, 38 Mo. 143; *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; *Dyer v. Wightman*, 66 Pa. 425; *O'Brien v. Ball*, 119 Mass. 28, 20 Am. Rep. 299; *McCardell v. Miller*, 22 R. I. 96, 46 Atl. 184; *Lodge v. Martin*, 31 App. Div. 13, 52 N. Y. Supp. 385. In *Gugel v. Isaacs*, 21 App. Div. 503, 48 N. Y. Supp. 594 (judgment affirmed, without opinion, 162 N. Y. 636, 57 N. E. 1111), it was decided that the acquisition of the premises by the city by condemnation proceedings, while it relieved the tenant from

rent thereafter accruing, did not relieve him from liability for rent which had previously come due, although payable in advance, the tenant having been given damages on the theory that he would pay such rent. As to a possible conflict between the above cited New York case and the earlier case of *Folts v. Huntley*, 7 Wend. (N. Y.) 210, see ante, note 957.

That such a defense must be specially pleaded in an action for rent, see *Hays v. Haffen*, 31 Misc. 655, 64 N. Y. Supp. 1111.

In *Uhler v. Cowen*, 199 Pa. 316, 49 Atl. 77, where the city, having statutory authority to open a street through private property upon three months' notice to the owner, gave notice to the lessor that it would require the property at the end of three months, and the lessor served this notice on the lessees, it was held that the lessees could remove from the premises at the end of the three months without further liability for rent, although the city did not then take possession, the possibility of their subsequent enjoyment of the premises being so uncertain as to be valueless, and the lessor having the right by statute immediately to proceed against the city for damages.

⁹⁵⁹ See ante, § 78 p (3).

rent.⁹⁶⁰ But the lessor's estate is not, properly speaking, "terminated" by reason of its forced sale to the state or to the corporation exercising the power of eminent domain, any more than it is terminated by its transfer to a private individual, and a transfer of the lessor's estate to a third person, whether voluntary or involuntary, is no reason for relieving the tenant from rent. Were the lessor's interest taken without the tenant's interest being taken, as would occur when the tenant is not made a party to the condemnation proceeding,⁹⁶¹ the tenant would presumably be liable for rent to the state or corporation which has succeeded to the rights of the lessor.

In Pennsylvania the view that the liability for rent ceases upon a taking under eminent domain is in terms based on the fact that the courts of that state have jurisdiction both at law and in equity, and that consequently, even in the condemnation proceeding, the interests of the landlord would be secured by the immediate payment to him of the whole fund, instead of leaving part of it in the hands of the tenant to be paid by him in installments in accordance with the covenant for rent, and that therefore the relation of landlord and tenant, and the liabilities incident thereto, are to be regarded as extinguished by such a proceeding.⁹⁶²

In two states a distinction is taken between the case in which the ownership of the premises passes to the state or other public agency, that is, in which the "fee" is taken, as it is usually expressed, and that in which an easement merely in the land is taken, giving a right of user only, and leaving the ownership of

⁹⁶⁰ In *O'Brien v. Ball*, 119 Mass. 28, 20 Am. Rep. 299, it is said that "the liability to pay the rent reserved ceased with the termination of the (lessor's) estate during the term subsequent to the making of the lease and the entry of the lessee) under it," and reference is made to *Lamson v. Clarkson*, 113 Mass. 348, 18 Am. Rep. 498, and cases there cited. The latter case merely decided that the tenant's liability for rent ceases when the landlord's estate comes to an end, as for instance when the landlord has merely a life estate. The theory which is thus, by implication, adopted in *O'Brien v. Ball*, supra, that the rent ceases on a taking under eminent domain because the lessor's estate then terminates, seems to be also adopted in *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212, and *Barclay v. Pickler*, 38 Mo. 143.

⁹⁶¹ *Lewis, Eminent Domain*, §§ 326, 339.

⁹⁶² *Dyer v. Wightman*, 66 Pa. 425 (ante, note 958), approved in *Uhler v. Cowan*, 192 Pa. 433, 44 Atl. 42.

the land undisturbed,⁹⁶³ it being decided that while, in the former case, the liability for rent immediately comes to an end, in the latter case it comes to an end only when the tenant is ousted by the beneficiary of the condemnation proceeding for the purpose of enjoyment of the easement.⁹⁶⁴ Having in view the very decided statement by at least one of these courts, that dispossession under eminent domain proceedings does not involve an eviction,⁹⁶⁵ it might be inquired on what theory the liability for rent is to be regarded as terminated even by the actual ouster of the tenant, the title to the fee remaining as before, but, apart from this, the distinction suggested seems a sound and rational one, as we will attempt to show in discussing the effect of the condemnation of a part only of the premises as regards the liability for rent.

The taking of a part only of the premises under the power of eminent domain does not, it has been decided, affect or in any way diminish the liability of the tenant for the whole amount of the rent reserved.⁹⁶⁶ This view is thus stated in what may be regarded as a leading case on the subject: "The lessee takes his term, just as every other owner of real estate takes title, subject to the right and power of the public to take it or a part of it, for public use, whenever the public necessity and convenience may require it. Such a right is no incumbrance; such a taking is no breach of the covenant of the lessor for quiet enjoyment. The lessee then holds and enjoys exactly what was granted him, as a consideration for the reserved rent; which is, the whole use and beneficial enjoyment of the estate leased, subject to the sovereign right of eminent domain on the part of the public. If he has suffered any loss or diminution in the actual enjoyment of this use, it is not by the act or sufferance of the landlord; but it is by the act of the public, against whom the law has pro-

⁹⁶³ As to this distinction, see 2 Tiffany, Real Prop. § 472.

⁹⁶⁴ *Emmes v. Feeley*, 132 Mass. 346; *Devine v. Lord*, 175 Mass. 384, 56 N. E. 570, 78 Am. St. Rep. 502; *Rhode Island Hospital Trust Co. v. Hayden*, 20 R. I. 544, 40 Atl. 421, 42 L. R. A. 107. See *McCardell v. Miller*, 22 R. I. 96, 46 Atl. 184.

⁹⁶⁵ See ante, at note 956.

⁹⁶⁶ *Parks v. City of Boston*, 32 Mass. (15 Pick.) 198; *Patterson v. City of Boston*, 37 Mass. (20 Pick.) 159; *Stubbings v. Village of Evanston*, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839, 29 Am. St. Rep. 300. It was so decided in *Gluck v. City of Baltimore*, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515, while in the later case of *City of Baltimore v. Latrobe*,

vided him an ample remedy. If he is compelled to pay the full compensation, for the estate actually diminished in value, this is an element in computing the compensation which he is to receive from the public.'⁹⁶⁷ This language is broad enough to impose a continuing liability for rent even when the whole of the premises is taken, but the case is usually referred to merely as authority for the view that there is no abatement of rent on a partial taking, and that the rent entirely ceases on a taking of all the premises is decided in a later case in the same state. It may perhaps be questionable whether the authority of the earlier cases, even as confined to cases of partial taking only, is not somewhat shaken in that state by the view of the subject involved in the later decision.⁹⁶⁸ However this may be, the earlier decision has been cited in other states as authority for the view that a partial taking does not affect the tenant's liability for the whole rent.

While, as indicated, the view just presented is adopted in some of the jurisdictions in which the question has arisen, there are also decisions to the effect that upon a partial taking under the power of eminent domain the rent is apportioned, and that the tenant is thereafter liable only for an amount proportioned to the value of the part of the premises not taken.⁹⁶⁹

The practical objection to the view that a partial taking does not affect the liability for rent, an objection which is applicable

101 Md. 621, 61 Atl. 203, it was decided that the rent should be apportioned, the later case being distinguished from the earlier one on the ground that it involved a lease for ninety-nine years renewable forever and a taking of a large part of the land, while the earlier case involved a short term lease only and a taking of a small portion of the land.

⁹⁶⁷ *Parks v. City of Boston*, 32 Mass. (15 Pick.) 198, per Shaw, C. J.

⁹⁶⁸ *O'Brien v. Ball*, 119 Mass. 28, 20 Am. Rep. 299, supra. The theory adopted, by implication, in this case, being, as above stated (ante, note 960), that the rent ceases because the landlord's estate has come to an end, it would seem that in the case of a partial taking the landlord's estate would come to an end as to that portion, and that the rent should cease in proportion.

⁹⁶⁹ *Biddle v. Hussman*, 23 Mo. 597; *Kingsland v. Clark*, 24 Mo. 24; *Board of Levee Com'rs v. Johnson*, 66 Miss. 248, 6 So. 199; *Cuthbert v. Kuhn*, 3 Whart. (Pa.) 357, 31 Am. Dec. 513 (rent in fee apportioned in equity); *Uhler v. Cowen*, 192 Pa. 443, 44 Atl. 42 (semble). See *Dyer v. Wightman*, 66 Pa. 427, and *City of Baltimore v. Latrobe*, 101 Md. 621, 61 Atl. 203, ante, note 966.

with even greater force to the view that an entire taking does not affect such liability, is that, while it results in giving the tenant a part of the damages for the taking of the premises, on the theory that he will continue to pay rent to the landlord, it furnishes no security that he will do so, and the result may be that the tenant, having gotten this fund, which equitably belongs to the landlord, as representing future rent payments, will dispose of it for other purposes, and the landlord, if the tenant is pecuniarily irresponsible, is without any possible relief. In view of this possibility it is in one case said that "if a case should arise where, upon the payment of the value of the leasehold interest to the tenant, the remedy of the landlord to collect his rent might be impaired or defeated on account of the insolvency of the tenant, or other cause, a court of equity might interpose to prevent the payment of the damages recovered into the hands of the tenant, and appropriate the fund, or so much thereof as might be necessary, to the payment of the rents due or to become due from the tenant to the landlord during such time as the lease might, by its terms, continue to run."⁹⁷⁰ Whether, however, equity would give such relief, even on a clear showing of insolvency, may be doubtful,⁹⁷¹ and the trouble and expense of such a proceeding, and the impossibility of determining in advance the continued solvency of the tenant during the whole period of the lease, would render it at best an insufficient safeguard to the landlord.

It has been suggested⁹⁷² that an equitable result, involving a cessation of the liability for rent in proportion to the value of the property taken, could be reached by the application of the principle which obtains in the law of contracts, that a party to a contract is discharged if the performance becomes impossible by reason of the destruction of the subject-matter of the contract. It may be remarked, in the first place, with reference to this suggestion, that the right to rent is primarily not a contractual right,⁹⁷³ and the unrestricted application thereto of principles drawn from the law of contracts is always a matter of serious

⁹⁷⁰ *Stubbings v. Village of Evanston*, 136 Ill. 37, 26 N. E. 277, 11 L. R. A. 839, 29 Am. St. Rep. 300.

more, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515.

⁹⁷² Article by Joseph H. Taulane, Esq., in 29 Am. Law Rev. 351.

⁹⁷¹ See remarks in *Gluck v. Baltimore*, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515.

⁹⁷³ See ante, at notes 122-125.

question. Rent is an incorporeal thing belonging to the landlord and is not merely a name given to payments which the lessee contracts to make to him. Furthermore, this suggestion is based, apparently, on the theory that the land leased is destroyed, at least for the tenant's purposes, by the taking under eminent domain, and that this is a destruction of the subject-matter "of the contract." But this principle of the law of contracts has rarely, if ever, been applied, it seems, except in the case of the physical destruction of material objects, or of the destruction, by interposition of legal authority, of a corporate entity in reference to which the contract was made, and has never been applied to a case in which the subject matter of the contract is merely rendered in some way unavailable for beneficial enjoyment. Nor has it ever, it is believed, been applied in the case of a merely partial destruction of the subject-matter of the contract. Furthermore, as we have before remarked,⁹⁷⁴ the lease is not a mere contract of which the land is the subject-matter, but is a conveyance of the land, and the only subject-matter of contract in this connection is the rent itself.

It appears to the present writer that, when the ownership of either a part or the whole of the leased premises, the "fee" as it is usually called, is taken under the power of eminent domain, the liability for rent should be proportionally reduced or extinguished, for the simple reason that the leasehold interest in the land taken has come to an end by reason of its merger in the reversion. When the reversion and the leasehold are voluntarily transferred to a single person by their respective owners, a merger results,⁹⁷⁵ and the same thing happens when they are so transferred involuntarily, as by condemnation, the fact that the transferee is the state or some other public agency being immaterial. On the other hand, the question of the continuance of the tenant's liability for rent after a taking, not of the "fee," but merely of an easement, in the whole or a part of the premises, may, it is submitted, be satisfactorily solved upon the theory that the dispossession of the tenant by the public agency, for the purpose of enjoyment of the easement, after the latter's acquisition thereof, constitutes an eviction under paramount title.^{975a} Such dispossession is not, indeed, under a paramount title, if by

⁹⁷⁴ See ante, § 16.

⁹⁷⁵ See ante, § 12 g (2).

^{975a} Compare cases cited ante, note 964.

paramount title is meant a legal title which was outstanding at the time of the lease, but neither is an eviction by one who purchases, at a sale under foreclosure of a mortgage or other lien prior to the lease, such sale not being based upon any legal title in the lienor, but being rather the exercise of a mere remedial right.⁹⁷⁶ An exclusion of the tenant from the *de facto* possession of the land, by one having a right to exclude him, by virtue of a power existing at the time of the lease, if not, strictly speaking, an eviction under title paramount, bears such a resemblance thereto as properly to be governed by the same principles, as regards the effect upon the liability for rent.

Some courts, in refusing to regard a dispossession of the tenant under condemnation proceedings as an eviction, may perhaps have been, to some extent, influenced by the undesirability of regarding this as within the scope of the covenant for quiet enjoyment. But this might readily be treated as an exception to the general rule that an eviction constitutes a breach of such a covenant, and in fact the decisions that such a dispossession does not involve a breach of this covenant proceed upon the theory that it could not have been so intended, since the covenantor is not responsible therefor, and the tenant is otherwise compensated, rather than upon the theory that it does not constitute an eviction.⁹⁷⁷

In England it is provided by statute that, upon dispossession of the tenant by act of parliament for public purposes, the tenant shall be liable merely for a part of the original rent, proportioned to the value of the part of the premises not taken⁹⁷⁸ and consequently there are very few English decisions involving any question as to the tenant's continuing liability for rent. Likewise, in this country occasionally a statute, in authorizing the taking of private property for public use, provides for the apportionment of the rent in case there is an outstanding lease

⁹⁷⁶ See 1 Harv. Law Rev. 65, 66; (Pa.) 86; *Ellis v. Welch*, 6 Mass. Peck v. Jenness, 48 U. S. (7 How.) 246, 4 Am. Dec. 122; *Goodyear Shoe* 612, 620; *Gilman v. Brown*, 1 Mason, *Mach. Co. v. Boston Terminal Co.*, 221, Fed. Cas. No. 5,441; *Ex parte* 176 Mass. 115, 57 N. E. 214. See *Foster*, 2 Story, 131, 142, Fed. Cas. ante, § 79 c (4).

No. 496 a; *Hutton v. Moore*, 26 Ark. ⁹⁷⁸ Land Clauses Act 1845, §§ 115-382; *Sparks v. Hess*, 15 Cal. 186; 118. See *Cripps*, *The Law of Compensation* (4th Ed.) p. 252.

⁹⁷⁷ See *Frost v. Earnest*, 4 Whart.

on the property, in proportion to the property taken. Such a statute providing for apportionment upon a partial taking has been held to require an apportionment according to value, as at common law, and not by area,⁹⁷⁹ and to require an apportionment even though the effect of the public improvement is to make the value of the leasehold not taken equal to that of the whole of the original leasehold, the tenant being by the statute made chargeable with benefits.⁹⁸⁰ Such a statutory provision is, it has been held, for the benefit of the tenant and may be waived, as by the insertion in the lease of a stipulation that the tenant should, in case a part of the premises is taken, pay rent up to the time of his actual dispossession, and that then the term should come to an end.⁹⁸¹ The benefit of a statute in effect allowing an apportionment, by giving the lessee a right to "diminution of rent" where "the thing leased is taken for a purpose of public utility," is not waived, it has been decided, by the action of the tenant in paying rent subsequently accruing, under the landlord's threat of dispossession by legal proceedings in case of failure to pay.⁹⁸² It has been decided that, in the case of an apportionment by the statute, the recovery by the landlord for the balance of the rent is properly in assumpsit for use and occupation, and not in covenant.⁹⁸³

Occasionally the lease itself contains a stipulation providing for the contingency of a taking of the premises in whole or in part for public use. A stipulation that the leasehold shall come to an end at the option of the lessor, upon such a taking in whole or in part, is, it has been decided, for the benefit of the landlord, and is intended to give him the right to deprive the tenant of any share in the damages awarded.⁹⁸⁴ A stipulation that the lease should come to an end in case the premises became untenable, owing to the widening of a street, was held to terminate the tenancy so soon as the ownership of the part of the building, which was within the lines of the street as widened,

⁹⁷⁹ *Gillespie v. Thomas*, 15 Wend. La. Ann. 1214, 24 So. 224.
 (N. Y.) 464; *Gillespie v. City of New York*, 23 Wend. (N. Y.) 643. ⁹⁸³ *McCardell v. Miller*, 22 R. I. 96,
 46 Atl. 184.
⁹⁸⁰ *Gillespie v. Thomas*, 15 Wend. (N. Y.) 464. ⁹⁸⁴ *Goodyear Shoe Mach. Co. v. Boston Terminal Co.*, 176 Mass. 115,
⁹⁸¹ *Phyfe v. Eimer*, 45 N. Y. 102.
⁹⁸² *Hinricks v. New Orleans*, 50 57 N. E. 214.

passed out of the landlord by a sale by the commissioner of highways, since the building might thereafter be destroyed at any moment.⁹⁸⁵ A tenant was regarded as entitled to consider the premises "untenantable," within a provision of the lease that the landlord might relinquish the premises and avoid further liability for rent, in case the premises were rendered untenable by the elements or any other cause, when a road was laid through the buildings on the leased premises, so as to require their removal.⁹⁸⁶

1. **Discharge in bankruptcy.** Rent to accrue in the future cannot ordinarily be proven upon the bankruptcy of the tenant, as a claim against the tenant's estate,⁹⁸⁷ since it is not an existing debt or claim, but is a mere possibility of a future debt.⁹⁸⁸ It seems to follow, from the fact that future rent is not provable against the bankrupt's estate, that a discharge in bankruptcy does not ordinarily relieve the bankrupt from liability for rent falling due after the adjudication, or even after the filing of the petition, since the bankrupt act limits the effect of the discharge to provable debts.⁹⁸⁹ The liability for rent due

⁹⁸⁵ *Payne v. Schollhamer*, 30 Misc. 755, 63 N. Y. Supp. 229.

⁹⁸⁶ *Hudson County Board of Chosen Freeholders v. Emmerich*, 57 N. J. Eq. 535, 42 Atl. 107.

⁹⁸⁷ *Atkins v. Wilcox* (C. C. A.) 105 Fed. 595; *Ex parte Houghton*, 1 Lowell, 554, Fed. Cas. No. 6,725; *In re Mahler*, 105 Fed. 428; *In re Jefferson*, 93 Fed. 948; *In re Hays*, *Foster & Ward Co.*, 117 Fed. 879; *In re Arnstein*, 101 Fed. 706; *Bray v. Cobb*, 100 Fed. 270; *Foster v. Kuhn*, 8 Watts & S. (Pa.) 183; *Savory v. Stocking*, 58 Mass. (4 Cush.) 607; *Wilson v. Pennsylvania Trust Co.* (C. C. A.) 114 Fed. 742.

In re Clancy, 10 N. B. R. 215, Fed. Cas. No. 2,782, it was decided, without any statement of the grounds of the decision, that if, on condemnation of leased premises for public use, the lessee received an award on the theory that he would continue liable for the rent re-

served, and, at the time of payment of the award, he actually agreed to pay such rent, the lessor could prove therefor upon the bankruptcy of the lessee. This seems correct provided such contract of the lessee was supported by a sufficient consideration, and was available to the lessor. The payments still to be made were no longer, properly speaking, rent, but were specific sums absolutely agreed to be paid at certain times in the future.

⁹⁸⁸ See ante, § 166.

⁹⁸⁹ See *Treadwell v. Warden*, 18 N. B. R. 353; *In re Collignon*, 4 Am. Bankr. Rep. 250; *Bernhardt v. Curtis*, 109 La. 171, 33 So. 125, 94 Am. St. Rep. 445; *Savory v. Stocking*, 58 Mass. (4 Cush.) 607; *Lansing v. Prendergast*, 9 Johns. (N. Y.) 127; *Stinemets v. Ainslie*, 4 Denio (N. Y.) 573; *Loveland, Bankruptcy* (6th Ed.) 365.

before the adjudication, on the other hand, is discharged thereby,⁹⁹⁰ since it is provable as a debt involving a fixed liability.

If the bankrupt is not the original lessee, but merely an assignee of the lessee, he will be relieved from liability for subsequent rent if the trustee accepts the leasehold, this involving in effect a reassignment,^{990a} while, if the trustee does not accept the leasehold, the bankrupt remains liable, until he reassigns to some other person. If the bankrupt is the original lessee, he remains liable on his covenants even though the trustee accepts the leasehold, in accordance with the rule that such liability cannot be terminated by the covenantor's own act.⁹⁹¹

Though a provision of the lease making the rent for the whole term immediately due upon a contingency named has been regarded as valid,⁹⁹² it has been questioned whether a provision that it should so become due upon the bankruptcy of the tenant would be enforceable, so as to entitle the landlord to prove a claim for the future rent as against the other creditors.⁹⁹³ A provision that the rent for the whole term shall become due in case of default in any installment of rent does not apply merely because a petition in bankruptcy is filed by the tenant, no rent being due at the time.⁹⁹⁴

m. Destruction of or injury to premises by unforeseen casualty—(1) Destruction of building on land leased. The liability of the tenant for accruing rent may in some cases be diminished, suspended, or extinguished, owing to physical changes or conditions, affecting the utility of the leased premises, or their capability of enjoyment by the tenant in the way contemplated at the time of the making of the lease.

Of the various classes of physical changes or conditions which may, in particular jurisdictions, have this effect, we will first consider that arising from the partial destruction of the leased premises, the effect of which is either to diminish or entirely to

⁹⁹⁰ See *Loveland, Bankruptcy* (3d Ed.) 365.

^{990a} See ante, § 158 a (2) (j) (n) (a a).

⁹⁹¹ See *Woodworth v. Harding*, 75 App. Div. 54, 77 N. Y. Supp. 969, and ante, § 157 a (2).

⁹⁹² *Platt v. Johnson*, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877.

⁹⁹³ *Wilson v. Pennsylvania Trust Co.*, 52 C. C. A. 374, 114 Fed. 742; *In re Winfield Mfg. Co.*, 137 Fed. 984. Compare dictum in *Ex parte Houghton*, 1 Lowell, 554, Fed. Cas. No. 6,725.

⁹⁹⁴ *Atkins v. Wilcox*, 105 Fed. 595, 53 L. R. A. 118.

destroy the utility of the premises for purposes of occupancy. It may happen that the land itself, the soil, is in part destroyed, as when the upper part of the leased premises is either entirely or partly washed away by a neighboring stream or body of water, leaving no part thereof visible above the surface of the water,^{994a} but this, it is evident, is a rare occurrence, and the destruction, total or partial, which calls for consideration, is almost invariably of buildings or other improvements erected on the land.

The well established rule of the common law is that the liability of the tenant for the rent called for by the lease is in no way affected by the fact that buildings or improvements on the land leased are wholly or partially destroyed by some unforeseen casualty, however much this may decrease the utility of the premises to the tenant.⁹⁹⁵ This rule finds its most frequent application in the case of a total or partial destruction of buildings on the premises by fire,⁹⁹⁶ but it has also been applied when buildings or other improvements on the premises were destroyed by a flood,⁹⁹⁷ a tempest,⁹⁹⁸ a hostile army,⁹⁹⁹ and a mob.¹⁰⁰⁰

The fact that the landlord receives the proceeds of insurance

^{994a} See post, § 182 m (5).

⁹⁹⁵ In Georgia the statute (Code 1895, § 3135), in effect, so provides. See *Mayer v. Morehead*, 106 Ga. 434, 32 S. E. 349.

⁹⁹⁶ *Holtzapffel v. Baker*, 18 Ves. Jr. 116; *Baker v. Holtzapffel*, 4 Taunt. 45; *Belfour v. Weston*, 1 Term R. 310; *Fowler v. Mott*, 6 Mass. 63; *White v. Molyneux*, 2 Ga. 124; *Hallett v. Wylie*, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; *Cook v. Anderson*, 85 Ala. 99, 4 So. 713; *Lamott v. Sterrett*, 1 Har. & J. (Md.) 42; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Buerger v. Boyd*, 25 Ark. 441; *Felix v. Griffiths*, 56 Ohio St. 39, 45 N. E. 1092; *Fowler v. Payne*, 49 Miss. 32; *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430; *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. 115; *Busman v. Ganster*, 72 Pa. 285, 13 Am. Rep. 673; *Stow v. Russell*, 36 Ill. 18; *Humiston, Keel-*

ing & Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893, 67 Am. St. Rep. 232; *Harrington v. Watson*, 11 Or. 143, 3 Pac. 173, 50 Am. Rep. 465; *Diamond v. Harris*, 33 Tex. 634; *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; *Nashville, C. & St. L. R. Co. v. Heikens*, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298; *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 73 N. E. 523; *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S. W. 1007.

⁹⁹⁷ *Smith v. Ankrim*, 13 Serg. & R. (Pa.) 39.

⁹⁹⁸ *Peterson v. Edmonson*, 5 Har. (Del.) 378.

⁹⁹⁹ *Paradine v. Jane, Aleyn*, 26; *Robinson v. L'Engle*, 13 Fla. 482; *Coy v. Downie*, 14 Fla. 544; *Pollard v. Shaffer*, 1 Dall. (Pa.) 210.

¹⁰⁰⁰ *Wagner v. White*, 4 Har. & J. (Md.) 564.

on the destruction of the building does not ordinarily alter the rule that in this regard.¹⁰⁰¹ In one state, however, a different view was taken, when the insurance had been effected by the tenant for the benefit of the landlord, in pursuance of a requirement in the lease, it being considered that this excluded an inference that the landlord was to have both the proceeds of insurance and the rent.¹⁰⁰²

The rule applies, it has been held, although there is no written lease, but merely an oral lease and an oral agreement to pay rent.¹⁰⁰³ But it has been decided that where the lease, which called for a monthly rent, was void under the statute of frauds, a destruction of the premises relieved the tenant from liability for rent, on the theory, apparently, that the tenancy from month to month created by occupancy and payment of rent was terminated by such destruction, as if by notice.¹⁰⁰⁴

The applicability of the above rule is not affected by the fact that the tenant cannot restore the building except at a greatly increased expenditure, owing to the adoption of a city building ordinance.¹⁰⁰⁵

In a few states the common-law rule, that the right to rent is not affected by the destruction of the buildings on the premises, has been disapproved, as bearing with undue severity on the tenant. This view has been adopted in Nebraska,¹⁰⁰⁶ and has

¹⁰⁰¹ Leeds v. Cheetham, 1 Sim. Mich. 438, 40 N. W. 747, 1 L. R. A. 146; Loft v. Dennis, 1 El. & El. 529.

474; Pope v. Garrard, 39 Ga. 471; ¹⁰⁰⁵ Harris v. Heackman, 62 Iowa, Sedalia Planing Mill & Lumber Co. 411, 17 N. W. 592. See ante, § 116 d, v. Swift & Co., 129 Mo. App. 471, 107 at note 965.

S. W. 1093; Kingsbury v. Westfall, ¹⁰⁰⁶ Wattles v. South Omaha Ice & 61 N. Y. 356; Bussman v. Ganster, Coal Co., 50 Neb. 251, 69 N. W. 785, 72 Pa. 285, 13 Am. Rep. 673; Magaw 36 L. R. A. 424, 61 Am. St. Rep. 554. v. Lambert, 3 Pa. 444.

¹⁰⁰² Whitaker v. Hawley, 25 Kan. 674, 37 Am. Rep. 277. The opinion in this case strongly criticises the common-law rule requiring rent to be paid after destruction of the buildings.

¹⁰⁰³ Voluntine v. Godfrey, 9 Vt. 186; Baker v. Holtzapffel, 4 Taunt. 45.

¹⁰⁰⁴ Cheesebrough v. Pingree, 72 The dissenting opinion, asserting the views of one-half the court, after most ably stating the reasons for following the rule generally adopted, does not itself do so, but merely approves the rule of Coogan v. Parker, 2 S. C. 255, 16 Am. Rep. 659 (note 1008, infra), to the effect that, in case of the destruction of the premises by act of God or the public enemy the tenant may surrender

been strongly asserted in Kansas in a case which, however, did not directly decide the question.¹⁰⁰⁷ In South Carolina, also, the rule ordinarily adopted has been repudiated so far as concerns the case of a destruction of the premises by the act of God or of the public enemies, and it is there said that the tenant can in such case relieve himself from liability for future rent by relinquishing possession of the premises to the landlord,¹⁰⁰⁸ it being, however, questioned whether the same doctrine should apply in case of destruction by fire, since to throw the loss in such case wholly on the lessor tends to diminish the interest which the tenant has in protecting the property from fire, and it would enable an unscrupulous tenant, who has agreed to pay a rent greater than the rental value of the premises, to relieve himself from rent by destroying the building. In at least one other jurisdiction there is a *dictum* adverse to the ordinary rule.¹⁰⁰⁹

The rule that the tenant continues liable for rent, although the building on the premises leased has been destroyed by fire, or by other unforeseen casualty, has quite frequently been the subject of criticism, as involving a hardship on the tenant, and, as above stated, it has occasionally been repudiated.¹⁰¹⁰ It might,

possession and so relieve himself from rent. The implication of the dissenting opinion is that the actual decision, affirming the lower court, was that the tenant was relieved from liability for rent even though he remained in possession. That he did so remain does not however appear from the statement of facts or from the opinion of the court.

¹⁰⁰⁷ Whitaker v. Hawley, 25 Kan. 674, 37 Am. Rep. 277. But even in that state there can be no diminution of rent, it has been decided, on account of the destruction of a house on the premises which does not appear to be "a substantial part of the leased property." Vale v. Trader, 5 Kan. App. 307, 48 Pac. 458.

¹⁰⁰⁸ Coogan v. Parker, 2 S. C. 255, 16 Am. Rep. 659.

¹⁰⁰⁹ In Galveston City R. Co. v. law.

Gulf Land Co., 2 Tex. Civ. App. 326, 21 S. W. 959, it is said that, in a proper case, rent should be abated on a total destruction of the property leased, and apportioned on a partial destruction.

¹⁰¹⁰ The opinion of Brewer, J., in Whitaker v. Hawley, 25 Kan. 674, 37 Am. Rep. 277, argues strongly in favor of relieving the tenant in case of the destruction of the building. It is submitted, however, that the learned writer of the opinion, in saying that a lease "is an agreement for a continuous interchange of values between landlord and tenant, rather than a purchase single and completed of a term or estate in lands," takes a view of a lease which is contrary to the common-law authorities, though in accordance with that of the civil

however, be questioned whether another rule, throwing the premises back upon the landlord so soon as they become valueless for immediate occupation, would not involve an approximately equal hardship upon him. The only apparent reasons why the landlord, rather than the tenant, should be made to bear the loss of the use of the premises for the balance of the term, are that the landlord is more likely to have insurance on the building, and that he can at once proceed to rebuild, which the tenant cannot do, without danger of losing the value of the building, and it seems that, in any case, it would be a hardship upon the landlord to deprive him of the rent, which the tenant has expressly agreed to pay, during the time necessary for the restoration of the premises. Furthermore, it has been suggested, the existence of the generally accepted rule, so far as regards injury or destruction by fire, tends to secure carefulness and vigilance in the care of the premises on the part of the persons temporarily in possession.¹⁰¹¹ The fact, however, that this rule accords with the contract of the lessee, as expressed in the instrument of lease, would seem to be its best justification.¹⁰¹² The general principle properly applicable, it would seem, to contracts to pay rent, as to other contracts, is that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any acci-

¹⁰¹¹ See *Fowler v. Mott*, 6 Mass. 63; *White v. Molyneux*, 2 Ga. 124; *Coogan v. Parker*, 2 S. C. 255, 16 Am. Rep. 659.

¹⁰¹² In *Fowler v. Bott*, 6 Mass. 63, it is said by Sewall, J., that "A lease for years is a sale of the demised premises for the term, and unless in the case of an express stipulation in the lease, the lessor does not insure the premises against inevitable accidents or any other deterioration. The rent is in effect the price, or purchase money, to be paid for the ownership of the premises during the term; and their destruction or any depreciation of their value, happening without the fault of the lessor, is no abatement of the price, but is entirely the loss

of the purchaser." And so it is said by Ewing, J., in *Gibson v. Perry*, 29 Mo. 245: "The supposed hardship of the case might be urged with equal plausibility as a ground of interference by the courts in almost all cases where, by reason of inevitable accident, one of the contracting parties has not derived the full measure of benefits he promised himself by the transaction. When the lease is taken, the lessee expressly stipulating to pay rent, he can with no more propriety say he pays the rent unjustly when the premises are destroyed than he could complain of paying the purchase money of any piece of property of which he might be deprived by accident after buying it and before payment."

dent by inevitable necessity, because he might have provided against it by his contract.'¹⁰¹³ By way of exception to this principle, a rule has become established to the effect that if the parties contract on the basis of the continued existence of a particular thing, the subsequent destruction of such thing will excuse performance by both parties,¹⁰¹⁴ and the common-law rule that the destruction of buildings on the leased land does not affect the liability for rent has been referred to as involving a conflict with this rule.¹⁰¹⁵ There does not, however, seem to be any necessary conflict in this regard. The rule relieving the party to a contract, in case of the destruction of a particular thing, has been ordinarily, if not exclusively, applied in the case of a bilateral contract, while the contract to pay rent is unilateral, as made in consideration, not of a promise, but of a conveyance actually made of an estate in the land, and furthermore, in almost every case of the application of the rule referred to, the destruction of the thing in question has rendered the performance of the contract, on one side or the other, impossible, while it is evident that the destruction of a building on the leased land does not render the payment of rent impossible. In what may be regarded as the leading case upon this rule of the law of contracts,¹⁰¹⁶ a contract for the use of a hall on certain days was held to be discharged by the destruction of the hall by fire. This was clearly a bilateral contract, a promise to pay a certain sum in return for a promise to allow the enjoyment of a license at certain times, and there was no suggestion of any possible conflict between this decision and the well recognized rule that rent is not discharged by the destruction of a building on the land leased. It may furthermore be remarked that, in order to apply the rule referred to, the circumstances must be such as to raise a presumption that it was intended by both parties that the destruction of the particular thing should terminate the contract, and there is little or no reason for presuming an intention upon the part of a lessor that the rent shall cease upon the destruction of the buildings, however probable may be such an intention on the part of the lessee.

¹⁰¹³ *Paradine v. Jane*, Aleyn, 26. ¹⁰¹⁵ *Harriman*, Contracts (2d Ed.)
See cases cited 1 Am. & Eng. Enc. 270 a.
Law (2d Ed.) 588.

¹⁰¹⁶ *Taylor v. Caldwell*, 3 Best &

¹⁰¹⁴ See *Hammon*, Contracts, 830; S. 826.

9 Cyclopaedia Law & Proc. 631.

(2) **Destruction of entire premises.** In case of the destruction, even though total, of the buildings on the leased land, there is not a total destruction of the subject-matter of the lease, and consequently there remains something out of which, in theory, the rent can issue, however small may be the value of the land as compared with the buildings destroyed. In the case, on the other hand, of a lease of a building alone, without the land,¹⁰¹⁷ or of merely certain rooms in or parts of a building,¹⁰¹⁸ if the building, or the part thereof which is the subject of the lease, is destroyed, it has been generally held in this country that nothing remains from which the rent can issue, and that consequently the liability therefor immediately ceases.¹⁰¹⁹ The question whether a lease is of the land together with the building, or of the building or a part thereof merely, so as to be within this rule, is properly one of the construction of the lease,¹⁰²⁰ and is referred to elsewhere.¹⁰²¹ The land is not necessarily included because the basement or cellar is leased.¹⁰²² On the other hand, a lease in terms of an entire building *prima facie* includes the land under it.¹⁰²³

In England, it appears, the same rule applies when the lease is of an apartment in a building, as when the land itself is leased, with the effect that the destruction of the building does not affect the rent,¹⁰²⁴ and in one jurisdiction in this country, like-

¹⁰¹⁷ Ainsworth v. Ritt, 38 Cal. 89, 99 Am. Dec. 352; Schmidt v. Pettit, 8 D. C. (1 McArthur) 179.

¹⁰¹⁸ Buerger v. Boyd, 25 Ark. 441; McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654; Womack v. McQuarry, 28 Ind. 103, 92 Am. Dec. 306; Stockwell v. Hunter, 52 Mass. (11 Metc.) 448, 45 Am. Dec. 220; Shawmut Nat. Bank v. City of Boston, 118 Mass. 125; Kerr v. Merchants' Exch. Co., 3 Edw. Ch. (N. Y.) 315; Graves v. Berdan, 26 N. Y. 498; Harrington v. Watson, 11 Or. 143, 3 Pac. 173, 50 Am. Rep. 465; Paxson & Comfort Co. v. Potter, 30 Pa. Super. Ct. 615; Porter v. Tull, 6 Wash. 408, 33 Pac. 965, 36 Am. St. Rep. 172, 22 L. R. A. 613.

¹⁰¹⁹ See cases cited in two preceding notes.

¹⁰²⁰ See Austin v. Field, 7 Abb. Pr. (N. S.; N. Y.) 29; Shawmut Nat. Bank v. City of Boston, 118 Mass. 125.

¹⁰²¹ See ante, § 26 c (2).

¹⁰²² Graves v. Berdan, 26 N. Y. 498; Stockwell v. Hunter, 52 Mass. (11 Metc.) 448, 45 Am. Dec. 220.

¹⁰²³ McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654; Nashville, C. & St. L. R. Co. v. Heikens, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298. Although portions of the house are excepted. Humiston, Keeling & Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893, 67 Am. St. Rep. 232. But see Schmidt v. Pettit, 8 D. C. (1 McArthur) 179, apparently *contra*.

¹⁰²⁴ Izon v. Gorton, 5 Bing. N. C. 501; Marshall v. Schofield, 52 Law

wise, the rule applicable in the case of a lease of land and the building thereon is applied in the case of a lease of an apartment in a building, without any suggestion of the application of a different rule.¹⁰²⁵ The view generally adopted in this country seems sound, provided it be conceded that the lease of the apartment does not necessarily include any interest in the soil, and, as elsewhere suggested, there seems no objection to thus viewing the operation of the lease.¹⁰²⁶

In order that the liability for rent thus cease by reason of the destruction of the building or of the apartment leased, it is necessary that the premises leased be entirely destroyed, and the liability for rent continues as before, if the building or apartment leased still exists, although it be necessary to repair it in order that it be tenantable.¹⁰²⁷

If the premises leased are thus entirely destroyed, a proportioned part of any rent paid in advance may, it has been held in one jurisdiction, be recovered back by the tenant,¹⁰²⁸ while in another a different view has been taken,¹⁰²⁹ on the ground that a voluntary payment cannot be recovered back.¹⁰³⁰ The latter is, it is submitted, a good and sufficient reason for denying such recovery, to which may be added that the opposite view involves

J. Q. B. 58. See *Selby v. Greaves*, L. R. 3 C. P. 594.

¹⁰²⁵ *Helburn & Co. v. Molford*, 70 Ky. (7 Bush) 169. In Georgia the statute providing that the liability for rent shall not abate by reason of the destruction of the premises was applied when the lease was of an apartment only in the building destroyed. *Pope v. Garrard*, 39 Ga. 471 and *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443, seems to be to the same effect. But apparently this construction of the statute no longer prevails. See *Gavan v. Norcross*, 117 Ga. 356, 43 S. E. 771; *Snook & Austin Furniture Co. v. Steiner*, 117 Ga. 363, 43 S. E. 775.

¹⁰²⁶ See ante, § 24 c.

¹⁰²⁷ *Smith v. McLean*, 123 Ill. 210, 14 N. E. 50; *Humiston, Keeling & Co.*

v. Wheeler, 175 Ill. 514, 51 N. E. 893, 67 Am. St. Rep. 232; *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. 115. But in New York the act of 1860 (post, at note 1101) has been held to apply so as to relieve the tenant from rent in such case. *New York Real Estate & Bldg. Imp. Co. v. Motley*, 3 Misc. 232, 51 N. Y. St. Rep. 864, 22 N. Y. Supp. 705.

¹⁰²⁸ *Porter v. Tull*, 6 Wash. 408, 33 Pac. 965, 22 L. R. A. 613, 36 Am. St. Rep. 172. In *Stockwell v. Hunter*, 52 Mass. (11 Metc.) 448, 45 Am. Dec. 220, the court expressly refuses to discuss the question.

¹⁰²⁹ *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. 115. See *Tarkovsky v. George H. Hess Co.*, 64 Ill. App. 513.

¹⁰³⁰ See ante, § 179.

an apportionment of rent as to time in disregard of the well settled rule.¹⁰³¹

(3) **Destruction of building before commencement of term.** The question has but seldom been considered whether, in case the tenancy is, by the terms of the lease, to begin at an interval after the making of the lease, and the buildings on the leased premises are destroyed during such interval, the same rule will apply as when the destruction occurs after the beginning of the tenancy. There are, however, a few cases adverse to the imposition of liability for rent in such case. "There is," it has been said, "an implied warranty that the condition of the demised premises shall remain substantially the same between the time of the execution of the lease and the beginning of the term,"¹⁰³² and other *dicta* to that effect are to be found.¹⁰³³ In Georgia and Pennsylvania, the destruction of a building after the making of the lease and before the commencement of the term has been regarded as entitling the lessee to a reduction or apportionment of rent, and this although he entered thereafter under the lease, if this entry was the result of promises by the lessor to restore the premises to their former condition.¹⁰³⁴ In Maine, on the other hand, it has been decided that the destruction of the leased premises, a wharf, "by natural decay," between the date of the lease and the beginning of the term, is no defense to rent.¹⁰³⁵ It is by no means clear why the principles upon which the lessee is ordinarily liable for rent, even though the buildings are destroyed during the term, should not also apply when the destruction occurs after the lease and before the term. One consideration only appears to be absent in the former case, which is present in the latter, that is, that if the possession of the premises has not passed into the hands of the latter, he is not in such a convenient position to destroy the building himself as a means of terminating his liability.

(4) **Change of possession after destruction.** Upon the de-

¹⁰³¹ See ante, § 176 a.

¹⁰³³ See *Wood v. Hubbell*, 10 N.

¹⁰³² *Weeks v. Ring*, 51 Hun, 329, Y. (6 Seld.) 479; *Hickman v. Rayl*, 4 N. Y. Supp. 117, where it was de-

55 Ind. 551.

ecided however, that if the fire occurred on the day "from" which the term was to run, though before noon, the destruction occurred with-

¹⁰³⁴ *Lightfoot v. West*, 98 Ga. 546, 25 S. E. 587; *Wayne v. Lapp*, 180 Pa. 278, 36 Atl. 723.

in the term, and consequently the lessee was liable for rent.

¹⁰³⁵ *Hill v. Woodman*, 14 Me. 38. Here the lessee was already in possession under a previous lease.

struction of the buildings or improvements, the tenant's liability for rent, which, under the general rule, would otherwise continue, may be suspended by reason of an eviction of the tenant by the landlord, as, for instance, when the latter, without permission from the former, takes exclusive possession of the premises for the purpose of rebuilding.¹⁰³⁶ So the lease might then come to an end as a result of a surrender of the leasehold,¹⁰³⁷ and this might sometimes be "implied" from a relinquishment of possession by the tenant and its acceptance by the landlord, though it seems that the tenant, seeking to avoid the payment of further rent, would have the burden of showing that the relinquishment of possession was intended to be permanent, so as to effect a surrender, and was not merely temporary, to endure only till the completion of repairs. These questions, of possible eviction or surrender after the destruction of parts of the premises, are to be settled in accordance with the principles ordinarily bearing upon the subjects of eviction and surrender.

(5) **Flooding or inundation of premises.** The destruction of the buildings or other improvements on the premises by a flood or freshet would, in accordance with the general rule above stated, not affect the landlord's right to rent.¹⁰³⁸

The question whether the erosion of the land leased, by the action of a neighboring stream or body of water, will terminate the liability for rent, presents considerable difficulty. Even though the land entirely disappears from view as a result, it can hardly be said that the premises are entirely destroyed, since in theory the ownership of the premises extends to the center of the earth, and the operation of the lease, likewise, it seems, extends thereto.¹⁰³⁹ Consequently, some part of the subject of the lease still remains, that is, the soil now covered by water, as a result of the erosion of that above it. When, however, as would frequently be the case, the stream or body of water is of such a character, as being tidal or navigable, that the title to the bed thereof

¹⁰³⁶ Hoeveler v. Fleming & Co., 91 Pa. 322; Humiston, Keeling & Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893, 67 Am. St. Rep. 232. But there is obviously no eviction when the entry for this purpose is with the landlord's assent. Schloss v. Schloss, 137 Mich. 289, 100 N. W. 392.

¹⁰³⁷ Ward v. Bull, 1 Fla. 271; Danziger v. Falkenberg, 46 N. Y. St. Rep. 331, 18 N. Y. Supp. 927.

¹⁰³⁸ See Smith v. Ankrum, 13 Serg. & R. (Pa.) 39.

¹⁰³⁹ See 1 Tiffany, Real Prop. § 217.

is vested in the public,¹⁰⁴⁰ the title to the part of the soil which has thus become covered by water would be vested in the public as being a part of the bed. Whether such destruction of a part or of all of the visible portion of the land leased, and possible divestiture, in favor of the public, of the interests of both the landlord and the tenant in the portion thereunder, would constitute such a destruction of the premises leased as to affect the liability for rent, has never been decided. It would seem, however, that it should have the effect of extinguishing the rent in proportion to the quantity of the land, measured by superficial area, that has thus disappeared, since, to that extent, the landlord's title to the land is extinguished. It appears to be somewhat analogous to the case in which the landlord's title passes to the state in the exercise of the power of eminent domain.¹⁰⁴¹ In case the lower part of the land, thus covered by water after the erosion of the upper part, does not become the property of the public, as in the case of an unnavigable, nontidal stream, the same rule might apply, it seems, as in the case of destruction of the buildings merely, since that part of the land still remains, and the lessee has the exclusive right to utilize the water thereover for particular purposes, such as fishing and the cutting of ice.¹⁰⁴²

It has been decided in one case that a lessee of land bordering on the sea is not relieved from rent because the waters encroach thereon and the soil is washed away, if he knew, when taking the lease, that two-thirds of the land was under water, and he had daily witnessed the erosion of the bank, and took the lease merely to prevent its occupation by a business competitor.¹⁰⁴³ And in another case it was decided that, where there was a lease of land

¹⁰⁴⁰ See 1 Tiffany, Real Prop. §§ 264-267. if part of the land is surrounded by the sea, "for though the soil remains to him, yet the water is part

¹⁰⁴¹ See ante, § 182 k.

¹⁰⁴² Compare the statement of Rolle, C. J. (1 Rolle, Abr. 236), that rent will not be apportioned if part of the land is surrounded by fresh water "because the soil remains, and the lessee only shall have the fish in the water, and by ordinary intendment this may be regained again,"

of the sea and so is common to every man to fish therein as well as the lessee, and by ordinary intendment there is not any possibility of regaining it."

but that the rent will be apportioned

¹⁰⁴³ Galveston City R. Co. v. Gulf Land Co., 2 Tex. Civ. App. 326, 21 S. W. 959.

for a "landing" for boats, or a lease of a right of landing thereon, it does not clearly appear which, the right to rent ceased, if, by the erosion of part of the particular land described, its use for landing purposes became impossible.¹⁰⁴⁴

As by the common-law rule even the partial destruction of the leased premises does not extinguish the liability for rent, so *a fortiori* the mere temporary submersion of the premises by a flood or otherwise, though rendering them for the time untenable, would not affect the right to rent in jurisdictions recognizing that rule,¹⁰⁴⁵ in the absence of a statute to the contrary.¹⁰⁴⁶

¹⁰⁴⁴ Waite v. O'Neil, 22 C. C. A. 248, 76 Fed. 408, 34 L. R. A. 550. The opinion in one place states that "the subject matter of the lease was the landing as it existed at the date of the lease," and that "a landing implies a place where vessels can be moored and loaded and discharged," and the nonliability for rent is based on the fact that "this landing was effectually destroyed by the ravages of the river," but elsewhere it is stated that "the subject matter of this lease was not (the lessor's) land, or any interest in it other than the riparian right, franchise, or enjoyment which was appurtenant to her lots, and would pass by a deed conveying them." The latter language would seem to support the view that there was a lease, not of the land, but of the mere right to use the land for loading and discharging cargoes, that is, that it was a mere grant of an easement of this character for a limited time. Assuming the lease to have been of this character, the sum agreed to be paid as compensation for the enjoyment of the easement would not, according to the common-law authorities, constitute rent, strictly speaking, but would be a "sum in gross" (ante, § 169 a), and

the case would seem to have involved the question whether a change in the land subject to an easement, rendering the enjoyment of an easement impossible, terminates liability for a periodical sum agreed to be paid to the grantor of the easement as remuneration for the enjoyment of the easement. The opinion of the court would seem to be in effect that since the easement is destroyed by such a change in the land, the right to such periodical compensation for its enjoyment comes to an end.

¹⁰⁴⁵ Niedelet v. Wales, 16 Mo. 214; Hill v. Wilson, 15 Ky. Law Rep. 814. So it was no defense to rent that the city opened certain streets and as a result the premises were constantly overflowed. Banks v. White, 33 Tenn. (1 Sneed) 613.

¹⁰⁴⁶ In Viterbo v. Friedlander, 120 U. S. 707, 30 Law. Ed. 776, it was held that the flooding of a sugar plantation by the giving away of a levee, by which the crop, canals and ditches and bridges thereover were destroyed, and a deposit was left on the ground to the depth of several inches, was a partial destruction of the premises within the Louisiana statute providing for an abatement of rent or annulment of the lease in

(6) **Express stipulations extinguishing or suspending rent—**

(a) **General considerations.** The rule, generally adopted, that the tenant continues liable for rent in spite of the total or partial destruction of the building on the leased premises, may be changed by an express provision to the contrary, and it is a very general practice to insert such a provision in the instrument of lease. The fact, however, that the lease in express terms relieves the tenant from any obligation to restore the building in case of its destruction, does not relieve him from rent in such case,¹⁰⁴⁷ nor does the fact that, in his covenant to yield up to the premises at the end of the term, there is an exception in case of destruction by fire or other casualty, have such an effect.¹⁰⁴⁸ A written obligation to pay rent, it has been held, cannot be varied by an oral agreement that rent should cease in case of a destruction of the buildings.¹⁰⁴⁹ But it may be shown that a clause to this effect was intended to be inserted in the lease and was omitted by mistake.¹⁰⁵⁰

Where the lease provided for the suspension or abatement of the rent, or of a just and proportionate part thereof, in case of the destruction by fire of the premises or of any part thereof, the abatement was not, it was decided, limited to the rental value

case of "partial destruction by an unforeseen event," and also made the premises "unfit for the purpose for which leased" within another statute authorizing a rescission of the lease on that ground. In *Vinson v. Graves*, 16 La. Ann. 162, and *Payne v. James*, 45 La. Ann. 381, 12 So. 492, it was held that the breaking of a levee was not an accident of such "an extraordinary nature that it could not have been foreseen," within a statute authorizing an abatement of rent in case of the destruction of the crop by such an accident.

In *Donnellan v. Wood, Curtis & Co.*, 4 Cal. App. 192, 87 Pac. 235, it was held that particular provisions of the lease to the effect that in case of submersion of the land there should be no liability for rent re-

lieved the tenant from liability for an installment of rent falling due before the submersion, this rendering the land incapable of producing a crop during that season.

¹⁰⁴⁷ *Monk v. Cooper*, 2 Ld. Raym. 1477; *Beach v. Farish*, 4 Cal. 339; *Hare v. Groves*, 3 Anstr. 687; *Holtzapffel v. Baker*, 18 Ves. Jr. 115; *Belfour v. Weston*, 1 Term R. 310; *Ward v. Bull*, 1 Fla. 271.

¹⁰⁴⁸ *Davis v. George*, 67 N. H. 393, 39 Atl. 979; *Fowler v. Bott*, 6 Mass. 63; *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 121; *Lewis v. Hughes*, 12 Colo. 208, 20 Pac. 621.

¹⁰⁴⁹ *Stafford v. Staunton*, 88 Ga. 298, 14 S. E. 479.

¹⁰⁵⁰ *Wood v. Hubbell*, 10 N. Y. (6 Seld.) 479; *Gates v. Green*, 4 Paige (N. Y.) 355, 27 Am. Dec. 68.

of the part destroyed, but included any depreciation in the rental value of the balance of the premises.¹⁰⁵¹

A stipulation that rent should cease if the landlord failed to make "heavy repairs," which the lease bound him to make, was held to apply where the buildings were destroyed and the landlord announced that he would not rebuild, so as to relieve the tenant from rent from the time of such destruction.¹⁰⁵² But the tenant is not relieved from rent during the making of repairs by the fact that the landlord has agreed to pay for necessary repairs.¹⁰⁵³

Even though the lessee is entitled by the terms of the lease to withhold rent after destruction of the buildings, if he pays it upon demand by the lessor, he cannot, it has been held, recover the rent so paid, this being in accordance with the general rule that a payment, not made under mistake of fact or through fraud, cannot be recovered by the payor.^{1053a}

(b) **Character of injury.** A provision of the lease for the termination of the tenancy or of liability for rent upon the "destruction" of the building, or in case it be "destroyed," without any reference to "injury," has been decided not to apply when there is no actual destruction, but merely injuries to parts of the building by fire or other casualty, temporarily unfitting such parts for occupancy.¹⁰⁵⁴ And the same view has been taken when the lease provided for a suspension of rent in case only of "total destruction,"¹⁰⁵⁵ or when the building was "destroyed and burned down."¹⁰⁵⁶ But in one state a provision for suspen-

¹⁰⁵¹ Cary v. Whiting, 118 Mass. 363. ever, a contrary decision in Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007.

A provision in a lease for an abatement of rent on destruction of the buildings does not entitle the lessee to an abatement on a note given by him in consideration of the landlord's acceptance of a surrender of the leasehold, the surrender having taken place before the destruction of the premises. Brooks v. Cutter, 119 Mass. 132.

¹⁰⁵² Thompson v. Pendell, 12 Leigh (Va.) 591. ¹⁰⁵⁴ Wall v. Hinds, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; Vincent v. Frelich, 50 La. Ann. 378, 23 So. 373, 69 Am. St. Rep. 436; Spalding v. Munford, 37 Mo. App. 281. In the latter case the lease provided that the tenant should repair all damage to the premises, "destruction by fire excepted," and that rent should cease in case of "destruction by fire."

¹⁰⁵³ Peck v. Ledgwick, 25 Ill. 109. ¹⁰⁵⁵ Einstein v. Levi, 25 App. Div. 565, 49 N. Y. Supp. 674.

^{1053a} Regan v. Baldwin, 126 Mass. 485, 30 Am. Rep. 689. There is, how- ¹⁰⁵⁶ Vanderpoel v. Smith, 2 Daly (N. Y.) 135.

sion of rent in case of "destruction" by fire seems to have been regarded as applicable if the fire merely makes the premises untenable.¹⁰⁵⁷ A provision for the cessation of rent, if the premises become untenable through fire, has been held not to apply when the occupancy is merely unpleasant, owing to the injury of the furnishings by fire, smoke and water.¹⁰⁵⁸ On the other hand, a provision for the apportionment of rent in case of an injury permitting but a partial occupation has been held to give no exemption from rent if the premises are made totally untenable and are therefore unoccupied.¹⁰⁵⁹

(c) **Cause of injury.** Quite frequently the provision of the lease is for the cessation of rent upon injury or destruction from "unavoidable casualty." In reference to this expression it has been said that it "does not signify a mere want of repair, arising from lapse of time or improper use of the premises; nor from trespasses or nuisances occasioned by the acts of the tenant or of third persons. Neither does it include any injuries which may happen by reason of the common and ordinary use and occupation of the estate leased, or of adjoining premises. The term has a much more restricted meaning, and comprehends only damage or destruction arising from supervening and uncontrollable force or accident."¹⁰⁶⁰ Consequently, in that case it was decided that the phrase did not cover injury to the premises by leakage from an adjoining tenement owned by the land-

¹⁰⁵⁷ *Chamberlain v. Godfrey's* Adm'r, 50 Ala. 530, citing *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64, which is to an opposite effect.

¹⁰⁵⁸ *Lewis v. Hughes*, 12 Colo. 208, 20 Pac. 621.

Under a covenant that in case the premises were partly destroyed by fire, but not rendered wholly untenable, the lessor should repair, but that if the premises were rendered untenable, the rent should cease till the premises were put in good repair, it was held that the building as a whole must be untenable in order that rent should cease. *Kip v. Merwin*, 34 N. Y. Super. Ct. (2 Jones & S.) 531.

That the tenant received a considerable amount from insurance has been regarded as evidence that the premises were so damaged as to be unfit for occupancy within a clause of the lease. *Meyer Bros. Drug Co. v. Madden, Graham & Co.* (Tex. Civ. App.) 17 Tex. Ct. Rep. 908, 99 S. W. 723.

¹⁰⁵⁹ *New York Real Estate & Bldg. Imp. Co. v. Motley*, 3 Misc. 232, 51 N. Y. St. Rep. 864, 22 N. Y. Supp. 705.

¹⁰⁶⁰ *Per Bigelow, J.*, in *Welles v. Castles*, 69 Mass. (3 Gray) 323. This language is quoted with approval in *Tays v. Ecker*, 6 Tex. Civ. App. 188, 24 S. W. 954.

lord, and, in other cases in the same jurisdiction, that it did not apply when the mill on the premises became useless owing to the rotten condition of the millwheel, which was not worth repairing,¹⁰⁶¹ or when the adjoining owner undermined the wall.¹⁰⁶² In another jurisdiction, however, it was decided, in reference to the giving way of boilers on the premises while under a low pressure and with a moderate fire, that "there was in the rupture of the boilers a degree of unexpectedness, as of something unforeseen and not contemplated in the making of the contract, which makes it proper to regard it as an unavoidable casualty within the meaning of the proviso."¹⁰⁶³ The fact that the building is condemned by the municipal authorities as unsafe, owing to natural decay, does not constitute an "unavoidable casualty,"¹⁰⁶⁴ nor does the destruction of part of the building in the process of widening the street.¹⁰⁶⁵

In one case the question whether the flooding of the premises from a sewer, as shown by the evidence, constituted a "casualty," within a provision authorizing the termination of the lease in case the premises were rendered untenable by fire or other casualty, was regarded as a question for the jury,¹⁰⁶⁶ and whether the premises were rendered "uninhabitable" within a provision of the lease has likewise been so regarded.¹⁰⁶⁷

A provision for the reduction of rent in case the premises "be rendered partially untenable by fire or the elements" has been held to refer to a sudden, unusual or unexpected action of the elements, such as a flood, tornado, and the like, and not to the natural and ordinary results of an efficient cause existing at the time of the demise, in this case the possibility of percolation of water from neighboring springs into the cellar of the building.¹⁰⁶⁸

¹⁰⁶¹ *Bigelow v. Callamore*, 59 Mass. (5 Cush.) 226.

¹⁰⁶² *Kramer v. Cook*, 73 Mass. (7 Gray) 550.

¹⁰⁶³ *Phillips v. Sun Dyeing, Bleaching & Calendaring Co.*, 10 R. I. 458.

¹⁰⁶⁴ *Tays v. Ecker*, 6 Tex. Civ. App. 188, 24 S. W. 954.

¹⁰⁶⁵ *Mills v. Baehr's Exrs*, 24 Wend. (N. Y.) 254.

¹⁰⁶⁶ *Miland v. Meiswinkel*, 82 Ill. App. 522.

¹⁰⁶⁷ *Goss Heating & Plumbing Co. v. Oviatt*, 60 Mo. App. 565.

¹⁰⁶⁸ *Harris v. Corlies*, 40 Minn. 106, 41 N. W. 940, 2 L. R. A. 349. It is there said by Mitchell, J., "Every case of damage to or destruction of human structures, not caused by animal force, may, in one sense, be said to be caused by the elements, as, for example, ordinary gradual decay. But it would hardly be claimed that such a case would be within the

That the injury to the premises leased was actually caused by water used in extinguishing a fire on adjoining premises has been held not to take the case out of a provision of the lease as to the rights of the tenant in case of damage to the premises by fire.¹⁰⁶⁹

(d) **Effect as terminating tenancy.** Whether a clause exempting the tenant from liability for rent in case of injury to, or destruction of, the building, has the effect of terminating the tenancy, or of merely suspending the obligation to pay rent till the premises are repaired or restored, is a question of construction. A provision that the rent shall "cease" upon the destruction of the building has, when availed of by the lessee, been regarded as absolutely terminating the lessee's interest in the premises,¹⁰⁷⁰ and this is the effect, it seems, of a decision that in such case the lease should be cancelled at the instance of the lessee.¹⁰⁷¹

A clause providing that the rent shall be suspended upon the destruction of the building until it is rebuilt has been regarded as terminating the tenancy on the landlord's election not to rebuild,¹⁰⁷² or on his election to build a different class of struc-

meaning of the provisions of the lease."

¹⁰⁶⁹ *Roman v. Taylor*, 93 App. Div. 449, 87 N. Y. Supp. 653.

The fact that injuries from a fire were repaired by the landlord has been considered evidence sufficient to justify a finding by a jury that the fire was not caused by the fault or neglect of the tenant, so as to exclude the application of an exception to that effect in a clause exempting the tenant from further rent in case the premises became untenable. *Weeber v. Hawes*, 80 Minn. 476, 83 N. W. 447, 81 Am. St. Rep. 275.

¹⁰⁷⁰ *Buschman v. Wilson*, 29 Md. 553. But in *Patterson v. Ackerson*, 1 Edw. Ch. (N. Y.) 96, where a lease contained a covenant for quiet enjoyment, and the lessee covenanted to pay taxes during the term,

and to surrender possession at the end thereof, without the words "or sooner determination," and the lease provided for the cessation of rent in case of the destruction of the buildings, it was held that, though the rent ceased on such destruction, the term was not thereby ended, and the tenant could continue in possession without paying rent, but still paying taxes, whether or not liable thereafter for use and occupation.

¹⁰⁷¹ *Gates v. Green*, 4 Paige (N. Y.) 355, 27 Am. Dec. 68. And see *Wood v. Hubbell*, 10 N. Y. (6 Seld.) 479, where, however, the agreement was that the lease should terminate in such case.

¹⁰⁷² *Schmidt v. Pettit*, 8 D. C. (1 McArthur) 179; *Snook & Austin Furniture Co. v. Steiner*, 117 Ga. 363, 43 S. E. 775.

ture.¹⁰⁷³ But in one jurisdiction a different view was asserted, to the effect that the leasehold estate remains outstanding, in spite of a provision for the suspension of rent until the building is restored, and that consequently the tenant is entitled to possession of whatever building may be erected in place of that destroyed.¹⁰⁷⁴ It is difficult to see why the leasehold estate should be divested out of the tenant merely because of such a clause, inserted apparently for his benefit.

Even though there is no provision that the tenancy shall terminate on destruction of the premises in whole or in part, the landlord, if he has covenanted to repair or rebuild "within a reasonable time,"¹⁰⁷⁵ or "forthwith,"¹⁰⁷⁶ or "as speedily as possible"¹⁰⁷⁷ on such destruction, must begin to repair or rebuild within a reasonable time, it has been decided, and if he fails to do so the tenant may relinquish possession and so terminate the tenancy. And it was held, on the construction of a particular lease, that a covenant to pay rent during the period of rebuilding was inoperative in case of unreasonable delay.¹⁰⁷⁸

(e) **Revival of liability for rent.** Though a provision for the suspension of rent, upon injury to or destruction of the building, until it is repaired or restored, imposes no obligation upon the landlord to repair or restore,¹⁰⁷⁹ yet if he does do this, with

¹⁰⁷³ *Snook & Austin Furniture Co. v. Steiner*, 117 Ga. 363, 43 S. E. 775. And see, to the same effect, *Gavan v. Norcross*, 117 Ga. 356, 43 S. E. 771. There the lease was of a room in the building destroyed, and it provided for a cessation of rent till the premises were restored, and it was also held that it was immaterial in this connection that subsequently the landlord recognized the tenancy as existing by undertaking to enforce a forfeiture for nonpayment of rent.

In *Witty v. Matthews*, 52 N. Y. 512, the court construed the language of the lease as giving the option to the lessor whether to repair the premises injured by fire or to terminate the lease by electing

to erect a different building. The court's reasoning is difficult to follow.

¹⁰⁷⁴ *Rogers v. Snow*, 118 Mass. 118.

¹⁰⁷⁵ *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S. W. 1007.

¹⁰⁷⁶ *Nimmo v. Harway*, 23 Misc. 126, 50 N. Y. Supp. 686.

¹⁰⁷⁷ *Bacon v. Albany Perforated Wrapping Paper Co.*, 22 Misc. 592, 49 N. Y. Supp. 620.

¹⁰⁷⁸ *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S. W. 1007. And it was there held that the lessor could not, in such case, assert a claim to money received by the lessee under policy taken out by the latter insuring against liability for rent after destruction of the building.

¹⁰⁷⁹ See ante, notes 1070-1074.

reasonable promptness at least,¹⁰⁸⁰ the liability for rent revives, the tenant having no option in the matter.¹⁰⁸¹ The tenant's liability for rent has also been regarded as revived upon the restoration of the building, when the lease provided for the payment of rent "except when untenable by fire,"¹⁰⁸² or for the cessation of rent while the premises "were unfit for occupation."¹⁰⁸³

(f) **Possession pending restoration.** Where the lease, in effect, provides for the termination of the tenancy upon injury to or destruction of the premises, the tenant must yield possession to the landlord,¹⁰⁸⁴ and it has been held that, if he holds over in such case, he is liable for the value of the use and occupation.¹⁰⁸⁵

¹⁰⁸⁰ See ante, at note 1078.

¹⁰⁸¹ Phillips & Buttorff Mfg. Co. v. Whitney, 109 Ala. 645, 20 So. 333; Snook & Austin Furniture Co. v. Steiner, 117 Ga. 363, 43 S. E. 775; Smith v. McLean, 22 Ill. App. 451; Id., 123 Ill. 210, 14 N. E. 50; Goss Heating & Plumbing Co. v. Oviatt, 60 Mo. App. 565. But in Schmidt v. Pettit, 8 D. C. (1 McArthur) 179, it was said, not only that the landlord could refrain from rebuilding or repairing and so terminate the lease and the obligation to pay rent, but also that, "since mutuality of obligation is necessary in every contract, the tenant could not have been held for the rent after the house had been rebuilt, unless he elected to enter into possession of the restored premises." As to this, it may be remarked that "mutuality of obligation" means merely that one promise is not sufficient as a consideration for another promise, unless the former promise is binding on the person who makes it (Hammon, Contracts, § 337; 9 Cyclopaedia Law & Proc. 327), and in the above case the making of the lease was a sufficient consideration for the lessee's promise to pay rent in case the

building should be destroyed and then restored.

¹⁰⁸² Phillips & Buttorff Mfg. Co. v. Whitney, 109 Ala. 645, 20 So. 333.

¹⁰⁸³ Smith v. McLean, 22 Ill. App. 451; Id., 123 Ill. 210, 14 N. E. 50. See Goss Heating & Plumbing Co. v. Oviatt, 60 Mo. App. 565; Rogers v. Grote Paint Co., 118 Mo. App. 300, 94 S. W. 548, for provisions for cessation of rent if the premises were rendered uninhabitable and were not made habitable within a reasonable time.

In Einstein v. Levi, 25 App. Div. 565, 49 N. Y. Supp. 674, it was held that the destruction of partitions, windows and parts of the roof did not render applicable a provision that the liability under the lease should terminate in case of the "total destruction" of the premises, but this came within a provision that in case the premises were rendered untenable the rent should cease till the building should be put in repair.

¹⁰⁸⁴ Buschman v. Wilson, 29 Md. 553.

¹⁰⁸⁵ Wallace v. Coe, 13 N. Y. St. Rep. 546. In Willard v. Tillman, 19 Wend. (N. Y.) 358, it was held that

On the other hand, a clause providing merely for the suspension of rent until the premises are put in repair has been regarded as involving no obligation on the tenant to relinquish possession,¹⁰⁸⁶ except so far as such relinquishment is necessary to enable the landlord to make repairs, such a provision giving the landlord, by implication, the right to enter on the premises for the purpose of repairs and restoration.¹⁰⁸⁷ It has even been decided that premises may be "untenantable," within a provision of the lease suspending rent in case they become so by fire, although the tenant still retains possession, keeping stock there and visiting them for certain purposes.¹⁰⁸⁸ Under a provision that, in case any building or buildings on the premises are destroyed or injured by fire, the tenant shall not be liable for rent "until the same are rebuilt or repaired, or he may thereupon quit and surrender possession," a tenant who remained in possession of one building was decided to be relieved from liability for rent until the restoration of another building on the premises which had been destroyed.¹⁰⁸⁹

(g) **Rent payable in advance.** A clause exempting the lessee from liability for rent upon destruction of buildings on the premises does not, it has been held, entitle the lessee to recover rent paid by him in advance in accordance with the provisions of the lease.¹⁰⁹⁰ And the same view has been taken of a clause providing that the rent should be paid up to the time of such destruction and that the lease should then cease.¹⁰⁹¹ But when the lease stated that the rent was paid in advance for the whole

under a covenant to pay rent so long as permitted to occupy the premises in the manner set forth in the lease, the destruction of the building on the premises, without the landlord's fault, did not exonerate the lessee from the payment of rent so long as he continued in possession. Compare *Patterson v. Ackerson*, 1 Edw. Ch. (N. Y.) 96.

¹⁰⁸⁶ *Kip v. Merwin*, 52 N. Y. 542; *Schutz v. Corn*, 5 N. Y. St. Rep. 19.

¹⁰⁸⁷ *Phillips & Buttorff Mfg. Co. v. Whitney*, 109 Ala. 645, 20 So. 333; *Smith v. McLean*, 123 Ill. 210, 14 N. E. 50.

¹⁰⁸⁸ *Weinberg v. Savitzky*, 47 Misc. 132, 93 N. Y. Supp. 485; *Beers v. Taussig*, 49 Misc. 619, 96 N. Y. Supp. 738.

¹⁰⁸⁹ *American Bicycle Co. v. Hoyt*, 118 Wis. 273, 95 N. W. 92.

¹⁰⁹⁰ *Felix v. Griffiths*, 56 Ohio St. 39, 45 N. E. 1092; *Cross v. Button*, 4 Wis. 468; *Tarkovsky v. George H. Hess Co.*, 64 Ill. App. 513; *Cornock v. Dodds*, 32 U. C. Q. B. 625.

¹⁰⁹¹ *Werner v. Padula*, 167 N. Y. 611, 60 N. E. 1122; *Id.*, 49 App. Div. 135, 63 N. Y. Supp. 68. Compare *Einstein v. Tutelman*, 110 N. Y. Supp. 1025.

term, and provided that in case of the destruction of the premises during the term the rent should be "suspended or abated," the lessee was regarded as entitled to recover a proportionate part of the rent paid in advance, since otherwise the latter provision was meaningless.^{1092, 1093}

A provision that in case of the destruction of the building the lessor shall refund to the lessee rent paid in advance, at the rate of a certain named sum per month for the unexpired term, has been regarded as applicable when the premises were sufficiently injured to be "untenantable and unfit for the uses of the lease,"¹⁰⁹⁴ but not to be available to the lessee unless he relinquished possession.¹⁰⁹⁵⁻¹⁰⁹⁷

(7) **Stipulations as to repair and restoration.** There are *dicta* to the effect that if the landlord is bound by a covenant to restore the building destroyed, as for instance, when he has covenanted to keep the premises in repair, his right to rent ceases on the destruction of the building,¹⁰⁹⁸ and this view is in accordance with decisions relieving the tenant from liability for rent in case the premises become untenantable, and the landlord, though bound by covenant to repair, fails to do so.¹⁰⁹⁹ There are, however, other authorities to the effect that the breach of a covenant on the part of the landlord to rebuild or repair does not relieve the tenant from further rent in case of the destruction of the building.¹¹⁰⁰

^{1092, 1093} Rich v. Smith, 121 Mass. 328. Y.) 355, 27 Am. Dec. 68, and Gibson v. Perry, 29 Mo. 245, it is said

In Ward v. Bull, 1 Fla. 271, where the whole rent was paid in advance, and upon the destruction of the building the landlord rebuilt and leased the premises to another person, the first lessee was regarded as entitled to recover a portion of the rent paid by him, calculated from the time of the second lease. It appears to have been assumed that there was a surrender of the first leasehold as of that date.

¹⁰⁹⁴ Chamberlain v. Godfrey, 50 Ala. 530.

¹⁰⁹⁵⁻¹⁰⁹⁷ Chamberlain v. Godfrey, 50 Ala. 530; Buschman v. Wilson, 29 Md. 553.

¹⁰⁹⁸ In Gates v. Green, 4 Paige (N. Y.) 44; Newman v. French, 45 Hun

that the liability for rent continues after destruction "unless the lessor has covenanted to rebuild." In Fowler v. Payne, 49 Miss. 32, it is decided that the tenant may obtain an injunction against the action for rent in such case, and it seems to be thought that the destruction of the premises, together with the lessor's agreement to repair, would be a defense at law to an action for rent. The authorities cited for the view that in equity the lessee would be relieved in such case do not sustain it.

¹⁰⁹⁹ See post, note 1252.

¹¹⁰⁰ Hallett v. Wylie, 3 Johns. (N. Y.) 44; Newman v. French, 45 Hun

(8) **Statutes relieving from liability for rent**—(a) **The provisions of the statutes.** In a number of jurisdictions statutes have been adopted which have the effect of partly or wholly relieving the tenant from rent in case of the destruction of the buildings, or any part thereof, during the term. In New York it was provided by the Act of 1860¹¹⁰¹ that “the lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed, or be so injured by the elements, or any other cause, as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant, and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises, and of the land so leased or occupied.” This language has been changed by a later enactment,¹¹⁰² without, however, apparently, affecting the law on the subject. In Ohio, Minnesota, and Wisconsin, there are statutes substantially the same as that of New York.¹¹⁰³ In Connecticut the statute provides that “the tenant of any tenement which may be, without his fault or neglect, so injured as to be unfit for occupancy, shall not be liable to pay rent after such injury so long as said tenement is untenable, if he continue to occupy, unless it be otherwise expressly provided by written agreement; and in case of such injury he may quit possession of such tenement, but if the same shall become fit for occupancy during the continuance of the lease, he shall then pay the rent, and may again occupy it.”¹¹⁰⁴ In Kentucky it is provided that, in the absence of stipulation otherwise, the tenant shall not be liable for rent after the

(N. Y.) 65 (semble); *Leavitt v. Fletcher*, 92 Mass. (10 Allen) 121; *Surplice v. Farnsworth*, 7 Man. & G. 576.

¹¹⁰¹ Laws 1860, c. 345.

¹¹⁰² By the New York Real Property Law of 1896, § 197, it is provided that “where any building which is leased or occupied is destroyed or so injured by the elements, or any other cause, as to be untenable and unfit for occupancy, and no express agreement

to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises; and he is not liable to pay to the lessor or owner rent for the time subsequent to the surrender.”

¹¹⁰³ *Ohio* Rev. St. 1906, § 4113; *Minnesota* Rev. Laws 1905, § 3331; *Wisconsin* Acts 1903, c. 306.

¹¹⁰⁴ Gen. St. 1902, § 4045.

destruction of the building leased by him by fire or by other casualty without his fault or neglect;¹¹⁰⁵ and in Maryland that "whenever the improvements on property rented for a term of not more than seven years shall become untenable by reason of fire or other unavoidable accident, the tenancy shall be thereby terminated, and all liability for rent thereunder shall cease upon payment proportionately to the day of fire or unavoidable accident."¹¹⁰⁶ In Mississippi it is provided that "the tenant shall not be bound to pay rent for buildings after their destruction by fire or otherwise, without negligence or fault on his part, unless he may have expressly stipulated to be so bound."¹¹⁰⁷ The New Jersey statute provides that, in the absence of stipulation otherwise, if the building or buildings erected on leased premises be injured by fire without the fault of the lessee, the landlord shall repair the same as speedily as possible, or, in default thereof, the rent shall cease until they are put in complete repair, while in case of their total destruction the rent shall be paid up to the time of such destruction, and the lease shall come to an end.¹¹⁰⁸ In North Carolina it is provided that "if a demised house, or other building, be destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired except at an expense exceeding one year's rent of the premises," there being no agreement otherwise, and the tenant not being in default, "and the use of the house damaged being the main inducement to the hiring," the lessee may surrender his estate, paying a proportionate part of the rent calculated up to the time of the damage, and liability for rent will then cease.¹¹⁰⁹ The Virginia statute provides that no covenant or promise to pay rent shall bind the lessee to make such payment if the buildings "be destroyed by fire or otherwise, without fault or negligence on his part, or if he be deprived of the possession of the premises by the public enemy," but that "in case of such destruction, there shall be a reasonable reduction of the rent, for such time as may elapse until there be again upon the premises buildings of as much value to the tenant for his purposes as what may have been so destroyed; and, in case

¹¹⁰⁵ St. 1903, § 2297.

¹¹⁰⁸ 2 Gen. St. p. 1923 (Act March

¹¹⁰⁶ Code Pub. Gen. Laws 1904, art. 5, 1874).

⁵³, § 27.

¹¹⁰⁹ Revisal 1905, § 1992.

¹¹⁰⁷ Code 1906, § 2498.

of such deprivation of possession, a like reduction until possession of the premises be restored to him."¹¹¹⁰

In California such case of destruction or injury to premises is covered, to some extent at least, by a statutory provision empowering the lessee to vacate the premises, and so relieve himself from rent, if the lessor fails to repair dilapidations, rendering the premises untenable, within a reasonable time after notice to him of their existence.¹¹¹¹ And in North Dakota and South Dakota a similar provision exists.¹¹¹² Under the California statute the tenant himself, it has been decided, must notify the lessor of the dilapidations before he can vacate and terminate his liability for rent, it authorizing him so to vacate "within a reasonable time after notice to the lessor" of their existence;¹¹¹³ while under the South Dakota statute it was regarded as sufficient that the lessor acquired knowledge thereof from other sources.¹¹¹⁴

The Connecticut statute, applying in terms to a "tenement," has been held to apply to a room which has been leased,¹¹¹⁵ and the same construction has been placed by implication on the New York statute applying in terms to the lessee of a "building."¹¹¹⁶ Apparently a wharf is regarded as within the Virginia statute in reference to the destruction of buildings.¹¹¹⁷

A statute relieving the tenant from rent in case of the destruction of the building leased obviously does not so relieve one, who is a tenant of a part only of a building, merely because another part of the building is burned, this not affecting the tenantability of that leased.¹¹¹⁸

A statute merely relieving the lessee from liability to rebuild in case of destruction does not have the effect of relieving him from liability for rent after such destruction.¹¹¹⁹

¹¹¹⁰ Code 1904, § 2455. See *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 85.

¹¹¹¹ Civ. Code, § 1942. There the lessor is in general bound to repair. Ante, § 87 c, at notes 94-102.

¹¹¹² *North Dakota* Rev. Codes, § 5528; *South Dakota* Civ. Code, §§ 1433, 1434.

¹¹¹³ *Green v. Redding*, 92 Cal. 548, 28 Pac. 599.

¹¹¹⁴ *Prior v. Sanborn County*, 12 S. D. 86, 80 N. W. 169.

¹¹¹⁵ *Miller v. Benton*, 55 Conn. 529, 13 Atl. 678, 3 Am. St. Rep. 70.

¹¹¹⁶ *New York Real Estate & Bldg. Imp. Co. v. Motley*, 3 Misc. 232, 22 N. Y. Supp. 705.

¹¹¹⁷ *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 49 S. E. 650.

¹¹¹⁸ *Jones v. Fowler Drug Co.*, 27 Ky. Law Rep. 558, 85 S. W. 721.

¹¹¹⁹ *O'Neil v. Flanagan*, 64 Mo.

A local statute in this regard does not apply in the case of litigation concerning rent, if the premises in question are situated in another state; and in such litigation it will be presumed that the common-law rule, that the destruction of premises does not affect the rent, is in force in such other state.¹¹²⁰

(b) **Injuries caused by tenant.** The statute ordinarily makes an express exception in case the injury or untenable condition is caused by the tenant's fault. It was held that the case was within such an exception when the building was destroyed as a result of the tenant's refusal to allow an adjoining owner, about to excavate on his land, to enter and shore up the building,¹¹²¹ when it was the result of a fire caused by the tenant's erection of a stove on the premises,¹¹²² and when it could have been avoided by the making by him of ordinary repairs.¹¹²³ That the tenant was free from fault in this respect must, it has been decided, appear from his answer setting up the defense of the statute in an action for rent.¹¹²⁴

(c) **Extent of relief from rent.** A statute, providing that liability for rent shall cease on destruction of the building, has been held not to relieve the tenant from liability for rent which is payable in advance, though the building is destroyed on the day on which the rent is due,¹¹²⁵ and it is immaterial that the lease provides that in case of the destruction of the premises the rent shall be paid only to the time of their destruction, since this is merely the equivalent of the statutory provision.¹¹²⁶

The Virginia statute, allowing a reasonable reduction for such time as may elapse until there are again upon the premises buildings of the same value to the tenant for his purposes as those destroyed, was held to authorize a reduction of rent equal to the diminished value of the premises to him for his purposes, and a finding that he was entitled to no reduction was regarded

¹¹²⁰ *Graves v. Cameron*, 58 How. Pr. (N. Y.) 75.

¹¹²¹ *Johnson v. Oppenheim*, 55 N. Y. 280.

¹¹²² *Dorr v. Harkness*, 49 N. J. Law, 571, 10 Atl. 400, 60 Am. Rep. 656.

¹¹²³ *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 49 S. E. 650.

¹¹²⁴ *Roach v. Peterson*, 47 Minn. 291, 50 N. W. 80.

¹¹²⁵ *Craig v. Butler*, 156 N. Y. 672, 50 N. E. 962, affirming 83 Hun, 286, 31 N. Y. Supp. 963. See *Copeland v. Luttgen*, 17 Misc. 604, 40 N. Y. Supp. 653.

¹¹²⁶ *Werner v. Padula*, 167 N. Y. 611, 60 N. E. 1122, affirming 49 App. Div. 135, 63 N. Y. Supp. 68.

as justified, when he took the lease merely to exclude a business competitor, made no use of the premises for two years before the accident, and did not use them thereafter because he thought it more profitable not to do so.¹¹²⁷

It has been decided that when there are two or more buildings on the land leased, and one of these is destroyed, the tenant is, under a statute relieving the tenant from rent upon destruction of the building leased, relieved from a portion of the rent proportioned to the value of the building destroyed.¹¹²⁸

(d) **Exclusion of statute by stipulations of lease.** The New York statute exempting the tenant from liability for rent in case the premises become unfit for occupancy applies in terms only when it is not "otherwise expressly provided" in the lease. A general covenant by the lessee to make repairs is not such an express provision otherwise, it has been decided, as to exclude the application of the statute.¹¹²⁹ And provisions in the lease that in case of injury by fire the lessee should pay rent only for such part of the premises as he could occupy during the time required for repair, and, if they were so injured as to require rebuilding, the lease should terminate, were held not to exclude the statute, when the building was rendered wholly untenable during the time required for repairs, but there was no necessity of rebuilding.¹¹³⁰ Likewise, a provision that in case the tenant shall abandon the premises at any time, the rent then due or to become due shall be due and collectible, does not exclude the application of the statute.¹¹³¹ These words of the statute, it is said, "while they do not require an agreement *in totidem verbis*, that the rent shall continue, notwithstanding the destruction of the premises, or their becoming untenable, are nevertheless not satisfied, unless it appears from the lease or other writing that the parties had in mind the contingency mentioned in the statute, and inserted provisions or covenants, inconsistent with the right of surrender thereunder."¹¹³²

¹¹²⁷ *Richmond Ice Co. v. Crystal E.* 385, distinguishing and questioning *Lockrow v. Horgan*, 58 N. Y. 635. *Ice Co.*, 103 Va. 465, 49 S. E. 650.

¹¹²⁸ *Scott Bros. v. Flood's Trust*. ¹¹³⁰ *New York Real Estate & Bldg. Co. v. Motley*, 143 N. Y. 156, 38 N. E. 103. *tee*, 30 Ky. Law Rep. 955, 99 S. W. Co. v. 967.

¹¹²⁹ *Butler v. Kidder*, 87 N. Y. 98; ¹¹³¹ *Vann v. Rouse*, 94 N. Y. 401. *May v. Gillis*, 169 N. Y. 330, 62 N. ¹¹³² *Butler v. Kidder*, 87 N. Y. 98,

The application of the statute was held to be excluded, in a case where the premises were rendered untenable by a leak from a water pipe, by clauses in the lease exempting the landlord from liability for injury caused by water leaking or flowing from pipes or from any parts of the building, providing that there should be no reduction of rent during repairs except when necessitated by fire, suspending rent, if the premises became wholly untenable from fire, till the damage was repaired, and requiring redelivery at the end of the term in as good condition as at the beginning of the term, "reasonable use and wear and damage by fire excepted."¹¹³³ It was also held to be excluded by a provision in the lease that in case of fire the landlord should immediately repair, and that, if the landlord should decide to rebuild, the term should cease,¹¹³⁴ by particular provisions as to rebuilding and insurance,¹¹³⁵ and by a provision that the lease should terminate on a total destruction by fire, provided it did not result from the negligence of the lessee or his servants.¹¹³⁶

A provision, applicable in terms to a case in which the premises became untenable as a result of fire, was held to be applicable, so as to exclude the statute, when they became untenable as a result of the water used to extinguish a fire.¹¹³⁷

(e) **Premises made "untenable."** Several of the state statutes provide for a cessation of rent only if the premises are so injured or destroyed as to be "untenable." This term the courts have not attempted to define with any approach to accuracy. They seem ordinarily to have left to the jury the question whether the premises in the particular case had been rendered "untenable," without any statements as to the degree of inutility which would justify a finding that such a condition exists.¹¹³⁸ But it was held, as a matter of law, that the premises

per Andrews, J., quoted with approval in *May v. Gillis*, 169 N. Y. 330, 22 N. E. 385.

¹¹³³ *Butler v. Kidder*, 87 N. Y. 98.

¹¹³⁴ *Roman v. Taylor*, 93 App. Div. 449, 87 N. Y. Supp. 653; *Nimmo v. Harway*, 23 Misc. 126, 50 N. Y. Supp. 686.

¹¹³⁵ *Lehmeyer v. Moses*, 67 App. Div. 531, 73 N. Y. Supp. 1016; *Id.*, 174 N. Y. 518, 66 N. E. 1111.

¹¹³⁶ *Tocci v. Powell*, 9 App. Div. 283, 75 N. Y. St. Rep. 905, 41 N. Y. Supp. 511. And see *Weinberg v.*

Savitzky, 47 Misc. 132, 93 N. Y. Supp. 485; *Markham v. Stevenson Brew. Co.*, 104 App. Div. 420, 93 N. Y. Supp. 684.

¹¹³⁷ *Roman v. Taylor*, 93 App. Div. 449, 87 N. Y. Supp. 653.

¹¹³⁸ See *Vann v. Rouse*, 94 N. Y. 401; *Tallman v. Murphy*, 120 N. Y.

were not rendered untenable when fire occurred which merely burned a few fixtures, charred some joists and loosened some plaster, these injuries being reparable by the expenditure of a few dollars and the rental being eighteen hundred dollars a year.¹¹³⁹

(f) **Relinquishment of possession by tenant.** Under statutes providing that the tenant shall not be liable for rent after the building is injured or destroyed, and that he may thereupon surrender or relinquish possession, it is necessary, in order that the tenant may have the benefit of the statute, upon such injury or destruction, that he relinquish possession to the landlord.¹¹⁴⁰

It is not necessary that the tenant notify the landlord of his election to give up the premises, it being sufficient that he actually does give them up,¹¹⁴¹ but his relinquishment of possession is not sufficient for this purpose if his sub-tenant remains in possession, even against his will, since this is in law the tenant's possession.¹¹⁴² The landlord has a right to insist upon such relinquishment as a condition to the tenant's exemption from liability for rent, though he has already refused to accept the relinquishment.¹¹⁴³ In one case it is said that the tenant must not only quit, but must surrender possession to the landlord,¹¹⁴⁴ but

354, 24 N. E. 716; *Meserole v. Hoyt*, Y. 280; *Smith v. Kerr*, 108 N. Y. 31, 161 N. Y. 59, 55 N. E. 274, and post, 15 N. E. 70, 2 Am. St. Rep. 362; § 182 n (3). *Faron v. Jones*, 49 Misc. 47, 96 N.

So it was held to be for the jury whether premises were "untenantable" because a shed attached to the main building was so injured by a storm as to necessitate its removal by the building department, and whether the tenant's relinquishment of possession was on that account. *May v. Gillis*, 169 N. Y. 330, 62 N. E. 385. And evidence that the roof leaked to such an extent that water dripped upon the tenant's stock of goods whenever it rained was held to sustain a finding that the premises were untenable. *Weeber v. Hawes*, 80 Minn. 476, 83 N. W. 447, 81 Am. St. Rep. 275.

¹¹³⁹ *Wampler v. Weilmann*, 56 Minn. 1, 57 N. W. 157.

¹¹⁴⁰ *Johnson v. Oppenheim*, 55 N. Y. 280; *Smith v. Kerr*, 108 N. Y. 31, 161 N. Y. 59, 55 N. E. 274, and post, 15 N. E. 70, 2 Am. St. Rep. 362; *Faron v. Jones*, 49 Misc. 47, 96 N. Y. Supp. 316; *Roach v. Peterson*, 47 Minn. 291, 50 N. W. 80; *Gay v. Davey*, 47 Ohio St. 396, 25 N. E. 425, 8 L. R. A. 464, 21 Am. St. Rep. 840; *Danziger v. Falkenberg*, 46 N. Y. St. Rep. 331, 18 N. Y. Supp. 927; *Lansing v. Thompson*, 8 App. Div. 54, 40 N. Y. Supp. 425. See *Penn v. Kearny*, 21 La. Ann. 21.

¹¹⁴¹ *Fleischman v. Toplitz*, 134 N. Y. 349, 31 N. E. 1089.

¹¹⁴² *Johnson v. Oppenheim*, 12 Abb. Pr. (N. S.) 449, 43 How. Pr. 433, 34 N. Y. Super. Ct. (2 Jones & S.) 416; *Smith v. Sonnekalb*, 67 Barb. (N. Y.) 66.

¹¹⁴³ *Johnson v. Oppenheim*, 55 N. Y. 280.

¹¹⁴⁴ *Copeland v. Luttgen*, 17 Misc. 604, 40 N. Y. Supp. 653.

this, in view of the facts of the case, apparently means merely that his own departure from the premises is not sufficient if he places another in possession.

The tenant may, in New York, without losing his rights under the statute, remain in possession for a reasonable time, for the purpose of removing his effects or adjusting insurance thereon, and the question of what is such reasonable time is for the jury.¹¹⁴⁵ For the reasonable time during which he thus remains in possession he is, however, it seems, liable in use and occupation.¹¹⁴⁶

Under the New York statute, it has been decided, the landlord resumes possession of the premises, after destruction by fire, in the condition in which they were left by the fire, and the tenant is under no obligation to remove debris, although this consists of the remains of his own chattels on the premises.¹¹⁴⁷

In Mississippi, where the statute makes no reference to a relinquishment of possession by the tenant, but merely exempts him from liability for rent for buildings which have been destroyed, it was held that he was, after a destruction of one of several buildings on a farm leased, entitled to have the rent proportionally abated, without relinquishing possession.¹¹⁴⁸ In Connecticut the statute expressly exempts the tenant from liability for rent, though he continues his occupation, if the premises are so injured as to be unfit for occupancy.¹¹⁴⁹

(g) **Termination of tenancy.** The question whether the lease is absolutely terminated by the relinquishment of possession by the tenant on account of the destruction or untenable condition of the premises, necessarily depends upon the provisions of the particular statute. The Connecticut statute provides that if the premises again become fit for occupancy the tenant shall then pay rent, and this has been held to render him liable for the rent of a part of the premises after restoration by the landlord,

¹¹⁴⁵ *Zimmer v. Black*, 37 N. Y. St. Rep. 312, 14 N. Y. Supp. 107; *Bassett v. Dean*, 34 Hun (N. Y.) 250. ¹¹⁴⁷ *Fleischman v. Topplitz*, 134 N. Y. 349, 31 N. E. 1089.

¹¹⁴⁶ *Austin v. Field*, 7 Abb. Pr. (N. S.; N. Y.) 29; *Fleischman v. Topplitz*, 134 N. Y. 349, 31 N. E. 1089. ¹¹⁴⁸ *Taylor v. Hart*, 73 Miss. 22, 18 So. 546, 30 L. R. A. 716, 55 Am. St. Rep. 483.

¹¹⁴⁹ Gen. St. § 4045. See *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852. *See Stein v. Rice*, 23 Misc. 348, 51 N. Y. Supp. 320.

though the latter has leased the other part to another person,¹¹⁵⁰ and though the latter failed to restore the premises with the greatest possible expedition, the lessee having announced that he would not reoccupy the premises.¹¹⁵¹ The New Jersey statute provides for a cessation of the tenancy upon the "total destruction" of the premises¹¹⁵² and not upon a mere injury thereto.¹¹⁵³

Under the New York statute the relation of landlord and tenant is regarded as terminated by the tenant's relinquishment of possession upon the destruction of the premises.¹¹⁵⁴ But under the substantially similar statute of Minnesota, where the tenant resumed possession after the restoration of the premises, and paid rent at the former rate, this was held to show "that he elected to continue the tenancy,"¹¹⁵⁵ and it is quite evident that if a tenancy has once been terminated it cannot be revived at the election of one of the parties. This latter case may perhaps be reconciled with the New York cases just cited on the theory that the tenant's resumption of possession shows that his relinquishment was not under the statute, but was merely to enable the landlord to make repairs. But under this view of the case the tenant, so resuming possession, would seem to be liable for rent during the making of the repairs.

n. Untenantable condition of premises—(1) At common law. Since, as before stated, the landlord is under no obligation to the tenant as regards the condition of the premises and their fitness for the latter's use and occupation, either at the time of the lease or subsequently thereto, it is clear that the tenant should not be relieved from liability for rent, in the absence of an express stipulation in the lease or a statutory provision in that regard, by any defects in the premises,¹¹⁵⁶ and that this is so is attested by the numerous decisions at common law to the effect that even the destruction of the buildings will not have that

¹¹⁵⁰ *Miller v. Benton*, 55 Conn. 529, 15 N. E. 70, 2 Am. St. Rep. 362;
¹¹⁵¹ 13 Atl. 678, 3 Am. St. Rep. 70. *Fleischman v. Topplitz*, 134 N. Y. 349.

¹¹⁵² *Miller v. Benton*, 55 Conn. 529, 31 N. E. 1089.
¹¹⁵³ 13 Atl. 678, 3 Am. St. Rep. 70.

¹¹⁵⁴ See ante, note 1108. ¹¹⁵⁵ *Boston Block Co. v. Buffington*, 39 Minn. 385, 40 N. W. 361.

¹¹⁵⁶ *Booraem v. Morris*, 74 N. J. Law, 95, 64 Atl. 953. ¹¹⁵⁶ That the untenable condition of the premises is no defense to rent,

¹¹⁵⁴ *Smith v. Kerr*, 108 N. Y. 31, see *Elliott v. Aiken*, 45 N. H. 30;

effect.¹¹⁵⁷ In one state, however, that of Michigan, it is apparently the law that, without the aid of any statute, the tenant may be relieved from rent on account of defects in the leased premises rendering them undesirable for purposes of occupancy, or, as it is usually expressed, "untenantable," an expression which is perhaps adopted from the New York statute before quoted,¹¹⁵⁸ it not being found in the common law authorities. In that state it was decided that the tenant could remove from the premises and refuse to pay rent, when the house thereon was so poorly constructed that it was impossible to keep it warm, and the plumbing was so defective as to generate sewer gas.¹¹⁵⁹ This case is approved in a later decision in the same state, on the ground that there the unhealthy condition of the premises existed when the tenant entered, but it was said that the same rule did not apply when the premises became untenable by reason of inherent defects, provided they were habitable when demised, and it was accordingly decided that the tenant was liable for rent during repairs "made necessary by the uses and changes of the building during the time" the lessee and his agent had control of the premises under that and previous leases.¹¹⁶⁰ In another case in that state it was decided that a covenant by the lessee that he had received the premises in good condition involved in effect a covenant by the lessor that they were so, and that if they were not so there was a "failure of consideration" which constituted a defense to an action for rent, if the lessee relinquished possession.¹¹⁶¹

In a few other states an untenable condition is regarded as justifying an abandonment of the premises by the tenant and a refusal to pay further rent, provided there is a covenant on the part of the lessor to make repairs, which imposes on him or his transferee the duty of remedying that condition.¹¹⁶² In England,

Reeves v. McComeskey, 168 Pa. 571, 67 How. Pr. 76, which was properly 32 Atl. 96, and ante, § 86 a, at notes a case of eviction by the landlord's 4-10; § 87 a. misuse of adjoining premises. See

¹¹⁵⁷ See ante, § 182 m (1).

¹¹⁵⁸ See ante, § 182 m (8).

¹¹⁵⁹ Leonard v. Armstrong, 73 Mich. 577, 41 N. W. 695. The court cites in support of its decision

merely Bradley v. De Goicouria, 12 Daly (N. Y.) 393, 14 Abb. N. C. 53,

post, note 1197, and post, § 185 f (8), note 94 a.

¹¹⁶⁰ Petz v. Voight Brewery Co., 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531.

¹¹⁶¹ Tyler v. Disbrow, 40 Mich. 415. ¹¹⁶² See post, § 182 r (2).

and it seems in Massachusetts also, it having been decided that the lease of a furnished house is subject to an implied condition that it shall be reasonably fit for habitation,¹¹⁶³ if it is not so fit at the commencement of the tenancy, the lessee may immediately relinquish possession and refuse to pay rent.¹¹⁶⁴

As before stated, an eviction, actual or constructive, is a defense to the claim for rent,¹¹⁶⁵ and in some states this doctrine has been pushed to the extent that mere nonaction on the part of the landlord, consisting in his failure to make repairs for the purpose of removing unpleasant or deleterious conditions on the premises leased or on those adjoining them, not actually produced by him, when followed by the tenant's relinquishment of possession, has been regarded as constituting an eviction for this purpose.¹¹⁶⁶ So far as such conditions may in any case be actually produced by the landlord, the doctrine of constructive eviction is properly applicable,¹¹⁶⁷ but the extension of the doctrine to the case of a mere failure to make repairs on the premises leased is, it is conceived, difficult to justify on principle. Occasionally a mere change in the mode of utilization of adjoining premises by the landlord, rendering the leased premises less desirable for the particular purpose for which the lessee took the lease, when followed by the tenant's relinquishment of possession, has been regarded as calling for an application of the same doctrine in favor of the tenant.¹¹⁶⁸

(2) **Under statutes.** Usually the contention that the tenant is relieved from liability for rent, by reason of the existence of defects in the premises, has been based upon one of the local statutes referred to above, as affording such relief in case of the destruction of the premises. The New York statute has been the subject of numerous decisions in this regard, not apparently always harmonious in their nature, and there are occasional decisions in other states construing the local statute in this regard.

The provision of the New York statute, relieving the tenant from liability for rent in case the premises "be destroyed or be so injured by the elements or any other cause as to be untenable and unfit for occupancy," was originally construed as refer-

¹¹⁶³ See ante, § 86 e.

¹¹⁶⁶ See post, § 185 f (4).

¹¹⁶⁴ See *Wilson v. Finch Hatton*, 2

¹¹⁶⁷ See post, § 185 (a).

Exch. Div. 336.

¹¹⁶⁸ See post, § 185 f (8), at note

¹¹⁶⁵ See ante, § 182 e.

100.

ring "to a sudden and total destruction by the elements, acting with unusual power, or by human agency," or "to a case of injury to the premises, short of a total destruction, occasioned in the same way."¹¹⁶⁹ The same view has been taken in Ohio of a substantially similar provision, it being said that "the evident design of the act was to relieve the ignorant and inadvertant who might fail to protect themselves by special provision in their lease against the evil and mischief of the common law, which held the tenant liable for rent although the demised premises were destroyed by fire, flood, tempest or otherwise, unless he was exempt from liability by some express covenant in his lease," and that "the statute is designed rather to protect the lessee against an unexpected and unusual action of the elements or of human forces, causing a total destruction of the demised premises or an injury thereto only short of a total destruction, which the parties ignorantly or inadvertantly failed to anticipate and provide against when the demise was made."¹¹⁷⁰ So, of the like provision of the Connecticut statute, it is said that "it applies only to cases where the building becomes untenable by reason of some sudden and unexpected calamity; as where it is wholly or partially destroyed by fire, water, or by a mob, or other like cause,"¹¹⁷¹ and not where the condition is a result of a failure to make ordinary repairs.¹¹⁷²

The above view of the New York statute, adopted in a subsequent decision by the highest court, in which the fact that the premises were infected with disease was held not to involve an "injury" within the statute,¹¹⁷³ seems to have been abandoned in other decisions, though without, ordinarily, any express statement to that effect,¹¹⁷⁴ and in several decisions a condition of

¹¹⁶⁹ *Suydam v. Jackson*, 54 N. Y. Ohio St. 662, 52 Am. Rep. 99, per 450, 13 Am. Rep. 611. The opinion Dickman, J.

of Earl, C., proceeds: "If the legis- ¹¹⁷¹ *Hatch v. Stamper*, 42 Conn. 28.

lature had intended to provide that ¹¹⁷² *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852.

the tenant should cease to be liable ¹¹⁷³ *Edwards v. McLean*, 122 N. Y. 302, 25 N. E. 483.

for rent when the premises from ¹¹⁷⁴ In the majority opinion in *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716, it is said that the state-
any cause became so damaged or see *Lansing v. Thompson*, 8 App. ment in *Suydam v. Jackson*, 54 N. Y.
out of repair as to be untenable, 450, 3 Am. Rep. 611, in this regard,

it would have been easy to have ex-
pressed the intent in apt and proper
language." As following this case,
Div. 54, 40 N. Y. Supp. 425. ¹¹⁷⁰ *Hilliard v. Gas Coal Co.*, 41 was not called for by the facts of

the premises rendering them unsuitable for occupancy has been regarded as entitling the tenant to relief from rent, though the condition was evidently not the result of sudden and unexpected casualty, but rather of mere neglect on the part of the lessor or of a third person. Thus, a damp condition resulting from the percolation of water through the walls of the building,¹¹⁷⁵ or a damp and disagreeable condition created by a flow of water or drainage from adjoining premises,¹¹⁷⁶ has been regarded as within the statute, that is, as an injury "by the elements or other cause," as these words are used therein. And a like decision has been made as regards an unhealthy and disagreeable condition produced by effluvia from a sewer.¹¹⁷⁷

The New York statute does not apply, it is said, in a late case, if the defect existed before the lease was made,¹¹⁷⁸ and in accordance with this view is an earlier decision that the tenant cannot relinquish possession, and so terminate his liability for rent, on account of noxious gases and odors resulting from defects in the plumbing, which existed at the time of the lease.¹¹⁷⁹

the case, and the opinion is apparently expressed that any condition affecting the premises which can be regarded as rendering them "untenantable," if not caused by the lessee's failure to make ordinary repairs, is within the statute. The decision is not, however, rested on this ground, but rather on the principle of eviction. This, it has been said, "was a case of an apartment house, and the injuries to the demised apartment were from affirmative causes outside such apartment but inside the building or appurtenant to it. The tenant had no control over them. They were chargeable to the landlord and were such a breach of the covenant of quiet enjoyment (which is implied if not expressed) as amounted to an eviction." Per Gaynor, J., in *Huber v. Ryan*, 26 Misc. 428, 56 N. Y. Supp. 135.

¹¹⁷⁵ *Meserole v. Hoyt*, 161 N. Y. 59, 55 N. E. 274.

¹¹⁷⁶ *Vann v. Rouse*, 94 N. Y. 401.

¹¹⁷⁷ *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659. See *Kraus v. Fife*, 120 App. Div. 490, 105 N. Y. Supp. 384.

¹¹⁷⁸ *Meserole v. Hoyt*, 161 N. Y. 59, 55 N. E. 274; *Prahar v. Tousey*, 93 App. Div. 507, 87 N. Y. Supp. 845.

¹¹⁷⁹ *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236. This case does not refer to the statute of 1860, but is based wholly on the authorities to the effect that a landlord is under no obligation to the tenant as regards the condition of the premises at the time of the lease.

To the same effect, that defects existing at the time of the demise are not ground for relinquishment of possession and relief from rent, see *Zerega v. Will*, 34 App. Div. 488, 54 N. Y. Supp. 361; *Watson v. Almirall*, 61 App. Div. 429, 70 N. Y. Supp. 662; *Bloomer v. Merrill*, 1 Daly (N. Y.) 485, 29 How. Pr. 259; *Hays v. Moody*, 2 N. Y. Supp. 385; *Bon v. Watson*, 24

In the former of these cases, however, it is considered that the percolation of water into the cellar of the premises leased, making them unhealthy, is within the scope of the statute,¹¹⁸⁰ although, it would seem, this must have been the result of defects in construction existing at the time of the lease. And in another recent case, where the tenant of a room in a building relinquished possession owing to the presence of an offensive sewer under the building, which was there at the time of the lease, the tenant was relieved from liability for rent on the ground that "by its (the sewer's) defective construction, it became a source of offense and possible danger, and the efforts which the tenant made to keep it in clean and reasonably fit condition were nullified by the refusal of the landlord to remedy the defect in construction."¹¹⁸¹

The New York statute does not apply when the untenable condition is the result of acts on the part of the landlord which it was, at the time of the lease, fully understood that he was to do.¹¹⁸²

N. Y. St. Rep. 113, 4 N. Y. Supp. 872; *Dexter v. King*, 28 N. Y. St. Rep. 750, 8 N. Y. Supp. 489; *Sherman v. Ludin*, 79 App. Div. 37, 79 N. Y. Supp. 1066; *Flannery v. Simons*, 47 Misc. 123, 93 N. Y. Supp. 544.

¹¹⁸⁰ *Meserole v. Hoyt*, 161 N. Y. 59, 55 N. E. 274. In the decision of this case in the intermediate appellate court (*Meserole v. Sinn*, 34 App. Div. 33, 53 N. Y. Supp. 1072), it is said that such percolation of water involves an injury "by the elements" within the statute. If "injury by the elements" thus includes the action of water causing dampness, it would also, it seems, include the action of air causing decay, and in fact it would include approximately any deterioration of condition not directly the result of human interposition.

¹¹⁸¹ *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659. This case does not, however,

refer to the statute, but is in terms decided on the ground that the offensive condition of the sewer effected an eviction. Since the condition of the sewer was the result of its use by the landlord, it seems to constitute a clear case of eviction (see post, § 185 f 8), but it does not seem that the mere "refusal of the landlord to remedy the defects in construction" would be sufficient for this purpose. See next paragraph of text. In *Meserole v. Sinn*, 34 App. Div. 33, 53 N. Y. Supp. 1072, it is said that in *Sully v. Schmitt*, supra, "the legal effect of the statute was under consideration." Owing to the looseness with which the term "eviction" is frequently applied by the courts, it is not always possible to say whether, when the term eviction is used, an eviction at common law is intended or an "untenable" condition under the statute.

¹¹⁸² *Alsheimer v. Krohn*, 45 How.

Under the California statute, authorizing the tenant, on the landlord's refusal to repair, to make the necessary repairs, not to exceed one month's rent, or to vacate the premises, the tenant, if he remains in possession after the landlord's refusal to repair, without himself making the repairs, cannot refuse to pay rent,¹¹⁸³ nor can he relinquish possession and thereby relieve himself from liability for rent without first giving notice to the landlord to repair.¹¹⁸⁴

It has been decided, under the Minnesota statute,¹¹⁸⁵ that a tenant from month to month, by retaining possession after the first of any month, is not precluded from relinquishing possession during the month and refusing to pay rent, if he does so upon the occurrence of conditions rendering the premises untenable, which did not exist at the commencement of the month,¹¹⁸⁶ although he is so precluded if the conditions complained of did exist at the commencement of the month.¹¹⁸⁷

In view of the fact that the New York statute, and other statutes modeled thereon, apply in terms only when a "building" is "destroyed or so injured" as to be untenable, it is difficult to see how, in any case, the untenable condition of the premises can be ground for relieving the tenant unless this condition results from the destruction of or injury to the building. On this view, the presence of odors or dampness, or the occasional flow of water on the premises, although this renders the premises untenable, would not bring the case within the statute, unless the premises leased are by one of such causes so injured as to be untenable. That is, there should, by the terms of the statute, be an injury to the building, and injury to the tenant's right of enjoyment merely would seem to be insufficient. But apparently opposed to this view are decisions that dampness caused by percolation through the walls,¹¹⁸⁸ and the occasional flow of water on the demised premises without, apparently, causing any

Pr. (N. Y.) 127, where the tenant agreed to retain possession and pay rent, although knowing that the house on the premises was to be removed.

¹¹⁸³ *Moroney v. Hellings*, 110 Cal. 219, 42 Pac. 560.

¹¹⁸⁴ *Green v. Redding*, 92 Cal. 548, 28 Pac. 599.

¹¹⁸⁵ See ante, note 1103.

¹¹⁸⁶ *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348; *Damkroger v. Pearson*, 74 Minn. 77, 76 N. W. 960.

¹¹⁸⁷ *Flint v. Sweeney*, 49 Minn. 509, 52 N. W. 136.

¹¹⁸⁸ *Meserole v. Hoyt*, 161 N. Y. 59, 55 N. E. 274.

particular injury to the premises themselves, but merely affecting the comfort of occupancy,¹¹⁸⁹ bring the case within the statute, so as to afford relief to the tenant.

In order that the tenant may avail himself of the "untenantable" condition of the premises, under the statute, as a defense to rent, although this condition is the result not of unforeseen casualty, but of causes of a gradual operation, it is necessary, it seems, as when the premises are destroyed by fire,¹¹⁹⁰ that the tenant relinquish possession of the premises,¹¹⁹¹ this according with the language of the statute.

The fact that the premises are rendered untenable by the use made of adjoining property by a third person, without the connivance of the landlord, has been decided not to bring the case within the New York statute so as to enable the tenant to relinquish possession.¹¹⁹² So far as the untenable condition may be caused by the maintenance by the landlord of a nuisance, properly so termed, on the premises adjoining those leased, the tenant, if he leaves on account thereof, may properly, it seems, be regarded as evicted, and so relieved from liability for rent, without reference to the existence *vel non* of any statutory provision.¹¹⁹³

(3) **Specific conditions.** Among specific conditions affecting the utility or enjoyability of the premises, which have been at different times asserted as a defense to a claim for rent, that arising from the presence of sewer gas has perhaps most frequently been the subject of consideration. In Michigan it has apparently been decided, without reference to any statute, that the tenant has the right to assert this as a defense, if the gas is caused by defects in the plumbing which existed at the time of the lease.¹¹⁹⁴ In New York, on the other hand, it has been

¹¹⁸⁹ Vann v. Rouse, 94 N. Y. 401; pare Tallman v. Murphy, 120 N. Y. Damkroger v. Pearson, 74 Minn. 77, 345, 24 N. E. 716, ante, note 1174. 76 N. W. 960.

¹¹⁹⁰ See ante, § 182 m (8) (f).

¹¹⁹³ See post, § 185 f (8), at notes 95-99.

¹¹⁹¹ See Davis v. Banks, 32 N. Y. Super. Ct. (2 Sweeney) 184; Goldberg v. Lloyd, 110 N. Y. Supp. 530.

¹¹⁹² Floyd-Jones v. Schaan, 109 N. Y. Supp. 362 (by two judges to one); Brick v. Favilla, 51 Misc. 550, 101 N. Y. Supp. 970 (semble). Com-

¹¹⁹⁴ Leonard v. Armstrong, 73 Mich. 577, 41 N. W. 695, ante, note 1159. But sewer gas, or any other objectionable condition, was held not to be ground for relieving the tenant from rent, unless the landlord had notice of its presence, or

decided that the presence of such gas does not give the tenant this right, if the defects in the plumbing existed at the time of the lease.¹¹⁹⁵ It has ordinarily been decided, in the lower courts of the latter state, without reference to whether the defects in the plumbing existed at the time of the lease, that sewer gas, caused by defects in the plumbing on the premises leased, did not justify the tenant in vacating and refusing to pay rent,¹¹⁹⁶ while on the other hand, if the defective plumbing was not on the leased premises but was in a part of the building retained by the landlord, there was a constructive eviction by reason of the landlord's maintenance of a nuisance of that character on premises adjacent to those leased, if the tenant left as a result of such nuisance.¹¹⁹⁷ In one case, however, it seems to have been decided that the presence of noxious odors on the premises, caused by defects in the plumbing, resulting during the tenancy from external causes, made the premises untenable within the statute, without reference to whether the defects were on the premises leased or in that part of the building retained by the landlord;¹¹⁹⁸ and in another, that where the landlord, by agree-

unless the tenant's vacation of the premises was on account thereof. *Holmes v. Wood*, 88 Mich. 435, 50 N. W. 323.

¹¹⁹⁵ *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236, afg. 15 Daly, 431, 7 N. Y. Supp. 902.

¹¹⁹⁶ *Coulson v. Whiting*, 14 Abb. N. C. (N. Y.) 60; *Sutphen v. Seebas*, 14 Abb. N. C. (N. Y.) 67, note, 12 Daly, 139; *Chadwick v. Woodward*, 13 Abb. N. C. (N. Y.) 441.

¹¹⁹⁷ *Bradley v. De Goicouria*, 12 Daly (N. Y.) 393, 67 How. Pr. 76, 14 Abb. N. C. 53; *St. Michael's P. E. Church v. Behrens*, 13 Daly (N. Y.) 548; *Marks v. Dellaglio*, 27 Misc. 652, 59 N. Y. Supp. 707; *Id.*, 56 App. Div. 299, 67 N. Y. Supp. 736; *McCurdy v. Wyckoff*, 73 N. J. Law, 368, 63 Atl. 992. See *Sutphen v. Seebas*, 14 Abb. N. C. (N. Y.) 67, note, 12 Daly, 139, and the comments in *Daly v. Wise*, 15 Daly, 431, 7 N. Y. Supp.

902, on the case of *Bradley v. De Goicouria*, supra.

In *Krausi v. Fife*, 120 App. Div. 490, 105 N. Y. Supp. 384, it was decided, without mention of the statute, that there was an eviction if the tenant of an apartment relinquished possession because the plumbing of the house was so defective that waste water from another apartment flowed into the bath tub, and that sewer gas was emitted, and no hot water was obtainable from the faucet.

¹¹⁹⁸ *Lathers v. Coates*, 18 Misc. 231, 41 N. Y. Supp. 373. The decision might well have been based, as are the cases in the preceding note, on the theory of an eviction by the landlord's maintenance of a nuisance on his own premises, since the defects in the plumbing were throughout the building.

ment, put sewer pipes and drains in the dwelling leased, which were so defectively constructed as to render the premises unhealthy, his refusal to remedy the defects upon request amounted to a constructive eviction.¹¹⁹⁹

The dampness of the leased premises does not in itself properly constitute an eviction,¹²⁰⁰ though if this is the result of particular conditions maintained by the landlord on adjoining premises, he may be regarded as maintaining a nuisance, which, if resulting in the tenant's relinquishment of possession, effects an eviction excusing the payment of rent.¹²⁰¹ And it seems to have been decided that dampness, resulting from the percolation of water into the premises, may cause an untenable condition within the meaning of the New York statute.¹²⁰² A flow of water or of drainage upon the leased premises, owing to defects in the plumbing of that part of the building of which the lessor retains the control, has been decided to constitute an "untenable" condition within this statute,¹²⁰³ as well as within the similar statute of Minnesota,¹²⁰⁴ though in these cases the tenant might as well, it seems, have been relieved from rent

¹¹⁹⁹ *Thalheimer v. Lempert*, 17 N. Y. St. Rep. 346, 1 N. Y. Supp. 470. The case cites *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117, to the effect that "when the premises become untenable by reason of the failure of the lessor to do what is lawfully required of him, the effect is eviction which permits the lessee to leave them." This is not a correct statement of the decision in the latter case, which was that if the leased premises were rendered unsafe by the condition of the adjoining premises controlled by the lessor, it was immaterial whether this condition was the result of the act of the lessor in depositing water and filth there, or of his "default" in failing to remove it. This seems to involve merely a decision that the maintenance of a nuisance may consist of an act of omission as well as of commission.

¹²⁰⁰ *Truesdell v. Booth*, 6 Thomp. & C. (N. Y.) 379, 4 Hun, 100. That dampness is no defense to the claim for rent, see *Murray v. Albertson*, 50 N. J. Law, 167, 13 Atl. 394, 7 Am. St. Rep. 787, where the question of the obligations of a lessor at common law as to the condition of the premises is fully considered.

¹²⁰¹ *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117, ante, note 1199.

¹²⁰² *Meserole v. Hoyt*, 161 N. Y. 59, 55 N. E. 274.

¹²⁰³ *Vann v. Rouse*, 94 N. Y. 401; *St. Michael's Protestant Episcopal Church v. Behrens*, 13 Daly, 548, 1 N. Y. St. Rep. 627, 10 Civ. Proc. R. 181; *Fash v. Kavanagh*, 24 How. Pr. (N. Y.) 347; *Goldberg v. Lloyd*, 110 N. Y. Supp. 530.

¹²⁰⁴ *Damkroger v. Pearson*, 74 Minn. 77, 76 N. W. 960.

on the ground of a constructive eviction by the maintenance of a nuisance by the landlord.¹²⁰⁵

There are in New York occasional *dicta*,^{1205a} and also two decisions by an intermediate court,^{1205b} that although there is no express contract by the landlord to furnish heat, nevertheless, if the means of supplying heat are, as ordinarily is the case when an apartment is leased, in the possession and control of the landlord, there is an obligation upon him to supply heat, to the extent that the tenant is entitled to relinquish possession and refuse to pay rent if heat is not supplied.

It has apparently been decided in New York that where a building was shaken by explosions cracking the walls and ceilings and breaking articles therein, and the building inspector declared the building to be dangerous, and the rooms were at times filled with smoke and coal gas so as to make the inmates sick, it was a question for the jury whether an apartment in the building was "untenantable" and "unfit for occupancy" so as to authorize the tenant to vacate under the statute.¹²⁰⁶ And a like view

¹²⁰⁵ See post, § 185 f (8).

^{1205a} *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Ryan v. Jones*, 2 Misc. 65, 20 N. Y. Supp. 842; *Jackson v. Paterno*, 58 Misc. 201, 108 N. Y. Supp. 1073. In *Jackson v. Paterno*, 128 App. Div. 474, 112 N. Y. Supp. 924, while it is stated that the tenant of an apartment may relinquish possession for this cause, it is at the same time decided that, not having done so, he could not sue as for breach of a covenant to heat, there being no express agreement to furnish it.

In *Ryan v. Jones*, 2 Misc. 65, 20 N. Y. Supp. 842, supra, it is said that the circumstances "constituted the adequate supply of heat by the landlord an integral part of his covenant that during the term demised the tenant may quietly have, hold and enjoy the premises; and that for the breach of it, whether due to acts of omission or of commission, whereby the tenant is substantially

deprived of his right to their beneficial enjoyment, he may abandon the premises and successfully interpose as a defense to a demand for subsequently accruing rent that he was evicted by the landlord." In reference to this statement it may be said that, apart from the question of the propriety of calling such a mere act of omission on the part of the landlord an "eviction," the covenant for quiet enjoyment has never elsewhere been regarded as entitling the tenant to any particular physical comforts and conveniences apart from his exemption from disturbances.

^{1205b} *O'Gorman v. Marby*, 18 Misc. 228, 41 N. Y. Supp. 521; *Butler v. Newhouse*, 85 N. Y. Supp. 373.

¹²⁰⁶ *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716. An alternative ground stated for the decision is an eviction by the maintenance of a nuisance by the landlord in the shape of a defective water tank

was taken when there was a continuous and strong smell of smoke and burning wood, which made the tenant of an apartment in the building and his family apprehensive of fire and deprived them of sleep, it being the result of the mode of placing the steam boiler in the building.¹²⁰⁷ On the other hand, the fact that the premises are infected with disease does not, it has been held, bring the case within the New York statute, though this renders them temporarily unsafe for occupancy,¹²⁰⁸ nor does it involve an eviction, actual or constructive.¹²⁰⁹

Inconvenience of an ordinary character, experienced by the tenant of an apartment, as where the janitor was neglectful and troublesome, and the water supply was occasionally stopped owing to a break in a pump, was held not to justify the tenant in leaving.¹²¹⁰ And the same view was taken of deterioration in the management of a restaurant in the building, which was not referred to in the lease, though this forbade cooking in the apartment.¹²¹¹ The presence of bugs on premises leased for residence purposes has likewise been so regarded.¹²¹²

o. Unfitness of premises for particular purpose. The "untenantable" condition of the premises which, as above stated, will in some states relieve the tenant from liability for rent, apparently refers to a condition of the premises rendering them unsuitable for the purposes which the landlord had reason to suppose the lessee had in view in taking the lease.¹²¹³ Apart from

which caused the explosions, and the disease. The court says that of defective heating arrangements which caused the smoke and gas complained of (see ante, note 1174), and this seems sufficient for the purpose of the decision.

¹²⁰⁷ Tallman v. Earle, 3 Misc. 6, 23 N. Y. Supp. 17.

¹²⁰⁸ Edwards v. McLean, 122 N. Y. 302, 25 N. E. 483.

¹²⁰⁹ Majestic Hotel Co. v. Eyre, 53 App. Div. 273, 65 N. Y. Supp. 745. There an outbreak of disease occurred in a hotel in which the defendant had taken a lease of an apartment, and the landlord was guilty of no negligence in admitting or in preventing the spread of

actual negligence on his part in permitting the introduction of contagion might be regarded as an eviction, as might the omission to take precautions to prevent its spread through parts of the building of which he retained control.

¹²¹⁰ Humes v. Gardner, 22 Misc. 333, 49 N. Y. Supp. 147.

¹²¹¹ Gale v. Heckman, 16 Misc. 376, 38 N. Y. Supp. 85.

¹²¹² Pomeroy v. Tyler, 9 N. Y. St. Rep. 514; Jacobs v. Morand, 110 N. Y. Supp. 208.

¹²¹³ In Adams v. Werner, 120 Mich. 432, 79 N. W. 636, it is said that where the continued use of a build-

the statutes and decisions referred to there are a few cases in which, without the use of the expression "untenantable," the effect of the unsuitability of the premises to the lessee's purposes as a defense to rent has been the subject of decision, and these may here be appropriately referred to.

The general rule, before stated,¹²¹⁴ that the landlord owes no obligation to the tenant as to the condition of the premises, would seem to control in this regard. It has accordingly been decided that it is no defense to the claim for rent that, owing to statutory or municipal regulations, the lessee cannot carry on the particular business for which he took the lease,¹²¹⁵ and this has been decided to be so, even though the lease expressly prohibited the use of the premises for any other purpose.¹²¹⁶ And so, having agreed to pay rent, the lessee cannot refuse to do so because the water in a spring on the premises becomes polluted, though he took the lease in order to obtain a supply of pure water,¹²¹⁷ nor is he relieved from liability by failure of the supply of water by which the land is irrigated, so as to render it uncultivable.¹²¹⁸ Likewise, the fact that access to the water front from the leased premises is cut off by the action of the municipal authorities constitutes no defense to the claim for rent.¹²¹⁹

One who takes a lease, with the right of extracting a particular mineral from the land, is not relieved from rent because none of such mineral is found.¹²²⁰ And if one has stipulated to pay a

ing "for the purpose for which it is rented" is made practically impossible by the fault of the landlord, the tenant may terminate the lease. Compare cases cited ante, notes 1159-1161. In this case the decision might have been based on the theory of eviction, since the landlord himself injured the roof so as to expose the interior to rain and snow.

¹²¹⁴ See ante, § 87 a.

¹²¹⁵ *Kerley v. Mayer*, 10 Misc. 718, 31 N. Y. Supp. 818; *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966; *Baughman v. Portman* (Ky.) 14 S. W. 342; *Samuel v. Scott*, 13 Phila. (Pa.) 64.

¹²¹⁶ *Houston Ice & Brew. Co. v.*

Keenan, 99 Tex. 79, 13 Tex. Ct. Rep. 251, 88 S. W. 197.

¹²¹⁷ *Jones v. Springfield Water-works Co.*, 65 Mo. App. 388.

¹²¹⁸ *Stevens v. Wadleigh*, 6 Ariz. 351, 57 Pac. 622.

That the building threatened to fall when the lessee used it for storage purposes, for which it evidently was unfit, did not justify him in relinquishing possession and refusing to pay rent. *Murrell v. Jackson*, 33 La. Ann. 1341.

¹²¹⁹ *Lyman v. Snarr*, 9 U. C. C. P. 104.

¹²²⁰ *Abbot v. Smith*, 19 D. C. (8 Mackey) 600.

A lease of land "upon which is

certain royalty on the minerals mined to aggregate at least a minimum rent, he must pay such rent, though he cannot mine sufficient to equal it at the rate of royalty named.¹²²¹

The fact that premises adjoining those leased, belonging to a person other than the lessor, are so improved by the erection of buildings as to render the premises leased less commodious or less suitable for the purposes of the tenant under the lease, does not enable him to relinquish possession and refuse to pay rent.¹²²² He takes his lease subject to the possibility of such a contingency, as would a grantee in fee. In a number of cases, the fact that the use made of adjoining premises by the landlord is such as to interfere to some extent with the use of the premises for the purpose for which the lease was obtained has been regarded as justifying the tenant in relinquishing possession, and in asserting an eviction in defense to a claim for rent, and in some cases a mere cessation by the landlord of his use of the adjoining premises in a particular way, operating to the disadvantage of the tenant, has been regarded as justifying an abandonment by the latter. These cases will be referred to in the course of our discussion of the subject of eviction.¹²²³

p. **Lack of repair.** We will in a subsequent place,^{1223a} consider the question whether the noncompliance by the lessor with a covenant on his part to make repairs justifies the tenant in refusing to pay rent. We will now consider whether, in the absence of any such covenant by the lessor, the lack of necessary repairs upon the premises can in any case justify such action on the part of the tenant.

If the duty of repair is assumed by the tenant, by the express terms of the lease or by a valid extrinsic agreement, he cannot, it seems clear, repudiate his obligation to pay rent on the ground

an iron bank" does not involve a warranty that there is merchantable iron on the bank, so as to relieve from rent if there is no such iron. *Clark v. Midland Blast Furnace Co.*, 21 Mo. App. 58.

¹²²¹ *Bute v. Thompson*, 13 Mees. & W. 487; *McDowell v. Hendrix*, 67 Ind. 513. But the lease may call for a different construction. See *Smiley v. McLaughlin*, 138 Mass. 363.

¹²²² *Johnson v. Oppenheim*, 55 N.

Y. 280; *Hilliard v. New York & Cleveland Gas Coal Co.*, 41 Ohio St. 662, 52 Am. Rep. 99; *McMullen v. Moffit*, 68 Ill. App. 160; *Baylies v. Philadelphia & Reading Coal & Iron Co.*, 32 N. Y. St. Rep. 315, 10 N. Y. Supp. 316; *Seymour v. Hughes*, 55 Misc. 248, 105 N. Y. Supp. 249; *Hazlett v. Powell*, 30 Pa. 293.

¹²²³ See post, § 185 f (8).

^{1223a} See post, § 182 r (2).

of an untenantable condition of the premises which would not have existed had he performed his agreement.¹²²⁴

In case neither the landlord nor the tenant agrees to make repairs, the duty of making repairs to the extent of keeping the premises wind and water tight seems to be, by the weight of authority, as we have before seen, upon the tenant,¹²²⁵ though in some cases the obligation of the tenant as regards the making of repairs is differently expressed, as when it is said that he has the burden of making "ordinary repairs."¹²²⁶ So far as the tenant is by law under an obligation to repair, the absence of repairs can evidently not excuse him from the payment of rent. Accordingly, it is said that the tenant cannot relinquish possession and so relieve himself from liability for rent, by force of the New York statute,¹²²⁷ merely because of the lack of "ordinary repairs" to the premises.¹²²⁸ On the other hand, in one or two cases in New York, when the lease contained no covenant on the part of either of the lessor or lessee to make repairs, the lessee or his assignee was regarded as entitled to relinquish possession, and so relieve himself from liability for rent, on account of an untenantable condition which might have been prevented by the prompt making of repairs, the necessary repairs being, however, it seems, of an extraordinary and not of an ordinary character.¹²²⁹ These cases seem to be to the effect that there is

¹²²⁴ *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172; *Thomas v. Nelson*, 69 N. Y. 118; *Crawford v. Redding*, 8 Misc. 306, 28 N. Y. Supp. 733; *Sutphen v. Seabas*, 12 Daly (N. Y.) 139, 14 Abb. N. C. 67, note; *Goldberg v. Lloyd*, 110 N. Y. Supp. 530. See *Huber v. Baum*, 152 Pa. 626, 26 Atl. 101.

¹²²⁵ See ante, § 113, at note 893.

¹²²⁶ See ante, § 113, at notes 877-879.

¹²²⁷ See ante, note 1101.

¹²²⁸ *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Suydam v. Jackson*, 54 N. Y. 450, 13 Am. Rep. 611; *Meserole v. Sinn*, 34 App. Div. 33, 53 N. Y. Supp. 1072; *Thalheimer v. Lempert*, 17 N. Y. St. Rep. 346, 1 N.

Y. Supp. 470; *Sherman v. Ludin*, 79 App. Div. 37, 79 N. Y. Supp. 1066.

In Connecticut, likewise, it is said that "the statute manifestly has no reference to ordinary repairs, such as the lessee at common law is bound to make." *Hatch v. Stamper*, 42 Conn. 28. The opinion goes on, however, to state that the statute applies only when the building becomes untenantable by reason of some sudden and unexpected calamity. See ante, note 1171.

In *Oakley v. Loening*, 8 Misc. 302, 28 N. Y. Supp. 735, the duty to make all repairs on the leased premises is regarded as being upon the tenant, so that he cannot abandon for lack of repairs.

¹²²⁹ *Meserole v. Hoyt*, 161 N. Y.

a certain class of repairs, not "ordinary," the landlord's failure to make which, upon the premises leased, will relieve the tenant from liability for rent, provided there exists, in the particular jurisdiction, a statute making an untenable condition of the premises ground for nonpayment of rent, and provided further there exists, by reason of the failure to make such repairs, an "untenable" condition.¹²³⁰ On the other hand, if the continuance of the untenable condition results from the failure to make "ordinary" repairs, or if it could be removed by the making of such repairs, the fault is, it seems, that of the tenant, and he is not entitled to relief from rent. As to what are ordinary repairs which the tenant is bound to make, the cases give little satisfaction. It has been decided that the mending of leaks in the roof involves repairs of this character,¹²³¹ while a different view has been taken with regard to the repair of defects in the original construction of water and heating appliances, put in by the landlord under special agreement with the tenant.¹²³² Repairs necessary to render the premises wind and water tight are, it seems, for the tenant rather than the landlord to make.¹²³³

In a number of the cases in which the tenant has been relieved

59, 55 N. E. 274 (percolation of water through walls); *Thalheimer v. Lempert*, 17 N. Y. St. Rep. 346, 1 N. Y. Supp. 470 (sewer gas from defective plumbing); *Lathers v. Coates*, 18 Misc. 231, 41 N. Y. Supp. 373 (ditto). In the last case it is decided that if the landlord fails to make repairs with reasonable diligence on being notified by the tenant that he will leave if the repairs are not made, he cannot, by commencing repairs before the tenant has in fact left, deprive him of the right to leave.

¹²³⁰ See *Prior v. Sanborn County*, 12 S. D. 86, 80 N. W. 169, construing the local statute, ante, note 1112.

¹²³¹ *Lynch v. Sauer*, 16 Misc. 1, 37 N. Y. Supp. 666. And see, to this effect, the remarks in *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716, upon the case of *Suydam v. Jackson*,

54 N. Y. 450, and also the case of *Hatch v. Stamper*, 42 Conn. 28. In *Flint v. Sweeney*, 49 Minn. 509, 52 N. W. 136, it seems to be considered that an untenable condition of the premises resulting from leaks in the roof was ground for the tenant's abandonment, presumably under the statute.

¹²³² *Thalheimer v. Lempert*, 17 N. Y. St. Rep. 346, 1 N. Y. Supp. 470. It is there said by Bradley, J., that ordinary repairs "are those of restoration, and such as are required to preserve the property in the condition it was placed by the landlord, with proper allowance for depreciation by use and the effects of time upon it. This does not embrace the modification or completion, if uncompleted, or defective construction."

¹²³³ See ante, § 113.

from rent, on account of the untenable condition of the premises, this condition was the result of a failure to make repairs, not on the leased premises, but on adjoining premises, usually other parts of the same building.¹²³⁴ As to such repairs, the tenant is under no obligation, and consequently no question can arise as between his duty to make repairs on the leased premises and his right to relinquish possession for lack of repairs on the adjoining premises.

In view of the general rule, that the landlord owes no obligation to the tenant as to the condition of the leased premises,¹²³⁵ it seems that, in the absence of any express agreement, or of a statute, such as that of New York, which is apparently construed to relieve the tenant from liability for rent on account of an untenable condition, a mere lack of repair is not a thing which can be charged against the landlord, so as thus to relieve the tenant, and it has been so decided.¹²³⁶

The landlord's failure to make repairs rendered necessary by the negligence of the tenant is evidently no justification for the tenant's refusal to pay rent,¹²³⁷ and the same has been decided to be the case when such failure was the result of obstacles interposed by the tenant.¹²³⁸ The fact, indeed, that the tenant has the right to exclude the landlord's entry for the purpose of making repairs,¹²³⁹ seems a strong reason why, in the absence of a provision authorizing repairs, a mere lack of repair should not expose the landlord to the possibility of losing his rent.

q. **Making of repairs.** The fact that the premises are tempor-

¹²³⁴ See *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Vann v. Rouse*, 94 N. Y. 401; *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659, and ante, § 182 n (3). had the right to leave on account of the landlord's failure to repair the roof of the building, it being considered that there was an implied covenant on his part to do this.

¹²³⁵ See ante, § 87 a.

¹²³⁶ *Lockwood v. Lockwood*, 22 Conn. 425; *Moffatt v. Smith*, 4 N. Y. (4 Comst.) 126 (before the statute of 1860); *Watson v. Moulton*, 100 Ill. App. 560; *Roth v. Adams*, 185 Mass. 341, 70 N. E. 445. See *Huber v. Baum*, 152 Pa. 626, 26 Atl. 101, and cases cited post, note 1243. ¹²³⁷ *Robinson v. Henaghan*, 92 Ill. App. 620. In *Parmele v. Pulvola Chemical Co.*, 31 Misc. 818, 64 N. Y. Supp. 1119, it is apparently decided that the tenant has no such right if, by the terms of the lease, he has a right to make the repairs at the expense of the landlord.

¹²³⁸ *Vincent v. Frelich*, 50 La. Ann. 378, 23 So. 373, 69 Am. St. Rep. 436. ¹²³⁹ See ante, § 3 b.

In *Bissell v. Lloyd*, 100 Ill. 214, it was held that the tenant of a room

arily made unsuitable for use or occupancy, owing to the making of repairs by the landlord, by agreement with or permission of the tenant,¹²⁴⁰ or by the tenant himself, in order to make them better suited to his purposes,¹²⁴¹ does not relieve the tenant in whole or in part from the payment of rent. If, however, the landlord, entering by the tenant's consent for the purpose of making repairs, fails to exercise diligence in carrying them through to completion, and thus in effect deprives the tenant of the use of the premises, the tenant, relinquishing possession in consequence thereof, might perhaps be regarded as evicted, and so entitled to a suspension of rent.¹²⁴²

r. **Breach of covenant or other contract by landlord**—(1) **Dependent and independent covenants.** The question whether the breach of a particular covenant or stipulation by the landlord is a defense to the claim for rent is in its nature one to be determined by reference to the intention of the parties, as expressed in the lease. That is, if a particular stipulation by the landlord, and that by the tenant for the payment of rent, are "dependent," then the nonperformance by the landlord is a defense to the claim for rent, while it is otherwise if the stipulations are "independent." This is merely an application of a general principle

¹²⁴⁰ Cook v. Anderson, 85 Ala. 99, 4 So. 713; McClenahan v. New York, 102 N. Y. 75, 5 N. E. 793; Kellenberger v. Foresman, 13 Ind. 475; Chambers v. Mattingly (Tex. Civ. App.) 19 Tex. Ct. Rep. 643, 103 S. W. 663. See Mittelstadt v. Wulfers, 1 Misc. 215, 20 N. Y. Supp. 880, and Petz v. Voigt Brewery Co., 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531, supra, note 1160.

¹²⁴¹ Peck v. Ledwidge, 25 Ill. 109; Kellenberger v. Foresman, 13 Ind. 475; Hoover v. United States, 3 Ct. Cl. 308.

¹²⁴² In Dexter v. King, 28 N. Y. St. Rep. 750; 8 N. Y. Supp. 489, it was held that a week's delay by the landlord's plumber in finishing repairs did not constitute an eviction, the landlord not knowing of the delay.

In Kelly v. Miles, 48 Hun (N. Y.)

6, it was decided that when the lessee agreed that the lessor should have possession for two months in order to make repairs, and all the premises were not put in condition for occupancy within that time, the tenant, occupying so much of the premises as were in such condition, was entitled to an apportionment of rent.

In Wayne v. Lapp, 180 Pa. 278, 36 Atl. 723, the tenant was regarded as entitled to a reduction of rent apparently for the reason that, after having been induced to enter by the landlord's promise to have a barn rebuilt by harvest time, the latter failed to do so and deprived him of the use of part of the property at that time for the purpose of rebuilding.

applicable to all contracts or instruments containing executory stipulations by both parties.

(2) **Contract to make repairs or improvements.** Considering first, in this connection, the landlord's covenant to make repairs or improvements upon the leased premises, the decisions are generally to the effect that this covenant, and that for the payment of rent, are independent, and that consequently its breach by the landlord will constitute no defense to the claim for rent.¹²⁴³ The tenant's remedy for such breach is either himself to make the repairs or improvements and recover their value,¹²⁴⁴ or, perhaps, to assert his outlay as a payment *pro tanto* on the rent,¹²⁴⁵ or, without making the repairs, to assert a claim for damages resulting from the breach of covenant, either by a cross action¹²⁴⁶ or by way of set-off or recoupment.¹²⁴⁷

- ¹²⁴³ *Surplice v. Farnsworth*, 7 Va. 476, 44 S. E. 149, 61 L. R. A. 957. *Man. & G.* 576; *Wilkes v. Steele*, 14 In *Knox v. Hexter*, 71 N. Y. 461, U. C. Q. B. 570; *Central Appalachian Co. v. Buchanan* (C. C. A.) 73 Fed. 1006; *Hall v. Smith*, 16 Minn. 58 (Gil. 46); *Long v. Gieriet*, 57 Minn. 278, 59 N. W. 194; *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330; *Lewis & Co. v. Chisholm*, 68 Ga. 40; *Young v. Burhans*, 80 Wis. 438, 50 N. W. 343; *Watters v. Smaw*, 32 N. C. (10 Ired. Law) 292; *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1127; *Baird v. Evans*, 20 Ill. 30; *Clark v. Ford*, 41 Ill. App. 199; *Obermyer v. Nichols*, 6 Bin. (Pa.) 159, 6 Am. Dec. 439; *Prescott v. Otterstatter*, 85 Pa. 534; *Bradley v. Citizens' Trust & Surety Co.*, 7 Pa. Super. Ct. 419; *Tibblits v. Percy*, 24 Barb. (N. Y.) 39; *Ellis v. McCormick*, 1 Hilt. (N. Y.) 313; *Plant v. Hernreich*, 19 Misc. 308, 44 N. Y. Supp. 477; *Newman v. French*, 45 Hun (N. Y.) 65; *McCullough v. Cox*, 6 Barb. (N. Y.) 386; *Douglas v. Cheesebrough Bldg. Co.*, 56 App. Div. 403, 67 N. Y. Supp. 755; *Smith v. Wiley*, 60 Tenn. (1 Baxt.) 418; *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957. It was decided that the lessee could not set up in defense to an action for rent that the lessor failed to finish the building so as to allow of the lessee's entry by the time stipulated, if the lessee had already claimed and recovered damages for breach of the lessor's covenant to so finish the building, without any deduction for rent, this amounting to an election by the lessee to treat the covenants as independent.
- ¹²⁴⁴ See ante, § 87 d (7), § 87 e (8).
- ¹²⁴⁵ See ante, § 177 g.
- ¹²⁴⁶ See ante, § 87 d (9), § 87 e (10).
- ¹²⁴⁷ *Whitbeck v. Skinner*, 7 Hill (N. Y.) 53; *Cook v. Soule*, 56 N. Y. 420; *Ely v. Fahy*, 79 Hun, 65, 29 N. Y. Supp. 667; *Sheary v. Adams*, 18 Hun (N. Y.) 181; *Hexter v. Knox*, 39 N. Y. Super. Ct. (7 Jones & S.) 109; *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330; *McFarlane v. Pierson*, 21 Ill. App. 566; *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. 246; *Keating v.*

Though the cases are thus ordinarily to the effect that the covenant to make repairs and improvements and that to pay rent are independent, the language used may no doubt be such as to necessitate a different construction,¹²⁴⁸ and this has occasionally been decided to be the case when the repairs or improvements were to be made before the time fixed for the lessee's taking of possession.¹²⁴⁹ There is a strong implication to the same effect in decisions that the tenant's right to require the landlord's compliance with his covenant for such preliminary repairs or improvements, as a condition precedent to the payment of rent, is waived by the lessee's taking of possession in spite of such breach by the landlord.¹²⁵⁰ In some cases, without any discussion of the matter on principle, and without reference to

Springer, 146 Ill. 481, 34 N. E. 805, three months. *Epping v. Devanny*, 22 L. R. A. 544, 37 Am. St. Rep. 175; 28 Ga. 422, 73 Am. Dec. 778. And *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1127; *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; *Piper v. Fletcher*, 115 Iowa, 263, 88 N. W. 380; *Deuster v. Mittag*, 105 Wis. 459, 81 N. W. 643.

¹²⁴⁸ See *Y. B. 27 Hen. 6, f. 10*, translated in note to *Surplice v. Farnsworth*, 7 Man. & G. 576. The language of the lease, as stated by the court, in *Fisher v. Nergararian*, 112 Mich. 327, 70 N. W. 1009, seems to be susceptible of the same construction.

Where the lease was on condition that the lessor should, before the day named for the commencement of the term, have the premises put in order, "it being understood and agreed that the payment of rent is not to commence until all the said work is finished," and with an option to the lessee to give up the lease if the work was not completed within three months after the day so named, it was held that the lessee was not bound for rent till the work was finished, even though he did not give up the premises at the end of the

three months. *Epping v. Devanny*, 28 Ga. 422, 73 Am. Dec. 778. And see *Clark v. Spaulding*, 20 N. H. 313, post, note 1250.

¹²⁴⁹ See *Hickman v. Rayl*, 55 Ind. 551; *Kiernan v. Germain*, 61 Miss. 498.

In *Mechelen v. Wallace*, 6 Nev. & M. 316, 7 Adol. & El. 54, note, the liability for rent was regarded, by reason of the language used, as dependent on the lessor's performance of his covenant to place furniture in the house leased.

¹²⁵⁰ *Allen v. Pell*, 4 Wend. (N. Y.) 505; *Etheridge v. Osborn*, 12 Wend. (N. Y.) 529, 27 Am. Dec. 152; *Thompson-Houston Elec. Co. v. Durant Land Imp. Co.*, 144 N. Y. 34, 39 N. E. 7; *Kelsey v. Ward*, 38 N. Y. 83 (semble); *Lewis v. Ritoff*, 51 Misc. 605, 101 N. Y. Supp. 40; *Cantwell v. Burke*, 6 N. Y. St. Rep. 308; *Henning v. Savage*, 51 Misc. 609, 100 N. Y. Supp. 1015; *Haven v. Wakefield*, 39 Ill. 509; *Wright v. Lattin*, 38 Ill. 293, 87 Am. Dec. 233; *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496; *Kiernan v. Germain*, 61 Miss. 498; *Chadwick v. Woodward*, 12 Daly (N. Y.) 399, 13 Abb. N. C. 441; *Sheary v.*

the particular language used, the landlord's failure to comply with a stipulation for the making of repairs or improvements during the tenancy has been assumed to justify the tenant in abandoning the premises and refusing to pay rent.¹²⁵¹ In other

Adams, 18 Hun (N. Y.) 181; Deuster v. Mittag, 105 Wis. 459, 81 N. W. 643 (semble).

So in *Williamson v. Miller*, 55 Iowa, 86, 7 N. W. 416, it was decided that the lessee, having taken possession, could not assert that the repairs of the fence made by the landlord were not sufficient under his covenant to repair. And in *McClure v. Little*, 19 Law T. (N. S.) 287, it was held that the lessee having accepted possession after the lessor had made certain repairs, could not complain that the premises were not put in "good tenantable repair" as agreed. But in *Clarke v. Spaulding*, 20 N. H. 313, where the term was, by the provisions of the lease, to begin "from the time that" the lessee should finish the premises and have them in readiness for occupancy by the lessees, it was held that the fact that the lessee took possession and expressed satisfaction with the premises did not prevent him from afterwards asserting, in an action for rent, that owing to a concealed defect the premises were never properly finished.

In *Stroecker v. Barnes*, 21 Ga. 430, it was decided that, while the tenant's entry after the first day of the term was a waiver of the provision requiring the making of repairs before that time, it was not a waiver of their being made within a reasonable time, and if not made within that time, or within a time subsequently agreed on, no rent was recoverable if the tenant elected to abandon.

¹²⁵¹ *Bissell v. Lloyd*, 100 Ill. 214; *Marks v. Chapman*, 135 Iowa, 320, 112 N. W. 817; *Harthill v. Cooke's Ex'r*, 19 Ky. Law Rep. 1524, 43 S. W. 705; *Kiernan v. Germain*, 61 Miss. 498; *Pierce v. Joldersma*, 91 Mich. 463, 51 N. W. 1116; *Jackson v. Farrell*, 6 Pa. Super. Ct. 31.

In *Young v. Burhans*, 80 Wis. 438, 50 N. W. 343, it is said that whether the tenant "was legally justified in leaving the premises" upon the lessor's failure to make repairs as agreed was a question for the jury. No statement is made as to what would constitute "legal justification." In *Auer v. Vahl*, 129 Wis. 635, 109 N. W. 529, it is assumed that the lessor's breach of his agreement in this respect justifies abandonment.

In *Tyler v. Disbrow*, 40 Mich. 415; *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. 246, and *Vincent v. Central City Loan & Inv. Co.* (Tex. Civ. App.) 17 Tex. Ct. Rep. 474, 99 S. W. 428, the lessor's failure to comply with his covenant to make repairs or improvements necessary to render the premises fit for the lessee's purpose was regarded as constituting a "failure of consideration," justifying the lessee in relinquishing possession and refusing to pay rent.

In some cases there is an implication to the effect that the tenant may, on the lessor's failure to comply with his contract to repair, relinquish possession and refuse to pay rent, it being said that so long as he remains in possession he can

cases it is stated or decided that the tenant may do this if the premises become "untenantable" through the landlord's non-compliance with his covenant.¹²⁵² As regards these latter cases, it may be remarked that, in those states in which the "untenantable" condition of the premises is itself ground for abandonment by the tenant, either by force of statute or otherwise,¹²⁵³ the fact that this condition would have been amended had the landlord complied with his covenant is evidently no reason for depriving the tenant of his rights in this respect. But in any state where the courts have not recognized the right of the tenant to give up possession and to refuse to pay rent in case the premises become untenable, as in the ordinary case of destruction of the buildings by fire,¹²⁵⁴ it is difficult to see how the fact that the lessor has agreed to make repairs can relieve the tenant from liability for rent, unless the covenants for rent and for repairs can be construed as dependent one on the other. Occasionally, the landlord's failure to make repairs as agreed by him, taken in connection with the undesirable conditions upon the premises which would have been obviated by the making of repairs, and the tenant's consequent relinquishment of possession, has been referred to as a "constructive eviction" for the purpose of relieving the tenant from liability for rent.¹²⁵⁵ But that there is no eviction in such a case has been several times decided,¹²⁵⁶ and

not defend against a claim for rent on the ground of the lessor's failure to comply with his covenant to make repairs. *Etheridge v. Osborn*, 12 Wend. (N. Y.) 529, 27 Am. Dec. 152; *Bryan v. Fisher*, 3 Blackf. (Ind.) 316; *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973; *White v. Y. M. C. A.*, 233 Ill. 526, 84 N. E. 658.

¹²⁵² *Lewis & Co. v. Chisholm*, 68 Ga. 40; *Piper v. Fletcher*, 115 Iowa, 263, 88 N. W. 380; *McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719; *Rutledge v. Quinlan*, 127 Mo. App. 419, 105 S. W. 653; *Mylander v. Beim-schla*, 102 Md. 689, 62 Atl. 1038, 5 L. R. A. (N. S.) 316. So if the premises are rendered useless. *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. 246; *Bissell v. Lloyd*, 100 Ill. 214.

¹²⁵³ See ante, § 182 n.

¹²⁵⁴ See ante, § 182 m (1).

¹²⁵⁵ *Lewis & Co. v. Chisholm*, 68 Ga. 40; *Rea v. Algren*, 104 Minn. 316, 116 N. W. 580, 124 Am. St. Rep. 627. In this latter case a finding that a failure to repair the roof and plumbing was a constructive eviction was sustained.

¹²⁵⁶ *Speckels v. Sax*, 1 E. D. Smith (N. Y.) 523; *Huber v. Ryan*, 26 Misc. 428, 56 N. Y. Supp. 135; *Hallett v. Wylie*, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457. So it is said in *Biggs v. McCurley*, 76 Md. 409, 25 Atl. 466, that "it can hardly be necessary to say that the failure of the lessor to

it is difficult to see the slightest element of an eviction, as the term is understood at common law, in the breach of a covenant to repair.

The same result of relieving the tenant from liability for rent in case of the landlord's failure to repair, and the consequent untenable condition of the premises, might, perhaps, in some cases, be attained on the theory that the use of the premises in such condition is valueless, and that consequently the tenant is entitled to recoup or set off against the claim for rent, as damages for the breach of the contract to repair,^{1256a} the difference between the rental value with and without repairs, which would in such a case be *prima facie* the amount of the rent reserved.¹²⁵⁷

(3) **Contract to furnish heat, power, or other facilities.** Quite frequently the landlord covenants to furnish certain facilities or conveniences to the tenant while occupying the premises, and according to some decisions, his failure to comply with his covenant may enable the tenant to relinquish possession, and to defend against a claim for subsequently accruing rent. Thus, where the landlord has agreed to furnish heat for the leased premises, as is frequently the case when a single apartment in a building is leased, a failure to furnish such heat, if this results in making the leased premises unfit for occupancy, has been regarded as effecting an eviction,¹²⁵⁸ though in the same state it had previously been decided¹²⁵⁹ that this was not a case of injury to the premises, within the statute¹²⁶⁰ relieving the tenant from rent, in case of an untenable condition caused by such injury.

In New York there are a number of decisions in this connection, which are generally favorable to the tenant's right to relinquish possession for the landlord's breach of a covenant of this character, and so to relieve himself from liability for rent, though

make the repairs stipulated in the lease would not in itself amount to a constructive eviction."

^{1256a} See post, § 294.

¹²⁵⁷ See *Prescott v. Otterstatter*, 85 Pa. 534; *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330. Compare ante, § 87 d (9), at note 171.

¹²⁵⁸ *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348. In *Rogers v. Babcock*, 139 Mich. 94, 102 N. W. 636, it was considered that the lessee had a right to leave by reason of the failure to heat, but there, perhaps, there was an agreement that his liability for rent should be conditioned on the erection of a furnace.

¹²⁵⁹ *Minneapolis Co-Operative Co. v. Williamson*, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473.

¹²⁶⁰ See ante, note 1103.

they are not entirely satisfactory as regards their statements of the reasons for such a holding. Thus it was decided that the tenant had this right when the heating apparatus, which was under the landlord's exclusive control, was by reason of "faulty construction or accident or mismanagement" out of repair, and so permitted by the landlord to remain,¹²⁶¹ this being apparently regarded as within the Act of 1860.¹²⁶² In another case it was decided, without reference either to the Act of 1860 or to the doctrine of eviction, that, where premises were leased to a tenant "for the purposes of her business," the lessor agreeing to furnish a certain amount of steam power, and also heat for drying purposes, the furnishing of an uneven power, although exceeding the amount agreed, together with the failure to furnish the heat agreed, justified the tenant in abandoning the premises.¹²⁶³ And the same view has been taken of a failure to furnish water as agreed.¹²⁶⁴ In another case the inefficiency of the elevator service, which the lessor had impliedly agreed to furnish, was regarded as effecting an eviction, when the tenant left in consequence thereof,¹²⁶⁵ and the same view was taken of a combination of such defective elevator service, a failure to heat the apartment as agreed, and the presence therein of smoke from defective flues and chimneys.¹²⁶⁶ In Illinois, Iowa and Michigan, also, the failure to furnish heat or power as agreed, if in consequence thereof the tenant leaves, has been regarded as excusing payment of rent,¹²⁶⁷

¹²⁶¹ *O'Gorman v. Harby*, 18 Misc. 228, 41 N. Y. Supp. 521. A failure to furnish heat as agreed is regarded as an eviction in *Ryan v. Jones*, 2 Misc. 65, 20 N. Y. Supp. 842; *Butler v. Newhouse*, 85 N. Y. Supp. 373.

¹²⁶² See ante, note 1101.

¹²⁶³ *Trenkman v. Schneider*, 26 Misc. 695, 56 N. Y. Supp. 770.

In *Myers v. Bernstein*, 104 N. Y. Supp. 348, the failure to furnish power as agreed was regarded as constituting a constructive eviction. But see *Ely v. Spiero*, 28 App. Div. 485, 51 N. Y. Supp. 124, apparently to a contrary effect.

¹²⁶⁴ *Rosenbloom v. Solomon*, 57 Misc. 290, 109 N. Y. Supp. 540.

¹²⁶⁵ *Lawrence v. Mycentian Marble Co.*, 1 Misc. 105, 20 N. Y. Supp. 698; *Ardsley Hall Co. v. Sirrett*, 86 N. Y. Supp. 792. See, also, *Delmar Inv. Co. v. Blumenfeld*, 118 Mo. App. 308, 94 S. W. 823.

¹²⁶⁶ *Lawrence v. Burrell*, 17 Abb. N. C. (N. Y.) 312. This case is, in *Daly v. Wise*, 15 Daly, 431, 7 N. Y. Supp. 902, said to be "so palpably erroneous that no time need be spent in exposing its errors."

¹²⁶⁷ *Filkins v. Steele*, 124 Iowa, 742, 100 N. W. 851; *Harmony Co. v. Rauch*, 64 Ill. App. 386 (compare *Orcutt v. Isham*, 70 Ill. App. 102); *Rogers v. Babcock*, 139 Mich. 94, 102 N. W. 636.

and there is an implication to that effect in Pennsylvania.¹²⁶⁸ In any jurisdiction, it would seem, if the rent is payable in advance, the tenant cannot justify his nonpayment on the ground that the landlord may not perform his covenants as to furnishing heat or power during the rent period.¹²⁶⁹

The tenant's failure to promptly relinquish possession, on breach of the landlord's covenant to furnish heat or power, will, by occasional decisions, not prevent his assertion of the right to relinquish, and so free himself from liability for rent, upon a subsequent failure in this respect,¹²⁷⁰ assuming that this is a ground for relinquishment. But the failure to supply heat during the cold part of the year will not justify his leaving after the arrival of warm weather,¹²⁷¹ and he cannot leave, it is said, till the landlord has had a reasonable time for the repair of any defects in the heating apparatus.^{1272, 1273}

(4) **Miscellaneous contracts and covenants.** The question of the interdependence of the lessee's covenant to pay rent and various covenants, other than those previously mentioned, has occasionally been the subject of consideration, and ordinarily they have been regarded as independent. So it has been held to be no defense to the claim for rent that the lessor has broken his covenant not to lease adjoining premises for certain purposes,¹²⁷⁴ to furnish certain material for repairs,¹²⁷⁵ or to furnish timber and roads for use in connection with the sawmill leased.¹²⁷⁶

The covenant for quiet enjoyment and that to pay rent are in-

¹²⁶⁸ Moore v. Gardiner, 161 Pa. 175, 28 Atl. 1018, where it was held that the defense was insufficient, since the lessee did not relinquish possession till the summer time, when there was no need of heat. But the view that the tenant can leave for this reason seems inconsistent with Reeves v. McComeskey, 168 Pa. 571, 32 Atl. 96, holding that he cannot leave on account of the untenable condition of the premises.

¹²⁶⁹ See Hurliman v. Seckendorff, 10 Misc. 549, 31 N. Y. Supp. 443; Trenkmann v. Schneider, 26 Misc. 695, 56 N. Y. Supp. 770.

¹²⁷⁰ Trenkmann v. Schneider, 26 Misc. 695, 56 N. Y. Supp. 770; Bass v. Rollins, 63 Minn. 226, 65 N. W. 348. But see Orcutt v. Isham, 70 Ill. App. 102.

¹²⁷¹ Ryan v. Jones, 2 Misc. 65, 20 N. Y. Supp. 842; Moore v. Gardiner, 161 Pa. 175, 28 Atl. 1018.

^{1272, 1273} O'Gorman v. Harby, 18 Misc. 228, 41 N. Y. Supp. 521.

¹²⁷⁴ Chicago Legal News Co. v. Browne, 103 Ill. 317. But see Delmar Inv. Co. v. Blumenfeld, 118 Mo. App. 308, 94 S. W. 823.

¹²⁷⁵ Hall v. Smith, 16 Minn. 58.

¹²⁷⁶ McCoy v. Hill, 12 Ky. (2 Litt.) 372.

dependent, so that the breach of the former is no defense to an action on the latter,¹²⁷⁷ though damages arising therefrom may ordinarily be made the subject of recoupment and counterclaim.

s. **War and military occupation.** The fact that the leased property is rendered unavailable for occupation or is otherwise valueless to the tenant, by reason of the presence of a hostile army thereon, has been regarded as insufficient to relieve the tenant from liability for rent,¹²⁷⁸ and this would *a fortiori* be the case when not the property itself, but the surrounding country only, is so occupied.¹²⁷⁹ It was decided, however, by the United States supreme court, that a tenant of premises within the limits of the confederacy was discharged from liability for rent to his landlord if he was deprived of the possession by the action of the federal military authorities, or if he was compelled to pay the rent to such authorities.¹²⁸⁰

t. **Particular stipulations as to rent.** Occasionally the liability for rent is expressly made conditional upon the completion of particular improvements,¹²⁸¹ or upon the suitability of the premises

¹²⁷⁷ Dawson v. Dyer, 5 Barn. & Styles, 47; Pollard v. Schaeffer, 1 Adol. 584; Edge v. Boileau, 16 Q. B. Dall. (Pa.) 210, 1 Am. Dec. 239. Div. 117.

¹²⁷⁹ Coy v. Downie, 14 Fla. 544;

In Weed v. Crocker, 79 Mass. (13 Gray) 219, on a lease of a paper mill and water power, the lessee agreed to put in all machinery except the main shaft and wheel, which were to be furnished by the lessor, and it was held that as the water power was essential to the entire use of the premises as a paper mill, and as that could only be obtained by a main shaft and water wheel, the furnishing of these latter "was a condition precedent," and the stipulation of the lessee to pay rent was dependent, but that if the lessee went to work with such shaft and wheel as were furnished by the lessor, and continued to use them, he could not refuse to pay rent for the period of their use on the ground that they were defective.

Loggins v. Buck, 33 Tex. 113. Bowditch v. Heaton, 22 La. Ann. 356, contra, is based on civil-law authority.

In Bayly v. Lawrence, 1 Bay (S. C.) 499, it was resolved "that the defendant ought to pay for the time he peaceably enjoyed the premises, but not for the time he was prevented by the casualties of war;" but this is construed in Coogan v. Parker, 2 S. C. 255, 16 Am. Rep. 659, as referring to a destruction of the property.

¹²⁸⁰ Harrison v. Meyer, 92 U. S. 111, 23 Law. Ed. 606; Gates v. Goodloe, 101 U. S. 612, 25 Law. Ed. 895. Contra, Clark v. Mitchell, 64 Mo. 564.

¹²⁸¹ Clarke v. Spaulding, 20 N. H. 313; Fallis v. Gray, 115 Mo. App. 253, 91 S. W. 175; Corinthian Lodge v. Smith, 147 N. C. 244, 61 S. E. 49;

¹²⁷⁸ Paradine v. Jane, Aleyn, 26,

for a particular use,¹²⁸² or upon the satisfaction of some other specified requirement.¹²⁸³ In such cases, it is evident, rent does not ordinarily begin to accrue until the condition or requirement is satisfied. Occasionally, however, the lessee's entry on the premises, before such satisfaction has occurred, has been regarded as a waiver of the requirement and as rendering him immediately liable for rent.¹²⁸⁴

§ 183. Right to payment of rent as against levy under execution.

a. **Statutory provisions.** The statute of 8 Anne, c. 14, § 1, provided that "no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence what-

Acorn v. Hill, 34 Nova Scotia, 508. Compare *McCready v. Lindenborn*, 37 App. Div. 425, 56 N. Y. Supp. 54, where it was held that a very slight delay in completion did not relieve the lessee.

In *Meyers v. Liebeskind*, 46 Misc. 272, 91 N. Y. Supp. 725, there was a lease or "agreement to lease" an apartment in a building in course of construction, and the court decided that this involved an implied covenant that the apartment leased should be fit for occupancy on the day specified for the tenancy to begin, and that, since it was not so fit, the landlord was not entitled to rent.

¹²⁸² See e. g., *Riley v. Pettis County*, 96 Mo. 318, 9 S. W. 906, where a lease of part of a building to a county provided that the lessee should not be liable for rent during any period when it was not in good condition for comfortable occupation for a court room, and it was held that the county was not so liable so long as the lessor allowed a lower room to be used in such a way as to ren-

der the room leased unfit for a court room, though this use existed at the date of the lease.

¹²⁸³ In *Marsh v. Bridgeport*, 75 Conn. 495, 54 Atl. 196, the liability for rent under a lease to a city was expressly made conditional upon the making of an appropriation by the city council. In *Mississinewa Min. Co. v. Andrews*, 22 Ind. App. 523, 54 N. E. 146, the lessee's liability for rent was expressly conditioned upon the lessee's failure to drill an oil well.

¹²⁸⁴ *Ober v. Brooks*, 162 Mass. 102, 38 N. E. 429; *Hallenbeck v. Chapman*, 72 N. J. Law, 201, 63 Atl. 498; *Acorn v. Hill*, 34 Nova Scotia, 508. See *Corinthian Lodge v. Smith*, 147 N. C. 244, 61 S. E. 49. But in *Clarke v. Spaulding*, 20 N. H. 313, it was held that no such waiver occurred, the lessee having entered under the mistaken impression that the stipulated improvements were satisfactorily completed and subsequently discovering that they were not properly finished.

soever, unless the party at whose suit the said execution is sued out shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of this act."

The English statute has been re-enacted without change in South Carolina,¹²⁸⁵ and the statute of New Jersey¹²⁸⁶ is similar, except that it provides for the case of goods taken "on attachment or other process" as well as those taken on execution, and also contains a provision as to rent not yet due.¹²⁸⁷ The statute of Pennsylvania,¹²⁸⁸ instead of requiring the payment of one year's rent by the party at whose suit the execution is sued out, before the removal of the goods by virtue of the execution, in terms requires the sheriff to pay such amount of rent to the execution creditor, if and when realized by their sale. And in Delaware it is provided that if the goods of the tenant be seized by virtue of any process of execution, attachment or sequestration, they shall be liable for one year's rent, in arrear, or growing due, in preference to such process, and that the landlord shall be first paid such rent out of the proceeds of the sale of the goods, while in case of rent payable in grain or other produce, such grain or produce, even though sold, is still liable to distress, and is not removable till rent be paid.¹²⁸⁹ The Kentucky statute provides that, out of the proceeds of property on the leased premises taken on execution or attachment, the officer shall make payment of the rent payable in money, due and to become due, for the year in which the levy is made, unless a bond of indemnity is executed.¹²⁹⁰ The former statute of New York,¹²⁹¹ repealed at the time of the abolition of

¹²⁸⁵ Civ. Code, §. 2427.

¹²⁸⁶ 2 Gen. St. p. 1915, § 4.

¹²⁸⁷ See post, § 183 d.

¹²⁸⁸ Act June 13, 1836, §§ 83-85;

¹²⁸⁹ Rev. Code 1893, pp. 874-875,

§§ 60, 62.

¹²⁹⁰ St. 1903, § 2315.

¹²⁹¹ Rev. St. 1836, p. 2, c. 1, tit. 4,

Pepper & Lewis' Dig. Landl. & Ten. §§ 12-14.

§§ 15, 16.

distress, provided for notice by the landlord to the sheriff before the sale of the goods, and the levy by the sheriff of the amount of the rent in addition to the amount named in the execution, and the payment of the rent from the proceeds of sale in preference to the execution claim.

In view of the evident connection between these statutes and the right of distress, the abolition of the latter right in any particular jurisdiction would seem in itself to terminate, by implication, all rights previously existing under the statute of Anne or similar state legislation. The question seems, however, never to have arisen.¹²⁹²

b. **The tenancy.** The English statute has been regarded as applicable only when there is a tenancy still existent, even though the six months within which a distress may be made have not yet expired,¹²⁹³ but it has been held in one state that the local statute applies if there is a right of distress, although the tenancy has expired, the statute applying in terms to goods "liable to the distress of the landlord."¹²⁹⁴

A tenancy created by way of attornment and as security is sufficient to justify the application of the statute.¹²⁹⁵

If a landlord transfers the reversion, he then ceases to be the landlord, and loses the right to the benefit of the statute.¹²⁹⁶ The statute evidently has no application when no relation of tenancy exists.¹²⁹⁷

c. **The execution or other process.** The English statute has been held to apply not only to an execution from a court of law, but also to a sequestration from a court of equity.¹²⁹⁸ But it was not regarded as applicable when goods were seized by the sheriff on an attachment against a nonresident previous to suit, though in this case, the goods having been sold by the sheriff under order of court as being perishable, the landlord was allowed to claim, out of the proceeds of sale, such amount of rent as he could have

¹²⁹² The English statute is not in force in Illinois. *Herron v. Gill*, 112 Ill. 247. *Ege v. Ege*, 5 Watts (Pa.) 134.

¹²⁹³ *Cox v. Leigh*, L. R. 9 Q. B. 333. ¹²⁹⁵ *Yates v. Ratledge*, 5 Hurl. & N. 249.

¹²⁹⁴ *Moses' Appeal*, 35 Pa. 162; *Lewis' Appeal*, 66 Pa. 312. ¹²⁹⁶ *Hoskins v. Houston*, 2 Clark (Pa.) 489.

¹²⁹⁷ *Olden v. Mather* (N. J. Eq.) 67 Atl. 435.

¹²⁹⁸ *Dixon v. Smith*, 1 Swanst. 457.

demanded if the goods had been taken under execution.¹²⁹⁹ In another state the local statute was held to apply in the case of an attachment and sale thereunder.¹³⁰⁰ It has also been regarded as applicable when the goods were taken possession of by the assignee in bankruptcy¹³⁰¹ and by a receiver.¹³⁰² It has been also held to apply to a seizure and sale under warrant by force of an agricultural lien.¹³⁰³ In Pennsylvania there is a substantially similar statutory provision expressly applicable to the case of an assignment for the benefit of creditors.¹³⁰⁴

If two executions are levied, the landlord cannot have a year's rent on each.¹³⁰⁵

d. **Rent due or to become due.** By the terms of the statute of Anne, as well as by the terms of most of the local state statutes enacted in pursuance of the same policy, the landlord cannot make any claim on account of rent which is not due at the time of the levy.¹³⁰⁶ But it is sufficient, it has been held, if the rent falls due on the day of the levy.¹³⁰⁷ And rent has been regarded as due

¹²⁹⁹ Thomson v. Baltimore & Susquehanna Steam Co., 33 Md. 312.

¹³⁰⁰ Morgan v. Moody, 6 Watts & S. (Pa.) 333.

¹³⁰¹ Longstreth v. Pennock, 87 U. S. (20 Wall.) 576; In re Hoover, 113 Fed. 136; Wilson v. Pennsylvania Trust Co. (C. C. A.) 114 Fed. 742; In re West Side Paper Co., 159 Fed. 241. Compare Lee v. Lopes, 15 East, 230.

¹³⁰² Malcomson v. Wappoo Mills, 85 Fed. 907.

¹³⁰³ Brewster v. McNab, 36 S. C. 274, 15 S. E. 233. The opinion lays stress upon the words of the provision of the General Statutes, § 1824, giving this relief to the landlord, to wit: "By virtue of any execution or any pretense whatsoever." The word "or" is evidently a misprint for the word "on" as found in the English statute, but this appears not to have suggested itself to the court.

¹³⁰⁴ Act May 26, 1891, Pepper & Lewis' Dig., Landl. & Ten. § 22.

¹³⁰⁵ Dod v. Saxby, 2 Strange, 1024.

¹³⁰⁶ Hoskins v. Knight, 1 Maule & S. 245; Reynolds v. Barford, 7 Man. & G. 449; Denham v. Harris, 13 Ala. 465; Washington v. Williamson, 23 Md. 244; Hazard v. Raymond, 2 Johns. (N. Y.) 478; Trappan v. Morie, 18 Johns. (N. Y.) 1; Theriat v. Hart, 2 Hill (N. Y.) 380; Case v. Davis, 15 Pa. 80; Ex parte Watson, 3 Brev. (S. C.) 60; Ayres v. Depras, 2 Speer Law (S. C.) 367; Dawson v. Dewan, 12 Rich. (S. C.) 499. But under a local statute providing for the assertion of a claim for "all money due for the rent of said premises at the time of taking such goods and chattels in execution, whether the day of payment, by the terms of the lease, shall have come or not," it was held that it was immaterial whether rent was due or not. Shanks v. Town Council of Greenville, 57 Miss. 168.

¹³⁰⁷ Carpenter v. Shanklin, 7 Blackf. (Ind.) 308.

within the particular statute, if it is payable in advance, although the period for which it is payable has not expired at the time of the levy,¹³⁰⁸ as it is if all the rent has become due and payable, under express provisions in the lease, by reason of the happening of certain contingencies.¹³⁰⁹ In one state the local statute, making the goods liable for any sums "due for rent," has been held to entitle the landlord to an apportionment of the rent up to the time of the levy,¹³¹⁰ a construction of the statute which has been strongly criticised in the same state¹³¹¹ and has been unwillingly adhered to. The landlord's claim need not, it has been decided, be restricted to the installment of rent falling due next before the levy.¹³¹²

The fact that the remedy by distress has been suspended by the giving of a note for the rent has been held not to affect the applicability of the statute, on the theory, apparently, that the rent is "due" within the meaning of the statute, when the day of payment, as fixed by the lease, has arrived, although the remedy for its collection is suspended.¹³¹³ That the landlord has distrained for part of the rent does not affect his right to assert his claim under the statute for another part.¹³¹⁴

The statute is not applicable in the case of a claim for a sum due for use and occupation, since this is not rent.¹³¹⁵

¹³⁰⁸ *Russell v. Doty*, 4 Cow. (N. Purdy, 23 Pa. 97; *Prentiss v. Kings-*
Y.) 576; *Beyer v. Fenstermacher*, 2 ley, 10 Pa. 120, 49 Am. Dec. 586;
Whart. (Pa.) 95; *Collins' Appeal*, 35 Bank of Pennsylvania v. Wise, 3
Pa. 83. But not if the rent is not Watts (Pa.) 394; *Anderson's Appeal*,
yet due. *Purdy's Appeal*, 23 Pa. 97. 3 Pa. 218; *Wickey v. Eyster*, 58 Pa.

¹³⁰⁹ *Platt v. Johnson*, 168 Pa. 47. 501.
31 Atl. 935, 47 Am. St. Rep. 877. ¹³¹² *Parker & Keller's Appeal*, 5 Pa.
But as to the validity of a provision 390; *Richie v. McCauley*, 4 Pa. 471;
that the entire rent shall become due *Wickey v. Eyster*, 58 Pa. 501; *Welt-*
on bankruptcy, see *Wilson v. Penn-* ner's Appeal, 63 Pa. 302. But the
sylvania Trust Co., 52 C. C. A. 374, local statute may require a con-
114 Fed. 742; *In re Winfield Mfg.* trary construction. See *Van Rens-*
Co., 137 Fed. 984. selaer v. Quackenboss, 17 Wend. (N.

¹³¹⁰ *West v. Sink*, 2 Yeates (Pa.) Y.) 34.
274; *Binns v. Hudson*, 5 Bin. (Pa.) ¹³¹³ *Fife v. Irving*, 1 Rich. Law (S.
505; *Parker & Keller's Appeal*, 5 Pa. C.) 226. But see the dissenting
390; *Morgan v. Moody*, 6 Watts & S. opinion.
(Pa.) 333; *Wickey v. Eyster*, 58 Pa. ¹³¹⁴ *Kreiter v. Hammer*, 1 Pears.
501; *Thropp's Appeal*, 70 Pa. 395. (Pa.) 559.

¹³¹¹ *Lichtenthaler v. Thompson*, ¹³¹⁵ *Riseley v. Ryle*, 11 Mées. & W.
13 Serg. & R. (Pa.) 158; *Appeal of* 16; *Farmers' Bank v. Cole*, 5 Har.

The sheriff may show, it has been held, to justify his payment of a certain sum to the execution debtor's landlord, that such sum was due as one year's rent, although, owing to a misstatement in the lease as to the time of the beginning of the tenancy, the landlord was precluded, by the "parol evidence" rule, from showing such sum to be due.¹³¹⁶

e. **Goods and chattels levied on.** The purpose of the original statute was evidently to prevent the entire loss of the landlord's right of recourse against the goods on the premises for his rent, in case the right of distress was defeated by the levy of an execution.¹³¹⁷ On the theory that this is the purpose of such a statute, it has been held, in one state, that no obligation is imposed on the sheriff as regards the goods of a stranger upon the premises, which, by the local law, are not subject to distress.¹³¹⁸ In England, apparently, though the goods of a stranger on the premises are subject to distress, the statute of Anne is regarded as inapplicable when the goods seized are not the property of the tenant.¹³¹⁹ In this country a different view has been taken as to a stranger's goods subject to distress.¹³²⁰

The English statute has been held not to apply in favor of the landlord as against an execution levied on goods belonging to a subtenant, although such goods would be liable to distress for the rent due the landlord.¹³²¹ A different construction, however, has been placed on the Pennsylvania statute, which provides that

(Del.) 418; *Central Bank v. Peter-* *pare Hughes v. Smallwood*, 25 Q. B. son, 24 N. J. Law (4 Zab.) 668. But D. 306.

see *Case v. Davis*, 15 Pa. 80.

¹³¹⁶ *Com. v. Contner*, 21 Pa. 266.

¹³¹⁷ See *Henchett v. Kimpson*, 2 Wils. 140.

¹³¹⁸ *Ryerson v. Quackenbush*, 26 N. J. Law (2 Dutch.) 236. To the same general effect, apparently, is *Brunswick-Balke-Collender Co. v. Murphy*, 89 Miss. 264, 42 So. 288, 119 Am. St. Rep. 702.

¹³¹⁹ *Beard v. Knight*, 8 El. & Bl. 865, per Crompton, J.; *Lee v. Lopes*, 15 East, 230, per Lord Ellenborough, C. J.; *Foulger v. Taylor*, 5 Hurl. & N. 202, per Martin, B. See, also, *Bennet's Case*, 2 Strange, 787. Com-

If the sheriff seizes the tenant's goods under color of an execution against another, he cannot, in an action against him by the landlord under the statute, allege that they were not taken under execution. *Forster v. Cookson*, 1 Q. B. 419.

¹³²⁰ *Russell v. Doty*, 4 Cow. (N. Y.) 576. And see *McCombs & Howden's Appeal*, 43 Pa. 435, post, note 1322.

¹³²¹ *Bennet's Case*, 2 Strange, 787 followed, with hesitation, in *Brown v. Fay*, 6 Wend. (N. Y.) 392, 22 Am. Dec. 537.

the landlord's claim for rent may be asserted in case of execution levied on goods on the demised premises "and liable to the distress of the landlord," the latter words being regarded as defining the cases in which the claim might be asserted.¹³²² Under the state statute last referred to, the claim cannot be asserted if the execution is levied on goods which are not liable to distress because removed from the premises before the levy, unless perhaps the removal was fraudulent so that they would be liable to distress.¹³²³ The English statute does not apply, it seems, if the goods were removed from the premises before they were taken under execution, even though the removal was fraudulent, so that they would be subject to distress, since the goods must be "in or upon" the premises.¹³²⁴

It has been held that a statutory exemption from distress of chattels to a certain value, to be selected by the tenant, is not available to the execution creditor as a ground for denying, to that extent, the applicability in favor of the landlord of such a statute, the two statutes being entirely distinct, and that in regard to exemptions from distress being intended only for the benefit of the tenant and his family.¹³²⁵ Likewise, in England it has been said that the act applies, regardless of whether the goods levied on are subject to distress.¹³²⁶

That goods on which a distress has been made, though replevied and then levied upon by the sheriff, have been seized under execution, does not justify the landlord's claim under the statute on account of the same rent.¹³²⁷

If, after the seizure of goods on the premises under execution

¹³²² McCombs & Howden's Appeal, Law, 499. But in Pennsylvania the rule is apparently different. Rowland v. Goldsmith, 2 Grant Cas. (Pa.) 378. And see, to the effect

The execution creditor cannot require the landlord to distrain on goods of a third person in order that the goods of the tenant may be left free to satisfy the execution. Timmes v. Metz, 156 Pa. 384, 27 Atl. 248.

¹³²³ Grant & McLane's Appeal, 44 Pa. 477.

¹³²⁴ See Geiger's Adm'r v. Harman's Ex'rs, 3 Grat. (Va.) 130.

¹³²⁵ Van Horn v. Goken, 41 N. J.

¹³²⁶ Riseley v. Ryle, 11 Mees. & W. 16, 22.

¹³²⁷ Gray v. Wilson, 4 Watts (Pa.) 39.

against the tenant, the landlord asserts a claim to them as belonging to him, he cannot afterwards demand, as landlord, it has been decided, to share in the proceeds of their sale as the goods of his tenant.¹³²⁸

The execution creditor cannot demand that the landlord distrain on goods on the premises not belonging to the tenant, so as to relieve from his claim those which do belong to the latter.¹³²⁹

f. **Notice to the sheriff.** The statute of Anne contains no express requirement as to notice to be given to the sheriff of the arrears of rent due, and it has been held that it is sufficient, for the purpose of imposing on the sheriff the obligation to satisfy the arrears before removing the goods, that he has knowledge of the existence of arrears of rent, however acquired.¹³³⁰ By other cases it is assumed that an express notice is necessary, though not specifically required by the statute, but that it is sufficient if given even after the sale of the goods under execution and their removal from the premises, provided it is given before the proceeds of the sale are paid over to the execution creditor,¹³³¹ and that it need not be in writing,¹³³² or in any particular form,¹³³³ or state the exact amount of arrears.¹³³⁴ Occasionally a state statute, in most respects similar to the statute of Anne, has contained an express requirement of notice.¹³³⁵ Un-

¹³²⁸ Vetter's Appeal, 99 Pa. 52; In Maryland it is provided (Code Edwards' Appeal, 105 Pa. 103. Pub. Gen. Laws 1904, art. 53, § 21)

¹³²⁹ Timmes v. Metz, 156 Pa. 384, that whenever any landlord shall 27 Atl. 248. give notice of rent due to the sheriff or constable who may be about to

¹³³⁰ Andrews v. Dixon, 3 Barn. & Ald. 645; Riseley v. Ryle, 11 Mees. & W. 6; Bible v. Hussey, 2 Ir. R. C. tenant under execution, there shall L. 308. be appended to said notice an affi-

¹³³¹ Smith v. Russell, 3 Taunt. 400; Arnitt v. Garnett, 3 Barn. & claimed to be due. Ald. 440; Beekman v. Lansing, 3

¹³³² Colyer v. Speer, 2 Brod. & B. 67. Wend. (N. Y.) 446, 20 Am. Dec. 707.

¹³³³ Timmes v. Metz, 156 Pa. 384, 27 Atl. 248. And notice at such time was held

¹³³⁴ In Maryland, where the statute of Anne is in force, a local statute (Code Pub. Gen. Laws 1904, art. 53, § 21) provides that a landlord

¹³³⁵ good where the statute required the sheriff to pay over such rent to the landlord "after the sale of the goods." Ege v. Ege, 5 Watts (Pa.) 134. Dana) 209.

der a statute providing that the landlord, at any time before sale under execution, might give notice to the execution creditor, or to the officer, of the amount claimed by him to be due, and that the officer should then levy the amount of the rent so claimed, in addition to the sum directed to be raised on such execution, and pay it over to the landlord, it was held not only that the notice must be given before the sale under execution,¹³³⁶ but that it must show the relation of tenancy,¹³³⁷ and that the sum due was rent,¹³³⁸ and it must obviously be given by a person properly authorized.¹³³⁹ Even though a notice before the payment over of the proceeds by the sheriff is ordinarily sufficient, it must be given before the sale, if this is, by consent of the execution plaintiff, made by the execution defendant, so that the proceeds do not pass into the hands of the sheriff.¹³⁴⁰

It was decided soon after the passage of the English act that the sheriff was under no obligation to ascertain that rent was due,¹³⁴¹ and consequently, apart from any statutory requirement as to the giving of an express notice, the landlord should always give it in order to insure the preservation of his rights.

g. **The duty and liability of the sheriff.** The duty of the sheriff, under the statute, is to call upon the execution creditor to pay the rent in arrear, and in default of such payment he may refuse to make any sale and withdraw from possession of the goods seized.¹³⁴² He has the alternative of selling the goods under the execution and applying the proceeds, so far as necessary, upon the rent.¹³⁴³ But if the goods sold under execution

giving notice of rent due to the (N. Y.) 382, where it was decided sheriff or constable about to sell the that an attorney employed merely to goods of the tenant under execution institute distress proceedings had no must append to the notice an affidavit as to the amount claimed. See ¹³⁴⁰ *Work's Appeal*, 92 Pa. 258, 37 Washington v. Williamson, 23 Md. Am. Rep. 681.
244.

¹³³⁶ *Bussing v. Bushnell*, 6 Hill (N. 1841 *Waring v. Dewberry*, 1 Strange, 97: *Palgrave v. Windham*, 1 Strange, Y.) 382. 212. See *Arnitt v. Garnett*, 3 Barn.

¹³³⁷ *Millard v. Robinson*, 4 Hill & Ald. 440.
(N. Y.) 604; *Olcott v. Frazier*, 5 ¹³⁴² *Cocker v. Musgrove*, 9 Q. B. 223; *Thomas v. Mirehouse*, 19 Q. B. Div. 563.
Hill (N. Y.) 562; *Camp v. McCormick*, 1 Denio (N. Y.) 641.

¹³³⁸ *Olcott v. Frazier*, 5 Hill (N. ¹³⁴³ *In re Mackenzie* [1899] 2 Q. B. 566, 575; *Sullivan v. Ellison*, 20 S. C. Y.) 562.

¹³³⁹ *Bussing v. Bushnell*, 6 Hill 481.

against the tenant belong to a person other than the tenant,¹³⁴⁴ or his bankrupt trustees,¹³⁴⁵ the sheriff will be liable not only to such person, for the wrongful sale of his goods under execution against another, but also to the landlord, in jurisdictions where such goods are liable to distress, for depriving him of the right of distress against such goods. And though the goods bring, on the sale, less than the amount of the year's rent, the jury might, in an action against the sheriff by the landlord, give damages in an amount greater than such proceeds of sale.¹³⁴⁶

The effect of the statute is to make the sheriff liable to the landlord if, having notice that rent is due, he removes the goods from the premises, and this liability may be asserted by an action on the case.^{1346a} In England it has been decided that a sale of the goods by the sheriff, without any removal, does not impose any liability on him, for the reason that the goods are still liable to distress even after such sale, although no longer the property of the tenant.¹³⁴⁷ But in a state in which distress is expressly restricted to the goods of the tenant, the local statute, although similar to the English statute in providing for the payment of rent only "before the removal of such goods," was construed to render the sheriff liable in case of a sale on the premises, since thereby the landlord's right of distress was destroyed.¹³⁴⁸ But whether or not such sale on the premises renders the sheriff liable in damages, the landlord, instead of seeking redress by that form of proceeding, may ask a rule on the sheriff to compel him to pay arrears of rent from the proceeds of the sale.¹³⁴⁹

¹³⁴⁴ Forster v. Cookson, 1 Q. B. 419; Beard v. Knight, 8 El. & Bl. 865; Foulger v. Taylor, 5 Hurl. & N. 202; White v. Binstead, 13 C. B. 304.

¹³⁴⁵ Duck v. Braddyll, McClel. 217; Lee v. Lopes, 15 East, 230.

¹³⁴⁶ Henchett v. Kimpson, 2 Wils. 140; Calvert v. Joliffe, 2 Barn. & Adol. 418.

^{1346a} Calvert v. Joliffe, 2 Barn. & Adol. 418; Riseley v. Ryle, 10 Mees. & W. 101; Lane v. Crockett, 7 Price, 566; Forster v. Cookson, 1 Q. B. 419; Yates v. Ratledge, 5 Hurl. & N. 249.

¹³⁴⁷ Smallman v. Pollard, 6 Man. & G. 1001; White v. Binstead, 13 C. B. 304.

¹³⁴⁸ Ryerson v. Quackenbush, 26 N. J. Law (2 Dutch.) 236.

¹³⁴⁹ Gore v. Goston, 1 Strange, 643; Henchett v. Kimpson, 2 Wils. 140; Arnitt v. Garnett, 3 Barn. & Ald. 440; In re Mackenzie [1899] 2 Q. B. 566; Washington v. Williamson, 23 Md. 244; Fischel v. Keer, 45 N. J. Law, 507; West v. Sink, 2 Yeates (Pa.) 274.

The sheriff cannot, it has been decided, relieve himself from liability for removing the goods by afterwards returning them to the premises,¹³⁵⁰ nor by paying into court the proceeds of the sale of the goods.¹³⁵¹

The sheriff is liable to the landlord, it has been decided, if he pays over the proceeds of the sale unreasonably soon after the sale, so as not to give the former an opportunity to present his claim before such payment.¹³⁵²

It has been held that the landlord waives his right to assert liability on the part of the sheriff if he consents to a sale of the goods by the latter, and the latter sells accordingly.¹³⁵³

The measure of the damages recoverable by the landlord against the sheriff for removal of the goods, or in some jurisdictions, their sale,¹³⁵⁴ without first paying the claim for rent, is *prima facie* the amount of the rent due¹³⁵⁵ to the extent, it seems, of one year's rent. But the sheriff may prove in mitigation of damages that the value of the goods removed is less than the amount of rent due.¹³⁵⁶

It has, in one state, been suggested that the statute might have the effect, not only of making the sheriff liable in damages by reason of his violation of its provisions, but of justifying the landlord in preventing the removal of the goods by the execution creditor purchasing at the execution sale.¹³⁵⁷ That the execution creditor, by directing and advising the sheriff to remove the chattels in violation of the statute, does not himself become liable in damages, seems unquestionable.¹³⁵⁸

¹³⁵⁰ Lane v. Crockett, 7 Price, 566; ¹³⁵⁵ Thomas v. Mirehouse, 19 Q. B. Wren v. Stokes [1902] 1 Ir. 167. Div. 563.

¹³⁵¹ Foster v. Hilton, 1 Dowl. 35; ¹³⁵⁶ Thomas v. Mirehouse, 19 Q. B. Calvert v. Joliffe, 2 Barn & Adol. 418. Div. 563.

¹³⁵² Fisher v. Allen, 2 Phila. (Pa.) ¹³⁵⁷ Van Horn v. Goken, 41 N. J. 115. Law, 499.

¹³⁵³ Rotherey v. Wood, 3 Camp. 24; ¹³⁵⁸ Gibson v. Princeton Bank, 20 Cloud v. Needles, 6 Md. 501. N. J. Law (Spencer) 138.

¹²⁵⁴ See ante, note 1348.

